New Jersey Court of Errors and Appeals.

Edward B. Humphreys, Plaintiff in Error, vs. The Mayor and Council of the Borough of Woodstown.	In Ejectment. On Writ of Error, &c.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF CASE.

This action was brought by the defendants in error (the plaintiffs below) to obtain possession of a strip of land claimed by them to be part of a public street or road in the Borough of Woodstown, which strip the plaintiff in error, (the defendant below) in 1865 enclosed and has since occupied, to the exclusion of the public.

The said Borough has been duly formed and incorporated, under the name of "The Mayor and Council of the Borough of Woodstown," in compliance with the borough act of April 5th, 1878. P. L. 1878, p. 403.

By the supplement to this act, approved March 13, 1883, the plaintiffs below became vested with the management and control of all the streets, avenues and roads within said Borough (see P. L. 1883, p. 9) and therefore they are entitled to the possession of the premises in despute if they are part of any such street.

Drummer v. Selectmen of Jersey City, Spencer, 85.

The Narr. is in the statutory form, demands possession of the premises, describing them, and says that the right of possession of plaintiffs accrued March 13, 1883. (Time of passage of said supplement.)

Plea, not guilty.

Defendant below demanded of plaintiffs a bill of particulars of their claim or title to the premises in dispute, which was duly served, and by consent of parties is made a part of the record and embraced in the state of the case. (See state of case, p. 5.)

In said bill the plaintiffs claimed that they, being "The Mayor and Council of the Borough of Woodstown," were entitled to the possession of the premises in dispute, because they are part of a public road or street in said Borough.

That said street or road became a public highway—

1st. By being laid out as a public road by surveyors of the highways of Salem county, in 1820.

2nd. By user, having been used by the public as a highway for more that twenty years.

3d. By dedication by the owners of the soil. No proof was offered of dedication.

This bill is not a mere statement of documentary evidence to be offered by plaintiffs, but is a specific statement of the nature of the plaintiffs' claim, and they are confined to it.

Graham vs. Whitely, 2 Dutch., 255.

The claim of the plaintiffs below was thus limited to the right of possession, leaving the fee in the defendant below.

Therefore the plaintiffs below complained against the defendant that he deprived them of the possession of the premises in dispute, to which possession they were entitled, making no claim to the fee or title to said premises, but claiming a mere possessory right, which defendant denied.

This was the issue to be tried.

It was not disputed that the defendant below put the railing around the *locus in quo* in 1865, nor was it disputed that the plaintiffs below were entitled to the possession of the premises in dispute if they were part of a public road, street or avenue in the said borough of Woodstown.

At the trial the plaintiffs below based their right to recover upon two grounds:

1st. That over the place in dispute, a public street or road had run and been used by the public as a highway, for more than 20 years anterior to 1865, and had become a public highway by user, of which highway the place in dispute was a part.

2d. If the same was not so used, it, the *locus in quo*, was within the limits of a public road laid out by surveyors of the highway in 1820.

They claiming of course that they were entitled to the possession of said premises if they were part of said street or road.

It was not disputed that the *locus in quo* is in said Borough of Woodstown.

To support the first point, the plaintiffs produced numerous witnesses as to the fact of the user of the road

by the public as a highway over the place in dispute for more than 20 years anterior to 1865.

To support the second, they offered the minutes of the Salem Common Pleas, showing the appointment of the surveyors and the record of the return of said surveyors, laying out said road.

The defendant below took exceptions to the admission of said minutes and record; exceptions sealed.

The Judge, at the trial, charged the jury that they should first consider the question of user.

"That a road runs over the place by reason of twenty years user anterior to 1865."

See state of case, p. 20.

And if they should find such user, that they should stop there and find their verdict for the plaintiffs; but if they should not so find, then they should go into the second point and find whether the return of 1820 included within its limits the place in dispute.

That it might be ascertained upon what grounds they based their verdict, and thus, if they found on the first point, that is user, the legal objections that might arise as to the second point would not enter into the case, the Judge directed the jury to determine first and return, as a matter of fact, the question whether the place in dispute was within the limits of a public street for a period of at least twenty years anterior to the erection of the railing and cellarway by the defendant, in 1865, and if they found yes to that they need go no further, but should render their verdict for the plaintiffs.—See state of case, p. 30.

The Judge was not present when the jury rendered their verdict, and it was taken by the clerk by consent.

The jury found, as to the questions of fact presented by the Judge, "that the place in dispute was within the limits of a public street for a period of at least twenty

years anterior to the erection of the railing and cellarway by the defendant, in 1865.

And they found generally for the plaintiffs. After the Judge's return, upon due notice to the defendants' attorney, this verdict was moulded into form, as shown by the record, and judgment entered that the plaintiffs recover the possession of the premises, and that the title to said premises other than the mere possessory right remains in the defendant. (See state of case, p. 9.) No exception was taken to the moulding of the verdict; but defendant excepted to Judge's ruling on points raised in second, third, fourth and fifth errors assigned.

It is clear from these facts, that the jury determined the case entirely upon the question of user, and that the minutes, and the return of the surveyors laying said road, had no effect in the determination of their verdict. Their special finding, taken in connection with the Judge's charge, and the fact that they made no finding as to the other questions presented by the Judge (which they were to make if they did not find user) concludes this.

The first assignment of error is, as to the admission by the Court below, of illegal and incompetent evidence.

The specification is found in the Bill of Exceptions, pp. 11 and 18, both inclusive, of the printed case.

It concerns the admission of the Book of Minutes of the Court of Common Pleas of Salem county, containing minutes of June Term 1820, pp. 43 and 44; also certified copy of same.

These minutes set forth an order of the Court reciting an application to it for the appointment of surveyors of the highway to lay a public road, and also appointing the same.

Also Book C of Roads, Salem county, folio 213, containing copy of return of surveyors of the highway, dated Aug. 19, 1820, and certified copy of record of same

The admission in evidence, by the Court, of these records, and the certified copies thereof, is the illegal and incompetent evidence referred to in the first assignment of errors.

The question here is, was the admission of said evidence erroneous?

No objection was made at the trial as to the form in which these records were presented.

The contention of the plaintiff in error went to the substance of the road return, in that, among other things, it does not recite that proof of the proper advertisement of their meeting was submitted to the surveyors, and that therefore they were without jurisdiction to act, and their return was and is a nullity at all times and for all purposes, even when, as in the present suit, it comes up collaterally.

It was at the trial, and is now, admitted upon our part, that if said return, within a proper period of time after it was made, had been directly attacked upon certiorari, it must have been set aside for substantial defects.

State vs. Hall, 2 Harr., 374.

Matter of Highway, 1 Id. 91, 93.

It was not so attacked; on the contrary, it stood unchallenged for more than sixty years, during which whole period the road therein described had been continuously traveled over by the public throughout its entire length, and worked upon by the township officers, as a public highway.

Under these circumstances our contention at the trial was, and here is,

That since the Legislature invested the Court of Common Pleas with jurisdiction over the subject matter of the laying out of roads, an anciently recorded road return cannot be collaterally attacked in respect of any defect of the character noted in this return.

Our reasons are:

A. Because the return was "a proceeding in the course of judicial action," (Frame v. Boyd, 6 Vr, 457, 458) which was completed when the return was recorded.

B. Because, after this lapse of time, when from the nature of things it is impossible to supply defective recitals by testimony as to the actual facts, when the road return is questioned collaterally, the Court, as a matter of public policy, will presume that whatever was necessary to give validity to the action of the Surveyors, or the proceedings touching the road, was, in fact, done.

A

A review historically of the form and method of the appropriation of lands for highways in this State, originally, and pursuant to legislation, appears to be pertinent.

The land owner here from the earliest times has always held his lands under liability to have a certain portion of them appropriated to the use of the public for highways, and this *for more than a century without compensation.*

Concessions and Agreements Proprietors West New Jersey, dated March 3, 1776, found in Leaming & Spicer, 390. Also in appendix to Smith's History of N. J., 526.

See as to allowance of five (5) acres in the hundred for highways made in all grants in West Jersey, in East Jersey six (6) acres; Judge Elmer's essay on "Titles to Land," printed in Nixon's Dig., edn. 1868, p. 936.

Quite uncertain how the earlier highways were laid out. No records in road books before 1760. Very few records of highways in public records of New Jersey between 1682 and 1760.

C. J. Kirkpatrick in Ward vs. Folly, 2 South., 482 decided in 1819.

The first legislation as to laying out of highways was by the act entitled "An act for regulating Roads and Bridges," passed in 1760.

See 2 Nevill, p. 346, Sec. 3 and 4.

Very simple. Then was passed the act of March 11, 1774—Allinson, p. 387, Sec. 3. Little more formal than the other. These two acts conferred power upon surveyors of the highways alone, without the aid of the Court or its intervention.

By a supplement to said act, passed Nov. 29, 1792, acts of New Jersey, 1783–1794, p. 815, jurisdiction as to the subject matter of the laying out of roads, for the first time, was given to the Courts of Common Pleas.

The operation of this act was to make what was before a *purely statutory proceeding, a proceeding under the direction of and before a Court of general jurisdiction.* Its intention was, to give to the method of appropriation of lands for highways greater force, dignity and validity than that theretofore employed.

This act, except section 7, was repealed by the act passed February 21, 1794. Both the act of 1792, and the supplement of 1794, were repealed by the act of June 1, 1799.

Pamphlet Laws, 1798–1799, p. 523.

This act enacted full provisions for laying out roads, and stood substantially as the law until the act of February 9, 1818.

Pamphlet Laws 1818, p. 26.

It was under said last mentioned act, with its supplements, that the proceedings touching the road in question were taken.

See history several road acts, also stated by Mr. Justice Depue.

State, Atkinson Pros., vs. Bishop, 10 Vr., 227.
Also, N. J. R. R. and Tw. Co. vs. Suydam, 2 Harr., 24, 53.

All these acts show that their intent was simply to provide an orderly proceeding in rem, by which land could be appropriated for highways. No compensation was provided for the owner until after the adoption of the constitution of 1844.

Bearing this fact in mind, it will be at once perceived, that the question of the regularity of these proceedings is a naked technicality. When this return was made and recorded, which was long before the present owner of the fee of the *locus in quo* was born, the then owner could not, under any circumstances, obtain compensation for his land taken for the road.

It was to allow amendments of technicalities of this very kind that the act of March 27, 1874, Revision, p. 1013, par. 98, was passed.

But naturally, there can be no amendment of proceedings taken more than sixty years since.

That the Court of Common Pleas is a Court of general jurisdiction is undeniable.

Den Vandervere v. Gaston, 4 Zab., 818.
Dean v. Thatcher, 3 Vr., 470.

If, then, proceedings to lay out roads, under the act of 1818, with its supplements, constitute "proceedings in the course of judicial action" before that Court, they must stand until reversed by direct attack, and cannot be collaterally questioned.

That they are such proceedings appears to be patent.

1. They are begun by petition to the Court.

2. The Court exercises a discretion in the selection of surveyors.

Inhabitants of Oxford v. Brand, 16 Vr., 332.

And such discretion is not reviewable.
Parsell v. State, 1 Vr., 530.

3 By a supplement to said act, passed January 26, 1820, (Pamph laws 1820, p. 40) the return of the surveyors was required to be transmitted by the applicants to the Clerk for record, within 15 days after its date, failing which the return became void. In State, Bodine Pros., v. Trenton, 7 Vr., 198, 200, the Supreme Court held, that the Court of Common Pleas had the right to determine the question of fact whether the return was transmitted in due time.

4. In the event of a caveat being filed, the return was not recorded, and upon the filing of a petition by the caveator at the next term of the Court, further action of the Court was evoked.

5. Finally, the proceeding to lay out a road has been, directly and in terms, decided by the Supreme Court to be "a proceeding in the course of judicial action."
Frame vs. Boyd, 6 Vr., 457, 458.

Note also on the general question :
Thompson vs. Tolmie, 2 Peters, 157.
Reversing Tolmie's Lessee vs. Thompson, 3 Cranch C. Ct., 123.
City of Camden vs. Mulford, 2 Dutch., 49.
Carron vs. Martin, 2 Ib., 594, 598.
Vantilburgh vs. Shann, et al., 4 Zab., 740, 748.
Taintor, Pros., vs. Morristown, 4 Vr., 57, 67.
State Bodine, Pros., vs. Trenton, 7 Vr., 198, 200.
Stokes vs. Middleton, 4 Dutch., 32.

The principle affirmed by this Court in respect of condemnation proceedings, in
The State, The Morris and Essex R. R. Co., Pros., vs. The Hudson Tunnel R. R. Co., 9 Vr., 548.

Municipal assessments for the purpose of payment of money under them, though defective, held conclusive until set aside by direct proceeding.

Davenport vs. City of Elizabeth, 12 Vr., 362.

Fuller vs. City of Elizabeth, 13 Vr., 427.

B.

That the Court, especially after great lapse of time, will make all presumptions necessary to the validity of public official acts, as a matter of public policy.

Williams v. Eyton, 2 H. and N., 771.

S. C. affirmed, 4 Id., 357.

Rex v. Morris, 4 Term R., 552.

Rex v. Stockton, 5 B and Ald., 546.

Waddington v. Roberts, L. Rep. 3 Q. B., 579.

Bank of United States v. Dandridge, 12 Wheat, 64, 69–71.

Chosen Freeholders Hudson co. v. State, 4 Zab., 718.

State, Paulison Pros. v. Taylor, 6 Vr., 184, 188.

State v. Alstead 18 N.H. 59

James v. Morris 4 C.E.G. 59

C

But assuming, for the purpose of argument, that the contention of plaintiff in error is correct, and that the proceedings mentioned can be here questioned, and that they are so defective as to have no validity as the return of a road, &c., we insist that they were admissible in evidence upon another ground, viz:

To define and limit the claim of the public in respect of user.

Foulke v. Bond, 12 Vr. 527, 547.

But whether the Court erred in admitting them or not, their admission can be no ground for reversing this judgment.

As the verdict was based solely upon user, the admission or rejection of the minutes and return could not possibly have affected the result, and did not prejudice the rights of the defendant below.

"It is a well settled rule, that unless the error complained of did occasion, or might have occasioned, some prejudice to the rights of this defendant, it constitutes no ground for reversal."

Graham v. Whitely, 2 Dutch., 260.
Freeman v. Bartlett, 18 Vr., 35.
Smith v. Ruecastle, 2 Halst., 361.
Hunter v. State, 11 Vr., 498.

"Even if the Court below clearly erred in the decision, the judgment will not be reversed on writ of error unless the evidence rejected be such as might have produced a different result."

Rodenbury v. Rosebury, 4 Zab., 493.
Ayres v. VanLieu, 2 South., 768.
Marshall v. Hann, 2 Harr., 429.

The second and third assignments of errors raise substantially the same points that the Judge declined to charge, that if the jury believe the road was not opened, &c., over the *locus in quo* 20 years before March, 1859 or 20 years next after the same was laid out, the road as to the *locus in quo* is vacated, and plaintiffs below cannot recover under the return. There is no cause for reversal in either of these assignments, because,

1st. The Court was right in so declining to charge. The *locus in quo* was not vacated, even if it was not so opened, worked or used.

It could not be vacated by lapse of time or adverse user. It is well settled in this State that an encroachment upon a street or road cannot be legalized by mere lapse of time, and that a public right in a road once

acquired cannot be lost by any mistake or neglect on the part of township officers.

State v. Smith, 3 Zab., 727.
Jersey City v. Mounce, 1 Beas., 561.
Cross v. Morristown, 3 C. E. G., 305.
Taintor v. Morristown, 4 Vr., 57.
Price v. Plainfield, 11 Vr., 614.

Nor is it vacated under the 78th Sec. of the Road act, Rev., p. 1010.

It is not disputed that the road as returned by the surveyors has been opened, worked and used through its entire length within twenty years after the return and within twenty years previous to 1859, but it is claimed that the *locus in quo* was not so opened, worked or used.

Even if this is so, the part in dispute is not thereby vacated. The act does not apply to this case, but only to roads laid out, but not opened, worked or used at all. It was so held in

Taintor vs. Morristown, 4 C. E. Gr., 60.

2d. But if the Judge did err in his charge on these points, it is no ground for reversal of this judgment. The case having been settled on the ground of user, and the jury so determined by their verdict, the result would have been exactly the same if the Judge had charged as defendant's counsel requested. The defendant below sustained no injury from the erroneous opinion (if it be so) and he cannot avail himself of the mistake to reverse the judgment.

Freeman vs. Bartlett, 18 Vr., 35.
And other cases above cited on this point.

The fourth assignment of error is as to the Judge's charge on the point raised by defendant below, that if the jury believe that Bullet Lane was a street in the

village of Woodstown at the time the road was laid by said surveyors, in 1820, and said road was laid over said Bullet Lane, the return was inoperative to lay out a public road over said street over the *locus in quo*, and that plaintiffs cannot recover under such return. The Judge declined to so charge for reasons stated in state of case, p. 29.

We contend that there is no ground for reversal contained in this exception, and the assignment of error therein—

1st. Because there was no error in the Judge's charge or ruling upon this point.

From the long user of this road, and the acquiescence of the adjoining property holders in such user, the presumption arises that the action of the surveyors was lawful.

Tanitor vs. Morristown, 4 Vr., 66.

And also from such user and acquiescence, that the Court of Common Pleas passed upon this point.

But the Judge was not called upon to charge as requested by defendant below, because there was no evidence before the jury that Bullet Lane was a street at the time of the laying of the road by the surveyors.

See State of Case, p. 29.

No one was produced who could remember the lane before or at the time said road was laid. Nor was any evidence as to its being a street at that time offered.

"Counsel cannot state a proposition and request the Judge so to charge, and this Court cannot reverse on account of omission so to charge, unless it be first made clearly to appear that the proposition was warranted by the evidence and necessarily involved in the verdict.

Davison vs. Schooley, 5 Halst., 146.

Allan vs. Wanamaker, 2 Vr., 371.

And it must be so shown in the bill of exceptions.
Davison vs. Schooley, 5 Halst., 147.

But even if the Court erred in declining to so charge the result was not thereby affected.

As the verdict was not based upon the laying out of the road or the return, the defendant was not injured by any mistake as to such charge, and under the ruling in Freeman v. Bartlett, and other cases above cited, this judgment cannot be reversed for such omission or mistake.

The fifth assignment of error is that the Judge erroneously declined to charge, when requested by defendant below, that if the jury believe the road ran through the shed attached to and part of the Clawson dwelling house, then said road was not lawfully laid out across the *locus in quo* and the plaintiffs cannot recover under said return.

We contend that this judgment should not be reversed by reason of anything contained in this assignment of error.

Because it does not appear by the exception, or anything in the case, that any evidence was before the jury as to such street, or such road running through it, nor as to the character of the ~~street~~ sheds—whether it was such a building as is contemplated in the 79th Sec. of Road Act, Rev. 1010, or a mere temporary structure.
Davison v. Schooley, 5 Halst., 147.

And that from long lapse of time (65 years) and acquiescence, the presumption arises that the action of the surveyors in laying said road was lawful, and because even if the Judge did err in declining so to charge the defendants below were not injured by such refusal.

Such charge could only affect the validity of the road

as laid by the surveyors, and as the jury found that the road had been established by user, if the Judge had charged as reques'ed by defendant below the result would not have been changed.

"The refusal of the Judge to charge can only be assigned for error when such refusal has operated to the injury of him who asks the charge."

Marshall v. Hann, 2 Harr., 429.

We further contend that the judgment should not be reversed by reason of anything contained in the second, third, fourth and fifth assignments of error, because in each of the requests to charge, upon which the said assignments of error were based, the Judge was requested to charge upon the law, if the jury believed certain alleged facts, and not if they believed the alleged facts to be true upon the evidence in the case; that the Judge was requested to charge upon legal propositions, based upon the belief of the jury, and not upon the evidence in this case.

The Judge was not requested so to charge. The jury might have believed these alleged facts to be true, from rumor or some other cause, and yet have no sufficient evidence before them to prove them.

No exception was taken to what the Judge did charge, but only to what he declined to charge.

The sixth assignment of error is, that after the jury rendered their verdict and had been discharged, the said Judge did alter, amend and change the said verdict in matter of substance, and did cause the said verdict so altered, &c., to be entered on the record.

It appears from the record itself, that due notice of the making of the application to the Court to mould the verdict was given to the attorney of record of the defendant below. See state of case, p. 9.

It is an actual fact that the counsel of said defendant was present at the time of the making of said application.

No exception was taken by the defendant below to the moulding of said verdict, or to the alleged alteration of the same complained of by the defendant below, in his said assignment of error. No such exception appears in the state of the case.

We contend that the judgment should not be reversed by reason of anything contained in this assignment of error.

Because no exception was taken in the Court below to this action of the Judge as to the verdict.

"On error a point not embraced in any exception taken below cannot be considered or decided.

Penn. R. R. Co. v. Page, 12 V., 183.

Oliver v. Phelps, Spencer, 180.

Coxe v. Field, 1 Gr., 218.

Conover v. Middleton, 13 Vr., 382.

Associates of Jersey City v. Davison, 5 Dutch., 417.

Hoey v. Lewis, 10 Vr., 507.

Ruth Hunter Mfg Co v Emmit 12 Ab. 659

For anything that appears on the record the verdict might have been so amended with the consent of defendant below.

Also, because the Judge did not amend or change the verdict in matter of substance, but merely amended and moulded it into proper form and did not err in such proceeding.

The statute gives the largest latitude to the Court in the amendment of all defects and errors in any proceeding

in civil causes for the purpose of determining in suits the real question in controversy.

Rev., p 1010, Sec. 138.

The real issue tried was, were the plaintiffs below entitled to the premises in dispute.

The title was, by the pleadings and bill of particulars, admitted to be in the defendant below. No damages were claimed or proved and only nominal damages could be given.

The intention of the jury can clearly be gathered from the verdict and the facts before this Court.

They found generally on the issue presented, for the plaintiffs below; their special finding shows clearly that they intended to find that the plaintiffs were entitled to the possession of the whole of the premises in dispute.

The verdict as rendered is equivalent to the verdict as moulded by the Judge.

The alleged injury was depriving the plaintiffs of the possession of the premises in dispute, to which possession they were entitled. Only a possessory right was claimed.

The verdict, both as rendered and as moulded, taken in connection with the facts appearing in the case, is equivalent to finding that the plaintiffs below are entitled to the possession of the premises in dispute, and that the title thereto other than the mere possessory right is in the defendant. The judgment was entered in accordance to this, and every right of the defendants below preserved.

"On writ of error every intendment will be made in favor of the legality of the proceedings under review."

Loweree v. Newark, 9 Vr., 151.

No objection can be taken by the defendant below that no damages were found by the jury. This is not to the disadvantage of the defendant below. "A man shall

not reverse judgment for error if he cannot show that the error is to his disadvantage."

Teys Case, 5 Coke, 396.

"When damages only are to be recovered, if none are assessed the verdict is bad, but is otherwise in ejectment, debt, &c., when anything is be recovered besides damages."

Trial per pais, 293, 5 Bac. Abridg., 324.

2 Lil. Abridg., 159.

Harvey vs. Snow, 1 Yeates, 159.

Sedgwick on Damages, 7 Ed., 244.

"When the jury omitted to assess damages as required by statute, Court held it to be a defect beneficial to plaintiff in error and refused to reverse."

Hand vs. Stringfield, 1 Morris, 18.

The Court below had the right, and this Court now has the right, if it be necessary, to mould this finding of the jury into such shape as shall sustain the judgment, and determine the question in controversy.

As far back as the time of Hobart this has been the rule.

"Although the verdict is not in form and does not find the technical issue raised by the pleadings, if it is at the same time a verdict that the Court can understand, and there is no difficulty in concluding a verdict out of the finding, in such case it is the duty of the Court to mould and work it into form according to the justice of the case.

Foster vs. Jackson, 1 Hob., 54.

Hawks v. Crofton, 2 Burr., 698.

Porter vs. Flummery, 10 Mass., 64.

Cane v. Watson, 1 Morris, 52.

Smith v. Johnson, 8 Texas, 418.

Jones v. Julian, 12 Ind., 274.
Settle v. Larabee, 2 Greenley, 37.

In our own State this has been repeatedly held. "If the point in issue can be concluded from the finding of the jury the Court will mould it into form and give it due and legal effect."

Stewart v. Fitch & Boyton, 2 Vr., 17.
Philips v. Kent, 3 Zab., 155.
State Street Church v. Gordon, 2 Vr., 264.
Cork v. Hendrickson, Penn, 343.
Ware v. Millville Fire Ins. Co., 16 Vr., 177.
Ordinary v. Thatcher, 12 Vr., 412.

Price v. D. R. R. & T. Co. 2 V. 232

"Whenever the verdict in ejectment is sufficiently certain to enable the Court to give judgment and the Sheriff to deliver possession when that is required by habere it will not be disturbed."

Tyson vs. Passmore, 7 Bar., 273.
Green vs. Waterouse, 17 Seargt. and Rawle, 400.
Adams on ejectment, 391 and notes.
Hagey vs. Detweiler, 35 Penna. State R., 74.

The verdict either as rendered or moulded is sufficient to sustain the judgment entered.

In bastardy case the statute required the jury, by their verdict, to declare and find whether the accused is the father of the child. The verdict was "guilty." Nothing else. Court permitted it to stand and gave judgment.

Gaskill vs. Overseers of poor of Downs, 7 Vr., 356.

Verdict in form, "We the jury find for the plaintiff." Held to be sufficient, the amount not being in issue.
Jones vs. King, 30 Minnesota, 368.

In action on claim of property seized under execution,

verdict—"We the jury, find the property subject and twenty-six per cent. damage;" held good.

Harvey vs. Head, 68 Ga., 247.

Browning v. Stillman 42 Ala. 355

In action on promissory note and no dispute as to the execution terms or amount of note, verdict was—We, the jury, find for plaintiff. Upon recording the verdict the Court rendered judgment for amount of note. Sustained on appeal.

Hutchinson vs. Supreme Court of Ingo County, 61 Cal., 119.

Also see:

Ernest v. Brown, 4 Bing. N. C., 162.
Richardson v. Mellish, 3 Bing. 334.
Lowry v. Brown, 3 Sneed, 17.
Steel v. Barnhill, 71 Ala., 157.
Massey v. Durer, 7 S. C., 310.
Woodruff v. Webb, 32 Ark., 612.
Plummer v. Currer, 52 N. H., 287.
Del. Lac. & W. R. R. v. Toffey, 9 Vr., 52.
Patterson v. Hubbard, 30 Ill., 201.
2 Johns, N. Y., 181—Obert v. Hammell, 3 Harr., 74.
Herbert v. Hardenburg, 5 Halst., 222.
Stephen v. Westmore, 25 Ala., 716.
Hawley vs. Twyman, 24 Grat, 516.
Russell v. Whelen, 1 Hump., 3.
Murray v. O'Neal, 1 Call., 216.
Elliot v. Sutor, 3 W. V., 37.
Brown v. Dunn, 123 Mass., 254.
Hann v. Culsey, 84 Ill., 56.

It has been held in this State that power of amendment conferred by 138th Sec. of practice act extends to changing actions from assumpsit to covenant.

American Life Ins. Co. v. Day, 10 Vr. 89.

Rushton v Comm. Ins. Co. 13 V. 295

To striking out name of pl't'ff and inserting another.
Farrier v. Schrodorer, 11 V., 601.

After argument in Court of Errors.
Apgar v. Hiler, 4 Zab., 808.
Brown v. Warden, 15 V., 179.
Lehigh Valley Co. v. McFarland, 15 Vr., 695.

Any amendment necessary to sustain judgment that might be made lawfully under a rule of the Court will be considered as already done.
Coxe v. Field, 1 Gr. 216.
Miller v. Fernald, 4 V. 206.

New Jersey Court of Errors and Appeals.

E. B. Humphreys,
v.
Borough of Woodstown.

Ejectment.
on Error.

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For Pl't'ff in Error.
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For Def't in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action of ejectment brought by defendant in error against plaintiff in error, to recover the ground included within an areaway leading to a cellar of plaintiff's building, and which he has enclosed with an iron railing. The case of defendant in error was that plaintiff had, in the construction of this areaway, encroached upon the limits of an ancient highway laid out and returned by surveyors in 1820. To prove the essential fact of the existence of this laid out public road defendant in error offered in evidence a copy of the surveyor's return, dated August 19th, 1820, and the record of that return in the Minutes of the Common Pleas of Salem county.

The case was tried upon the theory that the old road, as it was originally laid out by the surveyors, had been encroached upon by the defendant below, and that the *locus in quo* was within the limits of that road.

There was proof offered tending to show that there had been for many years, over twenty, public user of a road near the *locus*, the lines of which were not described or in any way certainly defined, from which evidence of user the inference of dedication was attempted to be drawn.

To the admissibility of the surveyor's return as evidence of the laying out of the old road the defendant objected, and upon the overruling of that objection took exception. Several requests were made by defendant below for directions to the jury, which the Court refused (p. 33, paper book) and error is assigned upon the admission of the surveyor's return and the refusal of these requests.

The jury found a general verdict of guilty, and, as an answer to the inquiry of the Court, found, "that the place in dispute was within the limits of a public street for a period of at least twenty years anterior to the erection of the railing and making the cellar-way by the defendant in 1865."

It may be observed here that the jury do not find *how* the public right to the street originated, whether by the laying out of a road by surveyors in 1820, by user for twenty years or more, or by dedication. They content themselves with finding as a fact that there *was* a public street at the *locus in quo* for at least twenty years anterior to 1865.

The first important inquiry then is, was there, before the jury, evidence showing, or tending to show, the existence of such a street or road which was incompetent as proof and which should not have been considered by

them? If there was, the defendant below was prejudiced and he is entitled to have the judgment below set aside.

The only evidence which, if competent, was not disputed, was the surveyor's return of 1820. If that return was properly before the jury the fact of the existence of a public road, regularly laid out, across the *locus in quo* was beyond controversy, and the plaintiff below could recover. The evidence of the existence of such a road from proof of facts tending to show user for twenty years, and so lay the foundation for a presumption of a laid out road, or of ancient dedication, was met by defendant below with contradictory testimony leading to the opposite result (see charge, pp. 21 to 26). Outside the return of the surveyors the testimony upon the question of the road was conflicting.

Regarding the proof of the existence of a public street or road over the *locus in quo*, by means of the criticised surveyor's return of August 19, 1820, the Judge charges the jury (page 26).

"The centre of the road was the line between Clawson and Hackett and Risley's. If you find where that line existed you have the middle of that road."

"I need not call the distances *because there is no substantial dispute in regard to them.* He (the witness, Morison the surveyor) established this line marked as 'The old Hackett Line,' and this is claimed as the north line of the old line known as Bullet Lane."

"If that was the Clawson and the Hackett line, called for as the centre of this street, *it undoubtedly was then carried right over the locus in quo, more than ten feet into the present house.*"

And the Judge concludes his review of all the possible locations of the street as laid in 1820 by the criticised return on page 28, by telling the jury: "Therefore, taking any of these surveys, *it covers the locus in quo.*"

In this state of the proofs the jury must be presumed to have resorted to that evidence which, having been offered by plaintiff below, and after objection and argument admitted by the Court as *competent*, conclusively demonstrated the existence of the ancient laid out highway, part of which plaintiff in error had, as was alleged, wrongfully possessed himself of.

Where a case presents two kinds of proof, both leading to the result reached by the jury, one of which is controverted, and in respect to which the jury must discriminate between conflicting testimony in order to decide, and the other is unchallenged and conclusive the legal inference must be that the jury reached its verdict by taking the *undisputed and conclusive* fact. Hence we may safely assume that the return of the surveyors, offered and admitted as a record of a court of general jurisdiction, *controlled* the action of the jury and was the predicate for the verdict.

Indeed, quite irrespective of the conclusive and undisputed character of the evidence offered, if competent, the courts will in all cases where competent and incomptent proofs have been offered protect the losing litigant by affording him another opportunity to try his case by strictly legal methods, and upon unquestionably lawful evidence. This, I understand, is the principle controling the action of the Court upon this matter; that as it is impossible for the Courts to discriminate the vicious evidence, which might or might not have influenced the jury, from the competent proofs, they will set aside the verdict or judgment, and then afford an opportunity for a *legal* investigation, conducted in accordance with the rules of law.

This doctrine is illustrated in the following cases:

Settle v. Allison, 8 Geo., 201–209.

Marquand v. Webb., 16 Johns., 89–91.

If incompetent or illegal evidence be admitted and not "*withdrawn* and *wholly withdraw and withdrawn for every purpose,* says Judge Strong, (in Del. & Hudson Can. Co. v. Barnes, 31 Pa., 193, 196, 197) it is error and the Court will set aside the judgment.

The necessity for the withdrawing, by the Court, of any incompetent evidence from the consideration of the jury is recognized and enforced in the following cases.

Deerfield v. Northwood, 10 N. H., 269.
Hamblett v. Hamblett, 6 N. H., 334.
Randal v. Doane, 9 Gray, 408
Tullidge v. Wade, 3 Wilson, 18.

So carefully have the courts guarded the rights of litigants to a perfectly fair trial by strictly legal methods and upon entirely competent proof only, that it has been held that even the *direction* of the Court to the jury to disregard illegal evidence is *not enough* to cover the error of its admission.

Shaeffer vs. Kreitzer, 6 Binney, 430.
Nash vs. Gilkeson, 5 S. & R., 352.
Ingham vs. Crary, 1 Pen. & W., 388.
Gillet vs. Mead, 7 Wend., 193.

And the Courts of review hold that incompetent evidence having been admitted in the trial Court, the Court of review must set the verdict aside and grant a new trial:

In Gage vs. McIlwain, 1 Strobhart (S. C.) 135; it was held that "where incompetent evidence has been received, the case should in general be sent back for new trial, as this Court (the Court of appeals at law) cannot "undertake to say upon what evidence the jury decided."

In Den. vs. Johnson, 3 Harr. (N. J.) 101, a wife who was then (1840) incompetent to be a witness by

reason that her husband was a party to one of several consolidated suits, was admitted to testify. Verdict set aside—Court saying "we have no right to modify or "give effect in any way to a verdict rendered on the "testimony of an incompetent witness."

The effect upon the right of plaintiff in error by the admission of the surveyor's return being thus manifest the next inquiry is:

Was the return of surveyors, dated August 19th, 1820, competent evidence by which to prove the existence of a public road, when objection was made to its admission in evidence?

The probative value of this return depends wholly upon its character as a record of the proceedings and finding of a competent tribunal acting upon a matter over which it had jurisdiction, and in the manner pointed out by law, and as it is not, as we contend, a record of a court of general jurisdiction, the plaintiff below must show that this return has all these characteristics. If this return is a record of a court of general jurisdiction, including the subject matter of the proceedings, the law, by presumption, clothes such a record with every requisite essential to its validity as a *record*, whether these essentials appear upon its face or not, and so changes the burden of proof and puts upon the party seeking to impeach it as a *record* the duty of a direct attack upon it in a proceeding having for its object solely the impeachment of the *record*.

This return of the surveyor's is not the record of the proceedings of the Court of Common Pleas, but of the

proceedings of the *surveyors* who were exercising a special authority given by the statute, not conferred by the Court. This return was made under the road act of 1818, Rev. 1820, p. 615, § 5, where the method of procedure for laying out public roads is pointed out, and is the same as that required by § 5, Rev. 1877, of the present act. The Court of Common Pleas has jurisdiction over the matter only to the extent of deciding whether notice of the application has been given and of *selecting* the members of a certain class of officers, the surveyors of highways, who shall serve. The six whom the Court of Common Pleas shall appoint, become *when so selected*, clothed by the *statute*, not by the Court, with certain special judicial powers defined by the *statute*. If the legislature had said that the power to lay out roads in each township should be exercised by the surveyors of the highways of *that* township, or by the board of chosen freeholders of the county, or by the director of the board, or by a road committee appointed by the board, such legislation would be competent but the effect of it would have been to delegate to and confer upon particular persons a power emanating from the legislature *directly*. Such a tribunal so created would undoubtedly be an inferior one of limited, special jurisdiction created for a special purpose and exercising a single defined and limited jurisdiction. In any of the cases stated no question could be made about the *character* of the tribunal or the necessity of its record, i. e. the history of its proceeding, exhibiting on its face all facts necessary to show its proper exercise of its delegated authority. Is the result in any way different when the legislature, instead of making a selection *itself*, as in the cases put, invests an existing tribunal, as its agent, with the power of making the selection for it out of a limited and designated class of officers? It is

to be observed that the *power* of the surveyors, when *selected* by the Court and properly assembled, comes directly from the legislature; they derive no power whatever from the Court. Hence it is clear that the illustration of the Court attempted to be drawn from the reference of a cause to a Master in Chancery to take proofs are both illusory and inapt. The Master gets his *power* from the Court which appoints him for a purpose. The surveyors get their's from the legislature whose agents, the Court, *selects*, by legislative direction and by legislative sanction, the officer whom the *legislature*, not the Court, clothes with the *power* to be exercised.

The judicial functions of the Court of Common Pleas is exercised and exhausted when that Court has passed upon the sufficiency of the application for the appointment of surveyors and of the sufficiency of the notice to be given. The selection of surveyors is but a quasi judicial function, as the Court must not only select from a class but must include in its selection certain members of *that class*, to wit: the surveyors of the township in which the road applied for is to be laid. The "judgment of the Court is final and conclusive" upon the sufficiency of the application and of the *notice* that it is intended to be made. When that "judgment" is invoked the Court's judicial function is ended, and when having pronounced that judgment it has appointed or selected surveyors it is, as a Court, absolutely *functus officio*.

It will be observed that after the appointment of surveyors no further judicial or quasi judicial function is exercised by the Court. The surveyor's return is not sent to the Court but to the *Clerk* (Sec. 5) to whom the *statute* gives the power to file and record (Sec. 5). The statute *directs* the *Clerk* to keep the return unrecorded to enable objectors to file a caveat (Sec. 7). It may be observed that this provision alone

is a tolerably clear indication that the legislature does not regard the return as a record or judgment of the Court of Common Pleas, else it would scarcely have provided that in case of a caveat against the proceeding and judgment of the Court of Common Pleas, as this is claimed to be, an appeal should be had to freeholders selected by that *Court* to review its erroneous action. Again, a further illustration of the feebleness of this claim is to be found in the provision of Section 6, which absolutely destroys the *record* of a Court of general jurisdiction, if a stranger to the Court, a mere applicant who invokes the exercise of its power to appoint surveyors, carelessly omits to transmit the return to the clerk. If such a misfortune overtakes the record of this Court the legislature declares the "*return void.*"

In all cases when the exercise of a special authority is delegated to particular persons, or special and limited tribunals, the preliminaries which give them power to act must appear on the face of the proceedings themselves, so this Court held in *State vs. Lewis*, 2 Zab. 564, and this is the rule.

But we are not left to support the objection to this surveyor's return upon general principles only. The Courts of New Jersey have in many cases declared the true construction of the act of 1818, and have defined the powers by that act granted, and the requisites essential to the validity of their exercise.

The objection made to the admission of the return of 1820 is, that the return has no probative force. That because the return itself shows no compliance with jurisdictional requirements it cannot be offered as a means of proof. There are several grounds of objection.

1st. The road act of 1818, § 2, requires that the applicants shall give notice to the surveyors six days, and to

the public by advertisements set up twelve days prior to the time of the meeting of surveyors.

§ 5 prescribes that "*on due proof being made* to them that the advertisements of their meeting had been set up according to law, *on which said surveyors shall decide*, and *their decision shall be final and conclusive*, they shall view the premises, &c.

It is to be observed that the *due proof* is a *condition precedent* of their proceeding to act. The surveyors *alone* and *exclusively* decide the question, and their decision is *final*. No court of general authority can approve or correct it.

That the surveyors shall act on the *proof* of the advertisement of their meeting is a jurisdictional fact which is necessary to give validity to their action.

In *State* v. *Scott*, 4 Halst, 20, is a case under the act of 1818, a return in almost the same words as that here objected to. The Supreme Court, speaking of the proof of advertisement of their meeting to be made before the surveyors, says, "*their authority and jurisdiction* to view and lay out the road *depend on such proof*." "That due proof in their opinion was made ought then to appear on the face of their proceedings. For it is a clear and certain rule with respect to persons exercising special and statutory authority, that all substantial matters requisite to give them jurisdiction to exercise such power, must not only have been performed *but must appear to have been performed*." The presumption in favor of jurisdiction extends only to tribunals of general or common law jurisdiction, "but tribunals or officers or persons executing special or statutory authority, or of limited jurisdiction, *must show their jurisdiction*," and cites.

Turner V. Bank of N. A., 4 *Dallas*, 8—Sup. Ct. of U. S. "And the fair presumption is (not as with regard to a court of general jurisdiction that a cause is within its

jurisdiction till the contrary appears, but rather) that a cause *is without its jurisdiction till the contrary appears.*"

The above case and the principle there recognized is cited and approved in *State* v. *Van Geisen*, 3 Green, 341-2.

N. J. R. R. vs. Ingham, 2 Harr., 31.

Stout v. Freeholders, 1 Dutch, 205.

Den vs. Hammell, 3 Harr., 78.

In this case the distinction as to what courts will be presumed to have acted correctly, and what not, is stated and discussed, and on pages 78 and 79 the difference between the exercise of a special statutory power, given for a particular purpose and that alone, and the action of a court of general judicial authority in the exercise of a power given by statute, is shown.

So in *State vs. Lewis*, 2 *Zab.* 564–6, a clear distinction is drawn between the consideration given the Court of Common Pleas on *their* order, and that given by statute to particular persons, &c., and the rule is stated to be "When general powers over a whole subject matter are conferred by statute on courts of general jurisdiction, although their jurisdiction over the subject matter must appear on the face of their proceedings, every intent will be made in favor of the correctness of their proceedings."

This case is approved in *Stout* vs. *Freeholders*, 1 Dutch., 205.

State vs. *Lord*, 2 Dutch., 140.

The distinction is to be observed that the special power is exclusively given *to the surveyors* to have due proof made to them, on which *they* shall finally decide. In *Matter of Highway*, 1 *Harr.*, 93, the Court marks this distinction between the freeholders' and the surveyors' meetings; and declares that "in the case of surveyors, they have no power or jurisdiction to proceed to lay out, &c.,

until they first inquire whether advertisements have been set up, &c., and *adjudge* that due proof has been made thereof to them, but in the case of the freeholders' meeting, they may proceed and act without this preliminary proof.

2d. The return of the road in Book C, p. 213 of Salem Roads Book, &c., objected to, shows that *five* of the surveyors acted, and made and signed the return; but it does not show whether the *sixth* was present and did not concur, or if absent whether he was served with such notice as the law requires.

In *State vs. VanGiesen*, 3 *Green Sup. Ct.*, 341, a precisely similar case was before the Supreme Court, and it was held that an omission to give the proper notice to any one or more must *vitiate the proceedings* of such of the surveyors as received notice and met. It was then attempted to show *aliunde* that the non-subscribing surveyors were present and did not concur. But the Court citing *State vs. Scott*, 4 Halst, 17, 21 and other cases, held that *it must appear upon the certificate or record that everything was done that the statute required.* "*The return alone is the record.* If no notice was given *the four who meet have* NO JURISDICTION *to proceed and vacate or lay out a road.*"

This case of VanGiesen was cited with approval in *N. J. R. R. vs. Suydam*, 2 Harr., 32, discussing same principle. So also in *State vs. Lord*, 2 *Dutch.* 141.

In *Griscom vs. Gilmore*, 1 Harr., 106, held to be a *fatal defect.*

3d. In § 11 of the act of 1818 it is required that verbal notice be given to parties present of any adjournment, and *written notice* to any absent surveyor.

The object is evidently to give notice to parties interested, and to the surveyors who are charged with the

exercise of special judicial authority to meet at the adjourned time.

But in the return of August, 1820, an adjournment to a different place than that fixed by the Court is set out, but no showing of any notice, either verbal to parties or written to the sixth surveyor.

The road act, section 5 of act 1818, requires the surveyors to lay the road as may appear to them to be most for the public and private convenience, having a regard to the best ground for a road, and the shortest distance, in such manner as to do the least injury to private property.

In *State v. Lippincott*, 1 *Dutch.* 434, "These requirements were held to be *matters of substance*, with which the surveyors are bound to comply," and it is well settled their return must show a compliance with all such requirements." The mention of the regard for *public* convenience and *omission* of regard for *private*, "*raises a presumption that the latter was disregarded.*"

In the return of August 20, 1820, the surveyors do not show that they regarded either *public* or *private* convenience, the *shortest distance* or *best ground.*

In the case of *State* (*Parmley Pros.*) *v. White*, 6th Vroom, 204, it was held that an omission to certify that in laying the road regard was had to the *public convenience would be fatal* to the validity of the return.

The highest Courts of New Jersey have repeatedly held the proceedings of special and limited jurisdictions to be void when jurisdictional facts do not affirmatively appear, and that *they may be impeached collaterally.*

The case of *Martin vs. Carrow*, 2 Dutch, 230, is exactly in point. The action was ejectment. Title was based on an assessment of expenses for laying out and opening

a road. Charter required three-fourths of land owners on the street to apply for road. Ordinance and assessment were objected to as *void*, because it did not appear that three-fourths of land owners applied. Held in Supreme Court, Ch. J. Green, J. J. Ogden & Vredenburgh—ordinance was *irregular and voidable*, but not void, and *could not be impeached collaterally:* Potts, J., dissented. Held the three-fourths requirement to be a limitation of grant of power which could only be exercised within the limitation. Want of jurisdiction is fatal, the proceeding *void;* may be treated *as a nullity.*

Same case on error, 2 Dutch., 594, Elmer, J., and whole Court: Held, *reversing Supreme Court,* "That tribunals "with special powers for adjudicating in particular cases, "under the various names of commissioners, *surveyors,*" &c., &c., "whose modes of proceeding are prescribed in "the statutes by which they are created, are of a different "class (from courts of general jurisdiction) and unless "their proceedings, *on the face of them,* show a compliance "with the directions required by the statute under which "they act, it could never be known whether they acted "within their jurisdiction or exceeded it."

And on p. 600, speaking of proceedings to take lands, the Court says: "*Every fact necessary to give jurisdiction* "*must appear affirmatively to give them validity.*"

Nixon vs. Ruple, 1 Vroom, 58, to same effect.

In *Munday vs. Vail*, 5 Vroom, 420, a decree in equity twenty-five years old—which was held to be aside from the issue raised in the record—was a nullity, on the broad ground that the Court *had not jurisdiction* to the extent claimed.

From the rule established by this concert of authorities, it is claimed that there are cases which show that proceedings of surveyors of the highways acting under our statute are accepted, as in *Cross vs. Morristown*, 3 C. E.

G. 305. In this case there was no return to be criticised. The road was an ancient highway, never laid out by surveyors, but the principle above stated was recognized by the learned Chief Justice who there sat as Master, who, speaking of the alteration made in the streets of Morristown, says, "the grant approved in the common council, to pass ordinances to regulate the sidewalks and streets—the power is undoubtedly conferred, but the mode in which that power shall be exercised is prescribed, and the *consequence is, such mode must be pursued.*"

In *Taintor v. Mayor of Morristown*, 4 C. E. G., 46, a return made under act of 1774 was challenged because it did not appear that proper notice of the meeting of surveyors had been given. No proof of any notice whatever was required by this statute of 1774 and consequently the return if attacked on that ground directly by *certiorari* would not have been set aside, as the Chancellor frankly admits in his opinion. It was then a perfectly good return and unimpeachable either by direct attack or collateral inquiry. All that the Court say beyond this is therefore mere *dicta*. But the Chancellor concedes that if the surveyors had not "jurisdiction of the subject matter," or if their acts were not "within their jurisdiction" (p. 59) their proceedings might be collaterally questioned. I contend, and I think the cases cited so establish the rule, that in tribunals of this character the only *evidence* of their jurisdiction is the return of their proceedings. Because, while their *power* comes from the legislature, the method of its exercise is pointed out by the legislature, and as was said by the Chief Justice, *Cross vs. Morristown*, "*the consequence is, such mode must be pursued.*" It must appear in and by the return, which is the only evidence that the power has been exerted, that the legislative direction as

to the " mode " of exercising the power has been observed, or there is *no lawful exercise of the power conferred.*

In Taintor vs. Morristown, 4 Vr., 57, the Supreme Court admitted (p. 65–6) that a return " offered as an instrument of evidence " might be " overcome for jurisdictional defects," although it was held there that none of the defects urged, among which was a lack of evidence of notice of meeting of surveyors, were jurisdictional defects. The action of the surveyors in this case was had under act of 1760, under which, as the Court declares. (p. 67) " the giving of notice is not a jurisdictional fact, The return is strictly in compliance with the statute and contains everything that the act requires the surveyors to include in it."

None of these cases when carefully examined militate against the doctrine contended for here, but on the contrary recognize and support it. The act of 1818, under which this return was made, requires that two of the applicants for the road shall give notice of the time and place of meeting of the surveyors, (§ 1 Rev., p. 991,) and the surveyors " when met * * * on due proof being made to them that the advertisements of their meeting have *been set up according to law*, on which the surveyors shall decide, and their decision be *final and conclusive*, shall view the premises, &c.," (§ 5.) Under this act the notice of the meeting was a jurisdictional fact—if the return did not show it the return was void. Without this there was no evidence that they had "jurisdiction of the subject matter," nor that what they did was " within their jurisdiction," and so, under the dicta of the Chancellor in *Taintor vs. Morristown*, their proceedings may be impeached collaterally, and under the ruling of the Supreme Court in *Taintor vs. Morristown* this return "may be overcome for jurisdictional defects * * * when offered as an instrument of evidence."

There is nothing in this return that affords any evidence of any notice whatever of the meeting of surveyors having been given, (p. 12-13 paper book,) or relieves it from the other jurisdictional defects above referred to.

The revision of 1877, road act, § 78, changes this vacating act from the construction given it by the Chancellor, as vacating only roads which have been laid out but not opened, &c., and vacates any public roads not opened, &c., for twenty years next before March 24th, 1859.

The act of 1859, as interpreted by the Chancellor in *Taintor vs. Morristown*, 4 C. E. Gr., 60, started the period of non-user necessary to vacate, to begin from the laying out of the road, wherever that might happen to be.

The revision by the legislature declares the period of non-user necessary to vacate to be that particular twenty years next preceding March 24th, 1859, irrespective of the time of laying out.

The trial judge was requested to charge upon this, that if the road in question had not been opened, &c., over the *locus in quo*, during this period *next before March 24th*, 1859, the act in the revision vacated the road.

To the Judge's refusal to charge as requested the second assignment of error is directed.

The act of March 24th, 1858, declares that whereas, difficulties have occurred by public roads being laid, and not opened, used or worked; therefore, "All public roads, having been laid by surveyors or otherwise, and not opened, worked or used for more than twenty years, shall be considered, and they are hereby vacated."

In *Taintor vs. Morristown*, 4, C. E. Green, p. 60, this act was held not to apply to the street in question, the Chancellor holding that it applied only to roads, which have been laid out, but not opened, used or worked.

The Morristown road had been opened from 1786, when laid out, to 1829, when Barnes extended his fence (p. 57).

Under this ruling the plaintiffs in error make their third assignment of errors—to the refusal of the trial Judge to charge as requested, that if the jury believed that the road in this suit was not opened, used or worked on the *locus in quo* for twenty years after it was laid out, then this act vacated the road to the extent of the *locus in quo*.

The Judge charged that "where a road has been used after it has been laid out through its length the public have a right to take the land within the boundaries of that road and use it whenever they please." See Book, page 29.

His charge in fact on this point takes from the jury any consideration of the use or non-use of the road through even its entire length, declares that it has been so used, and that the public have a right to extend its width out to the width it was originally laid out.

The words used in the vacating act of 1859 are "all public roads."

What the legal meaning of the words "public roads" is, has been judicially declared.

In *State, Newell, Pros. vs. Bassett*, 4 Vroom, 28, the words "public road" were held to include and mean *any part* of a public road or public highway."

Under the construction of the trial Judge the use of a foot-path alone, along one side of a three rod road, would be construed to have opened the road to its full width, notwithstanding the act of 1859.

The Judge refused to charge that if the public road was laid out over a street in a village, and the widening of such a street in this mode included the *locus*, the road laid was no ground of recovery of the *locus*, vid. §28, Road Act. 1818; same as Revision 1877, §79.

For this refusal the fourth assignment of errors is laid.

On this point the Judge declared that the presumption is in favor of the view that the Court passed on this question.

But there is nothing in the case on which to base such a presumption.

The Court of Common Pleas saw only the application for the road, which does not mention either the village of Woodstown, or Bullet lane, a street of that village. (Page 12 of book.) When the return came in, showing that the surveyors had laid a public road "down the Bullet lane to Woodstown street" (p. 13 of book) the mischief was done, beyond remedy, by the Court of Common Pleas. The surveyors who only had the power to lay the road, were *functus officii.*

It is respectfully insisted also, that the argument on the first assignment of error shows that no presumptions are made in favor of the action of special and statutory tribunals such as surveyors of highways.

When the road act speaks of towns, villages, &c., it means geographical localities, not municipal corporations.

State vs. Snedeker, 1 Vroom, 83.

In *State vs. Hale*, 1 Dutch., 324, the section forbidding widening of streets was held to extend to whole road act—"that the surveyors *had no authority* to alter the streets in question"—street in Hackensack.

In *Holmes vs. Jersey City*, 1 Beasl., 305, Chancellor Williamson declares it to be the purpose of the act to "protect the established streets in the settled towns and villages from the operation of the act."

The Judge was requested to charge that if the jury believed the road return of 1820 ran through the Clawson dwelling house or shed, then that the road was not

lawfully laid out over the *locus*. Vid. act of 1818, § 28, same as § 79 in Rev. 1877.

The Judge declined to express his views on this question, (page 30 of book.)

In *State vs. Troth*, 7 Vroom, 422, the Court of Errors unanimously declared that the above section "*made it unlawful*" to lay a road through a billiard saloon—part of a hotel.

We submit, in conclusion, that the jury having found for the plaintiffs generally—if the road return of 1820 was unlawfully admitted in evidence, as we contend it was, the verdict must be set aside, and a new trial granted. Because it is impossible to tell whether the jury found for the plaintiffs because the return made the *locus* a road, or because user or dedication did so.

The special reply of the jury to the Judge's question is open to the same criticism.

To find "that the place in dispute was within the limits "of a public street for a period of at least twenty years "anterior to the erection of the railing and making the "cellar-way by the defendant in 1865," does not find *whether it became* a public street *by virtue of a road return* in 1820, and continued to be a public street thenceforward and during the twenty years prior to 1865, or *whether it became* a public street by *use and occupation* of the public for twenty years prior to 1865.

If the jury depended for their finding upon the illegally admitted road return, as we contend they must have done, the verdict is tainted.

As they have not shown whether they did or did not make up their verdict on this return, we ask a new trial, eliminating the void return, and relieving the jury from the confusion of illegal evidence.

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S. H. GREY,
Of Counsel with Plaintiff in Error.

In the Court of Errors and Appeals

IN THE LAST RESORT.

EDWARD B. HUMPHREYS,
vs.
THE MAYOR AND COUNCIL OF THE BOROUGH OF WOODSTOWN.
} WRIT OF ERROR.

STATE OF NEW JERSEY, ss.

The State of New Jersey to our Circuit Court in and for the county of Salem, GREETING: Because in the record and proceedings and also in the giving of judgment in a plaint which was in our Circuit Court in and for the county of Salem, by our writ, between The Mayor and Council of the borough of Woodstown, plaintiff, and Edward B. Humphreys, defendant, of a plea of trespass in ejectment, manifest error hath intervened, to the great damage of the said Edward B. Humphreys, as by his complaint we are informed.

[L. S.]

We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you send to our Judges of our Court of Errors and Appeals in the last resort in all causes, distinctly and openly, under your seal, the records and proceedings of the plaint aforesaid, with all things concerning the same, and this writ, so that they may have them before our said Judges of our said Court, at the State House, in the city of Trenton, on the third Tuesday of November instant, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the constitution and laws of the State of New Jersey ought to be done.

Witness the Honorable Theodore Runyon, President Judge of our said Court, at Trenton aforesaid, this fourth day of November, eighteen hundred and eighty-five.

HENRY C. KELSEY.

E. S. Fogg,
Atty. of Pltff. in Error.

The answer of the Circuit Court of the county of Salem to the within writ of error.

The record and proceedings whereof mention is within made, with all things concerning the same, I hereby certify to the Court of Errors and Appeals in a schedule annexed to this writ of error, as within it is commanded.

ALFRED REED, J. [L. S.]

CIRCUIT COURT OF SALEM COUNTY, NEW JERSEY.

EDWARD B. HUMPHREYS, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF WOODSTOWN.	IN EJECTMENT, &c.

As yet of the tenth day of January, eighteen hundred and eighty-five:

Witness: Alfred Reed, Esquire, Judge of our said Circuit Court.

C. D. COLES, Clerk.

SALEM COUNTY, SS:

The Mayor and Council of the borough of Woodstown, the plaintiffs in this action, by Clement H. Sinnickson, their attorney, demand of Edward B. Humphreys, the defendant therein, the possession of a parcel of land, with the appurtenances, situate in the borough of Woodstown, in the township of Pilesgrove, in said county of Salem, containing forty-seven square feet, more or less, and bounded and described as follows:

Beginning at an iron post in the sidewalk in East Avenue street, in said borough, at the end of an iron fence or railing, and six feet and two-tenths of a foot from the southwest corner of the store of said Humphreys, (which stands at the corner of East avenue and Main street in the said borough), and at the corner of a cellarway leading down to the cellar under said store, and runs thence along said East avenue, and along said cellarway, and along the line of the said iron fence or railing, which stands at the side of said cellarway, an easterly course eleven feet and seven-tenths of a foot to

a corner in said fence or railing, four feet and four-tenths of a foot from the side of said store next to said East avenue; thence still along the said cellarway, and along the line of said fence or railing, crossing said sidewalk, a northerly course three feet and sixty-five hundredths of a foot to a point nine and one-quarter inches from the said side of said store; thence along said East avenue, a westerly course, crossing said cellarway, eleven feet and seven-tenths of a foot to a point at the beginning of said cellarway, five and three-quarters inches from the said side of said store; thence a southerly course, along the said cellarway, crossing said sidewalk to the beginning.

And the plaintiffs say that their right to the possession of the same accrued on the thirteenth day of March, eighteen hundred and eighty-three; and that the defendant wrongfully deprives them of the possession thereof, to their damage five hundred dollars.

And the said Edward B. Humphreys, by E. S. Fogg, his attorney, comes and defends this action and saith that he is not guilty of the injury whereof the said plaintiffs have complained in their declaration, nor of any part thereof, and of this he puts himself upon the country and the said plaintiffs do the like.

SALEM COUNTY, ss:

EDWARD B. HUMPHREYS, the defendant in this suit, being duly sworn, on his oath saith, that the above plea is not intended for the purpose of delay, but that he verily believes that he hath a just and legal defence to the action of the said The Mayor and Council of the Borough of Woodstown on the merits of the case.

E. B. HUMPHREYS.

Sworn and subscribed this 13th day of March, 1885, at Woodstown, N. J., before me.

EDWD. WALLACE,
Notary Public.

The defendant in error suggests that for the understanding of the proceedings in this case the following portion of the bill of particulars of the said defendant in error be made a part of the record, and the plaintiff in error assents to the making of the same part of the record.

The following is a bill of particulars of the plaintiffs' claim or title to the premises in question in the above cause:

The plaintiffs claim that the premises in question are included within the bounds of and are part of a public road, avenue or street within the Borough of Woodstown, in the county of Salem, New Jersey.

That said street or road was laid out as a public road by surveyors of the highways of the county of Salem, in the year eighteen hundred and twenty, and that the return of said road is recorded in the Salem county Clerk's office, in Book C of Banks and Roads, page 213, &c.

Also that the said street or road hath been used by the public as a highway for more than twenty years and hath become a public road or highway by user.

Also that the said street or road hath been dedicated to the public use as as a street or highway by the owners of the soil, and that said street or road hath become a public highway by dedication.

That said Borough hath been duly formed and the inhabitants thereof become a body corporate in law and fact in the manner provided by the act of the legislature of New Jersey, entitled an act for the formation of Borough governments, approved April 5th, 1878. That the plaintiffs have been duly elected Mayor and Council of the said Borough, and by virtue of the laws of the State of New Jersey are entitled to the general supervision, management and control of the streets, avenues,

roads, public places and sidewalks within the said Borough.

That the said premises in question being part of a road, avenue, street, public place or sidewalk within the said Borough of Woodstown, the plaintiffs are entitled to the possession thereof.

C. H. SINNICKSON,
Att'y for Deft. in Error.
E. S. FOGG,
Att'y for Pl'tff in Error.

Therefore let a jury thereupon come before our said Circuit Court, to be holden at Salem, in and for our said county of Salem, on the third Tuesday in October, in the year of our Lord one thousand eight hundred and eighty-five, by whom, &c., and the same day is given to the parties aforesaid there, &c.

And now on the said day, to wit: on the third Tuesday in October, eighteen hundred and eighty-five, before our said Circuit Court, at Salem aforesaid, came the parties aforesaid, by their attorneys aforesaid; and it is ordered, on motion of C. H. Sinnickson, attorney for plaintiffs, that the trial of this cause do now come on, and that the Sheriff return a panel, which being done, the following named jurors appeared, and were severally sworn and affirmed as follows, those affirming having first declared themselves to be conscientiously scrupulous of taking an oath:

1. Elwood Fox, swn.
2. Ebenezer S. Mulford, swn.
3. Joseph Boon, swn.
4. James T. Mayhew, swn.
5. Joseph K. Ashton, swn.
6. J. Morris Reeves, swn.
7. James S. Layton, swn.
8. Thomas V. Gibbon, swn.
9. Ephraim Wright, swn.
10. John R. Whitesell, swn.
11. Richard Stretch, swn.
12. John Shimp, swn.

Att'ys for Plaintiff:
C. H. Sinnickson,
Wm. E. Potter.

Att'ys for Defendant:
E. S. Fogg,
M. P. Grey,
S. H. Grey.

Witnesses for Plaintiff:
Thomas Lippincott, aff.,
John H. Wriggins, swn.,

Witnesses for Defendant:
Ebenezer S. Reeves, swn.,
James Laurie, aff.,

Samuel Duell, aff.,
Samuel S. Dean, aff.,
Robert Hewitt, swn.,
W. H. Reed, swn.,
Israel A. Hewitt, swn.,
Joseph K. Riley, swn.,
Peter Keen, swn.,
Daman Dickinson, swn.,
James D. Lawson, swn.,
John Conover, swn.,
W. B. Kirby, aff.,
Omar Borton, aff.,
Aaron Giffins, swn.,
George R. Morrison, swn.,
C. F. Groff, swn.,
George Andrews, aff.,
James Laurie, aff.,
James Abbott, aff.,
John Holmes, swn.,
M. D. Dickinson, swn.

Ann Gilman, swn.,
David Edwards, swn.,
John Eft, swn.,
Ephraim Bennett, swn.,
Samuel Carney, swn.,
Abel Brown, swn.,
M. F. Edwards, swn.,
Joseph Turner, swn.,
I. C. Shinn, swn.,
George Edwards, swn.,
John W. Dickinson, swn.,
Elam Hitchner, swn.,
Gideon S. Layton, swn.,
Samuel M. Lippincott, swn.,
Edward Wallace, swn.,
Wm. R. Morrison, swn.,
Cornelius Mulverhill, swn.,
E. B. Humphreys, swn.,
A. Cochran, swn.

The evidence being closed, the case was summed up by the respective counsel of the parties. The Court charged the jury, after which the jury retired with John Buckalew, a constable sworn to attend them. The jury afterwards returned unto this Court, in charge of said constable, and being called all appeared, and being asked, say that they have agreed upon their verdict, and by Elwood Fox, their foreman, upon their oath and affirmation do further say, that they find for the plaintiffs, and they find that the place in dispute was within the limits of a public street, for a period of at least twenty years anterior to the erection of the railing and making the cellarway by the defendant, in eighteen hundred and sixty-five.

And afterwards the said Court did order as follows:

It appearing to this Court that the jury empanelled in the above stated cause did, on Saturday, the twenty-fourth day of October, instant, return and find a verdict in said cause which as received by the Clerk is as follows:

"We find for the plaintiffs, and we find that the place in dispute was within the limits of a public street, for a period of at least twenty years anterior to the erection of the railing and making the cellarway by the defendant in 1865.

And application being now made to this Court to mould said verdict into proper form, and it appearing that due notice of the making of this application hath been given to the attorney of record of the said defendant;

And the Court having heard said application and having duly considered the matter in question, it is, on this twenty-eighth day of October, A. D. eighteen hundred and eighty-five, on motion of Clement H. Sinnickson, attorney of record of the plaintiffs, ordered, that the verdict of the jury aforesaid be and the same is hereby amended and moulded into proper form so that the same shall read as follows: "We find that the said defendant, Edward B. Humphreys, is guilty of the injury above laid to his charge, in manner and form as the said plaintiffs, the Mayor and Council of the Borough of Woodstown, complained against him, and we do assess the damages of the said plaintiffs over and above his costs and charges to six cents, and that we do also find that the place in dispute was within the limits of a public street, for a period of at least twenty years anterior to the erection of the railing and making the cellarway by the defendant, in eighteen hundred and sixty-five."

And it is further ordered, that the Clerk of this Court make entry of the verdict returned by the jury aforesaid,

in manner and form as the same is herein above moulded and amended by this Court.

Therefore it is considered, that the said plaintiffs, the Mayor and Council of the Borough of Woodstown, "do recover against the said defendant, Edward B. Humphreys, the possession of the premises aforesaid, together with their damages aforesaid, in form aforesaid assessed; and that the title to said premises (other than the mere possessory right) is and remains in the said defendant, Edward B. Humphreys; and also that the said plaintiffs do recover against the said defendant the sum of one hundred and eight dollars and seven cents for their costs and charges by the Court now here adjudged to the said plaintiffs "The Mayor and Council of the Borough of Woodstown," and with their assent; which said damages, costs and charges in the whole amount to one hundred and eight dollars and thirteen cents. And thereupon the said plaintiffs, The Mayor and Council of the Borough of Woodstown, pray the writ of the State of New Jersey, to be directed to the Sheriff of the county of Salem, to cause them to have possession of the said premises aforesaid, and it is granted to them, returnable, &c.

Judgment entered this thirty-first day of October, A. D. eighteen hundred and eighty-five.

ALFRED REED, J.

SALEM CIRCUIT COURT.

THE MAYOR AND COUNCIL OF THE BOROUGH OF WOODSTOWN, vs. EDWARD B. HUMPHREYS.	IN EJECTMENT. BILL OF EXCEPTIONS.

Be it remembered, that in the trial of the issue joined upon the pleadings in this cause (*pro ut* the pleadings) at October term, eighteen hundred and eighty-five, before the Honorable Alfred Reed, Judge of the said Circuit Court, and a jury duly empanelled for that purpose, and sworn or affirmed to try the same, the said plaintiff, in support of the issue on the part of said plaintiff, offered in evidence to prove the existence of a public road covering the *locus in quo* described in the plaintiff's declaration—

Book of Minutes of the Court of Common Pleas of Salem county, containing minutes from June term, 1820, pages 43 and 44; also

Certified copy of the same; also

Return of Surveyors, recorded in Book C of Roads, folio 213, return dated August 19th, 1820.

Also certified copy of the same.

Which said Book of Minutes and said certified copy thereof and said

Return of Surveyors, recorded as aforesaid, and said certified copy thereof,

Are in the words and figures following:

(Copy of Minutes of Salem County Court of Common Pleas, June Term, 1820, pages 43 and 44.)

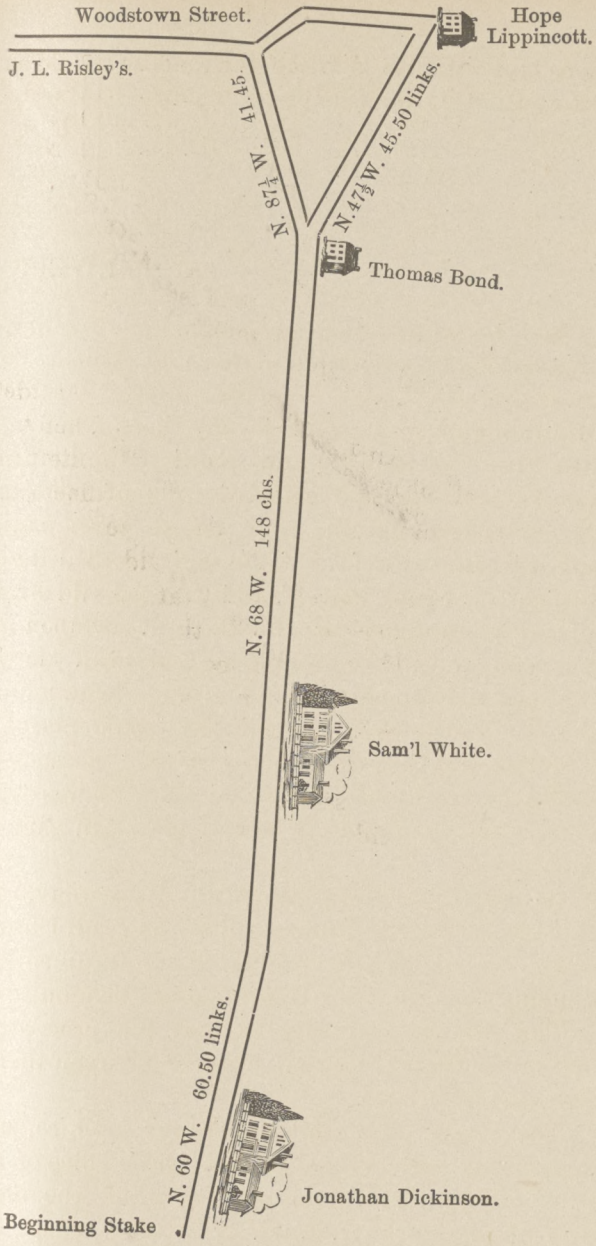
Application having been made to this Court by Damon Taylor, John Nixon and others, ten freeholders and residents of Salem county, to appoint surveyers of the highways to lay a public road of three rods wide in the township of Pilesgrove, in the said county, to begin at the line between Pilesgrove and Pittsgrove townships, on lands of Damon Taylor, or in the public road near by the house of Jonathan Dickinson; thence on lands of said Dickinson, John Hoskins and others, and to run between the houses where Samuel Miller and Daniel Ketcham live; thence on lands of Samuel White, Aaron Antrim, William Pancoast, the heirs of Abraham Silvers, deceased, Samuel Ogden, Thomas Bond, Josiah Shull, Esq., and others, to or near to a line between the said Bond and Shull, and from thence either or both of the two following courses or routes, to wit: on lands of the said Josiah Shull, Esq., Thomas Bond, David Davis and others, to intersect the main road between the houses of Hope Lippincott and James Hughes, and through lands of said Shull, Joseph L. Risley, William Hunt and others, to intersect the main road between Joseph L. Risley and Israel R. Clawson; the Court appoint Paul Scull, James Vernon, of Pilesgrove; John Blackwood, John Freas, of Upr. A. Creek; Jacob Hitchner and Abraham Swing, of Pittsgrove, surveyors of said county, to meet at the house or inn of Caleb Costill, in Pilesgrove, on the 15th day of August, at 10 o'clock A. M., to enter on said business.

Copy of Return of Surveyors in Salem county, Road Book C, folio 213. Return dated August 19th, 1820.

We, the subscribers, five of the surveyors of the highways of the county of Salem, being appointed on the application of Aaron Antrim, Joshua Barnes, and others, about ten of the freeholders and residents of the said county, by the Inferior Court of Common Pleas of the said county, in the term of June last past, to lay out a

public road of three rods wide, in the township of Pilesgrove, in the said county, as by the order and appointment of the said Court, and the minutes of said Court, a certified copy is hereto annexed, may more fully appear, as hereby certified and returned; that having met agreeable to the order of said Court, on the fifteenth day of August, at the house of Caleb Costill, in Pilesgrove, in said county, and after viewing and reviewing the road and said premises, adjourned to meet again on the 19th of this instant, at the house of Elijah Dilks, at 2 o'clock P. M., and having met agreeable to adjournment, and after hearing what could be said for and against said road, do think and adjudge the said road as applied for and as mentioned in the annexed copy of the said order of the said Court, to be necessary and to public benefit; we do therefore lay out a public road of three rods wide, in the township of Pilesgrove, and running through lands of sundries, to wit: Jonathan Dickinson, John Hoskins, Samuel White, Aaron Antrim, William Pancoast, Samuel Ogden, Thomas Bond, Josiah Shull, David Davis and others; beginning at a stake standing in the public road near the house of Jonathan Dickinson; from thence the following courses, to wit: first north sixty-one degrees west sixty chains fifty links to a stake in Samuel White's lane; thence north sixty-eight degrees west, one hundred and forty-eight chains to a stake in Josiah Shull's field; thence north forty-seven degrees thirty minutes west forty-five chains fifty links to Woodstown street and corner to lands of James Hewes and Hope Lippincott, and also from said stake in Josiah Shull's field north eighty-seven degrees fifteen minutes west forty-one chains forty-five links, first through Shull and then following the line between Michael Hackett, Joseph L. Risley and Israel R. Clawson, down the Bullet Lane to Woodstown street and to end there. Which said lines and courses are in the middle of said road now

by us laid out, that is to say, the road by us laid out at one rod and half a rod wide on each side of the line of courses hereinbefore expressed; which said road so by us laid out we have caused to be marked by stakes being set at proper distances in the middle thereof, and on the southerly side thereof, and we do hereby affix, on the nineteenth day of August next ensuing, as the time when the overseers of the highways of said township shall have the same open for fit public use; and we do also vacate, make null and void all the old road between Jonathan Dickinson as aforesaid and the end of the lane by late Davenport's Mill, by the line of Samuel Ogden's land or all such parts thereof, as the new road doth not lie upon when the new road is passable, dated at the house of Elijah Dilks, the 19th day of August, A. D. 1820. N. B. Erasure and interlining of the following words, viz: adjourned to meet again on the 19th of this instant, at the house of Elijah Dilks, at two o'clock P. M., and having met agreeable to adjournment, after hearing what could be before signed.


Woodstown Street.
Hope Lippincott.
J. L. Risley's.
N. 87¼ W. 41.45.
N. 47⅔ W. 45.50 links.
Thomas Bond.
N. 68 W. 148 chs.
Sam'l White.
N. 60 W. 60.50 links.
Jonathan Dickinson.
Beginning Stake

JAMES VERNON,	[L. S.]	Pilesgrove.
PAUL SCULL,	[L. S.]	
JOHN FREAS,	[L. S.]	U. A. Creek.
JOHN BLACKWOOD,	[L. S.]	
ABRAHAM SWING,	[L. S.]	Pittsgrove.

Received August 28th, 1820, and recorded September 19th, 1820.

NEWELL, Cl'k.

And thereupon the said defendant, by his counsel, objected to the admission of the said evidence so offered by said plaintiff, and contended that the said Book of Minutes, and said certified copy thereof, had no probative force, and that the said record of the Return of Surveyors, and the said certified copy of the same, were defective, and that the said defects were manifest and appeared upon the face of the said recorded Return, and said certified copy thereof, and that the said evidence so offered was not good or admissible in law upon the issues aforesaid, and the counsel of said plaintiff aforesaid did contend that the same was admissible and lawful, and the said Judge having heard said arguments of counsel, did then and there deliver his opinion thereon—that the said evidence so offered by said plaintiff was legal, competent and admissible in law to maintain said issues,—as follows:

In regard to the argument had yesterday, relative to the admissibility of the return of the road, I have looked at the cases cited and considered the arguments, and my conclusion is, that the return should be admitted.

The rule undoubtedly is, that the proceedings of a special statutory tribunal must show upon their face all jurisdictional facts.

The return of a road under our practice, when that return has been lodged in the Clerk's office of the Court of Common Pleas, I do not regard as the record of a special statutory tribunal, or as of a character to be

attacked upon a collateral proceeding. The Court of Common Pleas is admittedly a court of general jurisdiction over a class of subjects, and its judgments can no more be attacked collaterally than a decree of chancery or a judgment in the Supreme Court. It has jurisdiction over the subject-matter of the laying out of roads. The point raised here is that the surveyors who were appointed, in carrying out that object gave no notice of their time or place of meeting.

I regard the work of those surveyors in the same light as that of a Master in Chancery, to whom a matter has been referred by a Chancellor, or by the Orphans' Court, to make a report, and I think that the functions of the Common Pleas upon that return is similar to the operation of a Court which sends out these commissions and affirms the report of a Master under those circumstances. Nor do I think that taking this view of the case that the failure to give this notice was a jurisdictional fact; the jurisdiction attached when the application was made to the Court and the original advertisement was made and the finality of the proceeding was the return, the filing of the report of the surveyors. The intermediate steps were those steps which the law presumes to be rightly taken. For instance, a bill is filed in the Court of Chancery, that Court having cognizance of the subject matter, and it is sent to a Master. The Master fixes a time without notice to the defendant, and the plaintiff takes the testimony. Upon that *ex parte* testimony with no notice to the defendant, the Master makes his report and when his report comes in it is affirmed by the Court of Chancery. It cannot be pretended that the decree of the Court of Chancery on that report can be attacked collaterally because one of the parties did not have notice to appear before the Master. So in the Orphans' Court a matter is referred to a Master, the Master takes testimony without notice to one of the parties that testimony

is to be taken, there is a report and a decree made upon it and that decree would be entirely conclusive, in my judgment.

And thereupon the said plaintiff gave the said Book of Minutes, and said certified copy thereof, and said record of said Return of Surveyors, and said certified copy thereof, in evidence to the said jury; and thereupon the counsel of said defendant made their exception to the said opinion of the said judge, and the admission of the said evidence, and prayed that a bill of exceptions might be allowed and sealed, and it is sealed accordingly.

ALFRED REED, J. [L. S.]

And be it further remembered, that on the trial aforesaid, before the judge and jury aforesaid, upon the said pleadings, after the evidence upon the part of the said plaintiff and of said defendant had been closed, and the argument of the respective counsel of said parties had been heard thereon, the counsel of the said defendant requested the said judge to charge the said jury:

1st. That if the jury believe that the road returned by surveyors August 19th, 1820, (recorded in Book C of Roads, p. 213,) was not opened, used or worked over the *locus in quo* for twenty years or more next before the 24th day of March, 1859, then that road is, by the acts of March 24th, 1859, and of the Revision of 1877, p. 1010, S. 78, to the extent of the *locus in quo*, vacated, and plaintiffs cannot recover under any right to the said road as returned by the surveyors.

2d. That if the jury believe that the road of 1820 above named was not opened, used or worked over the *locus in quo* for twenty years or more next after the same was laid out by the surveyors, then that road is, by the act of March 24th, 1859, to the extent of the *locus in quo* vacated, and plaintiffs cannot recover under the right to said road as returned by the surveyors.

3d. That if the jury believe that when the road returned in August 19th, 1820, above referred to, was laid out by the surveyors, Woodstown was a village of the State of New Jersey, and that Bullet Lane was a street of that village, and that said road or any part of it was laid out over said Bullet Lane, and that such laying out operated to widen or alter said street, (Bullet Lane) and in this way to include the *locus in quo*, then that said return was inoperative to lay out or open a public road along or over the said street (Bullet Lane) and over the *locus in quo*, and that plaintiffs cannot recover by virtue of such a return.

4th. That if the jury believe that the north side line of the road returned on August 19th, 1820, as laid out by the surveyors, ran through the shed attached to and part of the Clawson dwelling-house, or any portion of said dwelling-house, then that said road was not lawfully laid out across the *locus in quo*, and the plaintiff cannot recover by virtue of said return.

And thereupon the said Judge did charge the said jury as follows:

Gentlemen of the jury:

I congratulate you that we have arrived at this stage of the case. The trial of land cases, as has already been observed, particularly where it involves lines which depend upon old surveys and the recollection of witnesses, necessarily consumes considerable time and that time must be spent. We all have a duty to perform. You as jurors are called upon to adjudicate upon substantial rights, the right of the plaintiffs to this street, and the right of the defendant to private property, if it belongs to him. That is the duty which you are to perform for these gentlemen, and they at some time may be called upon under our laws to perform for you a similar duty,

and it is to be hoped that when they are called upon they will devote that assiduous attention to your case which you have obviously given to this case.

The question in this case is a single one, whether a public street runs over the place where Mr. Humphreys erected a cellarway and a railing. Around that question clusters all the evidence which has been admitted in this cause. If the evidence in the cause convinces you of the existence of such a public street, then the plaintiffs, in asserting the right of the public to the undisturbed passage across a street in their borough, have a right to a verdict at your hands. The burden is upon them to show the existence of such a street. If the case should be evenly balanced in your minds so that you will say, "I cannot say one way or the other," the defendant is entitled to the benefit of that dubiety in your mind. If there is a balance of probability from the evidence, and the inference to be drawn from it is in favor of the view that there is a street there, the plaintiffs are entitled to the benefit of that preponderance of the evidence and to a verdict.

The existence of that street is placed by the plaintiffs upon two grounds: First. That over the place in dispute a public street was opened and used anterior to 1865, when Mr. Humphreys placed this erection there, for a period of at least twenty years. And secondly. If it was not so open and used, a survey of the road laid out in 1820 placed the monuments of that road so that the present structure fell within its boundaries.

First, then, how does the case stand upon the first point, that a road runs over the place by reason of a twenty years user anterior to 1865? The evidence in the case is that for a long period of time along the north line of this street (Indicating on map) where this erection is placed, there was an old fence known as the Clawson fence, and so far as there is testimony in the case, that

old fence remained in substantially the same position so long as the memories of the witnesses run. Now, if this structure, as presently located, is outside of the limits of that old fence, it was continuously within the street as used; whilst it may not have run over the exact spot it was within the limits of the highway, and if it was there twenty years, as it must have been by the testimony, and a highway arises by user, then you need go no further in this case; that ends it, and the plaintiffs are entitled to a verdict.

If you find that it was not included in the road, that is, that the fence was outside of the present location of the railing, then you can go another step and make another inquiry.

The bulk of the testimony has been directed to the one point, as to the part of the road there (indicating on map) for the purpose of ascertaining in what position the Clawson fence was placed before the Humphrey title or down near to the construction of the store; and as there is evidence on both sides in regard to the location and character of the surroundings I need scarcely call your attention to the fact that you need to look at such testimony with great circumspection, remembering the fallibility of human recollection in regard to the past in going back a period of twenty years.

To illustrate, a man goes to the place where he was born after an absence of twenty or thirty years and finds the stream which he remembers as a brook is nothing but a little dried up spring stream; or the school house of his boyhood days, which he remembers as a capacious structure, he finds upon a visit is only a small building fourteen by twenty feet.

This applies to the evidence on both sides, because there is evidence on both sides in regard to the recollection of the space between the objects testified to in this cause. In making a comparison of the local-

ity of that old fence certain monuments exist. In this case the fence itself is gone and it has been gone for nearly, if not quite, twenty years. There is no present vestige of that fence; therefore, in making the estimate of the distance of the place where that fence stood comparisons have to be made with something that now exists as a monument, and there are four or five different objects in this case with which the location of the old fence is compared. For instance, the first and prominent one is the old Risley store that was torn down soon after Mr. Humphreys built his store, but the cellar wall, the foundation of that old store, has been disclosed by the excavation; that, therefore is an established monument.

Then again, there is an old well in the barn yard which is there to-day as it was when it was used during the year when the fence in the rear of the property stood there. Again, there is the old Lippincott fence, which is a boundary, if the evidence is true that the fence along here (indicating on map) stood in the present fence line. Then there is evidence as to certain trees and as to the Humphreys building, which is standing there now and which immediately replaced the old fence, according to the testimony of some witnesses, and which was placed back from the old fence according to the testimony of others. Now, the old wall is 34.6 feet from the present locality of Mr. Humphreys' store. If the evidence shows that the fence stood back 34.6 feet then the old fence stood back where the railing is erected, and the railing was in the street. If the old fence stood out four feet further, then the railing was outside of that fence.

A great many witnesses have been sworn, and testify that there was a narrow road between that store when it was used and the Clawson fence. They testify that road was eighteen feet, twenty feet and twenty-two feet. Other witnesses testify that when a wagon stood there another

wagon could pass; another witness says another horse and wagon could drive past, and other witnesses say a horse could not drive by at all, and others that two teams could pass, and so the evidence goes. There was undoubtedly a narrow passageway there, but the question remains, was the passageway adjacent to the old Clawson fence? Did the wagon passing at the right hand along this passageway (indicating on map) pass close up the Clawson fence? That is a material inquiry. Witnesses have sworn that between the wagon road and the fence was an old wood pile; one witness says, that wood pile was near Mr. Humphreys' building or store at the tearing down of the fence. Another witness says, there was a willow tree and a path between it. Another witness says, that he does not remember the willow tree. All these facts are to be taken into consideration in measuring from the old wall, according to the testimony, until you reach the point where you believe the old Clawson fence to have stood as to this narrow roadway. Take the probability of the wood pile being there, and the probability of the willow tree being there, and you are to say whether you believe in taking this testimony, with the other testimony in the case, that the Clawson fence stood back 34.6 feet from the old store—that is the measurement from one line.

I said that the store of Mr. Humphreys was a monument. I meant by that, that comparisons were made by witnesses between the present location of the Humphreys store and the former location of the old fence, and upon this point you will remember the testimony for the plaintiffs, of Mr. Keen, Mr. Dickinson and Mr. Riley. These witnesses say that this building was placed substantially on the line of the old fence, this being to the south of it (indicating on map) and that end to the north (indicating on map.). They could not swear that it run diagonally across the fence. On the other hand a

number of witnesses, Mr. Wallace, Mr. Humphreys and Mr. Mulvahill, say that this store was actually built back from the fence several feet; Mr. Humphreys saying that he was satisfied the old fence stood two feet outside of the present curb, which I think is six feet outside of the lot. Other witnesses say that when the new fence was built from the corner of the building it run back and there was a diagonal panel connecting it with the old fence. In regard to that diagonal panel the counsel for the defendants hold that inasmuch as the corner was north of the fence line it could not be a line carried out there (indicating on map); whether there may have been an old fence originally in the place they claim, is a matter for you. You are to take, therefore, the testimony of these witnesses in regard to the location of the old fence and the location of Mr. Humphreys' store building, and say whether you think these gentlemen are mistaken, or who are mistaken? Whether the conversations that have been detailed as taking place about the posts at that time are the pure coinage of their imagination or whether you think the parties are mistaken, and, if so, who are mistaken? I spoke of the old Lippincott fence as a monument; that is, a monument by reason of the testimony, which places that old Lippincott fence in about the same position it has always occupied within the memory of the witnesses, together with the testimony, which seems to indicate, as the witnesses recall it, as a matter of recollection, that the north line was a uniform continuous line. Of course, if the witnesses are mistaken in regard to that, the evidence amounts to nothing. If that is true, the Lippincott line was standing the same as it always had been and was a continuous line on the north side and if you get the present line of the Lippincott fence you get the line of the old fence.

The plaintiffs say the line of the Lippincott fence runs

down and crosses the line where they claim the old fence to have been, and place it within eight inches of Mr. Humphreys' store. That all depends upon the question whether the Lippincott fence is in the old location and upon the question whether the north line was a continuous straight line.

Again, we have the well which is there now. That well is placed on the map on the north of the line where they claim the old fence existed four and a half feet. If the well was the same distance to the north of the old fence, it would show the old fence must have been about where the plaintiffs claim it to have been, that is, running along close to Mr. Humphreys' house. You have heard the testimony of the witnesses in regard to the location of this old well, and keeping in mind the fallibility of human recollection, you are to say whether those who place it two, three or four feet are correct, or whether those gentlemen who think it is more than that are correct, (some saying it is as high as eight feet.) You are to say whether that line which runs within four feet of the well is, as the plaintiffs claim, the line where the old fence is shown to have existed.

It has been testified that there were some apple trees in front of McAllister's. It is in evidence that the fence had been set back six or eight feet from the present row of trees, and it is also in evidence that the row of trees were placed along the old fence and therefore the present row of trees would show where the old fence was. A number of witnesses testify that instead of the trees being along the line of the old fence they were six feet out in the road, and therefore the trees do not show where the line of the old fence was, but are six feet outside.

You have heard Mr. Wallace's testimony as to the apple trees. Those are all of the monuments upon which you must rely as the basis of comparison between those monuments which exist and the locality which you must

establish. If from all this testimony there is in your mind a belief that it is more probable that this old fence stood where the plaintiff's place it, along where Mr. Humphreys' present store is, there must be a verdict for the plaintiffs without going further in the cause. Then the structure would be within the limits of the road which had been used twenty years at least anterior to 1865, because, as I have already said, the Clawson fence was within the time of the period of the recollection of the witnesses in the same position substantially. If the evidence fails to show you that, then there cannot be a verdict for the plaintiff upon that ground, and the plaintiffs must recover upon another ground, if at all.

If we go beyond this point the second question arises in the case, did the old return of 1820 include within its limits the place in dispute? This road was laid out, "Beginning, &c." (Reading from return.) This was the centre of the road. The centre of the road was the line between Clawson and Hackett and Risley's. If you find that line existed you have the middle of that road.

To establish that line Mr. Morrison, the surveyor, naturally resorted to the calls in the deeds of those parties bordering upon this line. The deed made in 1792 to Mr. Tuft has the line.

The line run down to it that established this line. I need not call the distances because there is no substantial dispute in regard to them. He established this line marked as "The old Hackett Line" and this is claimed as the north line of the old line known as the Bullet lane.

If that was the Clawson and the Hackett line, called for as the centre of this street, it undoubtedly was then carried right over the *locus in quo*, more than ten feet into the present house.

When the surveyor went to this side he found a conveyance made in 1807 to Mr. Risley, three days after the

conveyance to Mr. Clawson; he found the conveyances made to Turner and Morris, and he measures down the three distances and finds that it goes either to the old wall or else out to the place here marked with a cross, according as he gives to Groff, ninety-seven links or eighty-six links. You will recall there was a discrepancy between ninety-seven and eighty-six links, when the fact is, the lot being a parallelogram the sides must be equal.

The front line is eighty-six links in the deed. This is ninety-six links here (indicating), and if he measured eighty-six links then it run to the old wall. In running the James Risley seven acre lot he measures the distance from the Reed line, which is admittedly a well established line with trees growing up along it.

The significant fact is that this call is for a corner in the line of Clawson and in the corner of Risley. Inasmuch as the deeds on this side run down to here (indicating) and the deeds on this side call for the Clawson line running to here (indicating) the question would arise how this discrepancy exists. The notion is that there were lines running to the north of Bullet Lane; that the title was understood to run to the middle of the old alley which existed at that time. The plaintiffs think that is proven by the fact that in 1862 deeds were made and executed to Clawson in which the lines were lengthened about eight or ten feet.

The tavern tract lines were also lengthened until they reached the new Clawson and Hackett lines and they think that the new Clawson and Hackett line is not absolutely the centre of Bullet Lane but the lines which were understood by those who made the deeds to reach that point. As I have already said, if the centre is the new Clawson and Hackett line the road covers the *locus in quo*. If it is this red line which they claim to be the lines of that road (indicating) it would reach within

eight inches of the house and would include also the *locus in quo*, and therefore taking any of these surveys it covers the *locus in quo*.

Then again, for ascertaining the one out of these three lines which is the most probable one (indicating) we find that the line of the road as attained by the surveyor runs within a few inches of the line at the end of the chain measuring from the Reed line down. He tells you he fixes the point here (indicating) and placed his compass there (indicating) allowed for the number of years and run within twenty-five minutes of the red line. You can say whether any of these three lines are accurate; if any of those three lines are accurate you measure off a rod and a half on each side and it runs the line of the road over the *locus in quo*. If you think that cannot be ascertained that ends the case. The question is not whether they found the exact line; the question is whether any line you think is accurate covers the *locus in quo*. If from the evidence you think that none of these lines are accurate and it is impossible to define the middle of that old road, that ends the case on this branch, because they must satisfy you they have established one of the three lines, which is the Hackett line.

If you have found there was no error and if you have found one of these lines as the middle line of the old road and so covers the *locus in quo*, then I am asked to charge certain propositions of law.

In the first place, that if this road has not been opened, worked or used to its entire width in any place that that road as to the unopened place is vacant.

Now, gentlemen, on thinking over this matter, I am unable to charge you that that is the law. I think that the act was passed to vacate roads where nothing had been done at all, where roads had been laid out on paper for twenty years and there had been no physical mark of their use; where no wheels passed over them

the law steps in and says that a man's land shall not be burdened thereby. But I think where a road has been used after it has been laid out through its length, that the public have a right then to take the land which may be within the boundaries of that road and use it whenever they please. They need not accept the entire road. They can say this is sufficient for our use now. Therefore I refuse to charge you that this road which has up to this time been used through its entire length by the public for this long period of time has been as to any part vacated and I charge that the public have a right under those circumstances to extend its width out to the width to which it was originally laid out.

I am also asked to charge that if you find that the old Bullet Lane was a public street of the village of Woodstown at the time this road was laid out, that the surveyors of the highways had no jurisdiction to lay the road over it and that it has no efficacy now.

I refuse to charge in this language. If this is a fact at all, which can in any event be questioned collaterally, and I admit that Chancellor Williamson took that view, I think that under the testimony in this case, after the lapse of sixty-five years, the presumption is in favor of the view that the Court passed upon that question, and that the officers having laid out this road and returned it, it is at this time conclusive that it was not laid out over a public street. And then again, if this was not so the evidence in this case is not sufficient to show that it was a public street. There was a lane there; to where that lane led is entirely undefined; there was not a house built on the side of it, but it run between two houses fronting on the main street. I think, under the evidence itself, leaving out the question raised, I would have to charge you that this position is not tenable.

I am again requested to charge that if you find that this road is located so as to include within it a part of

the house or shed of Clawson, that then the road is a nullity.

I shall not express my views in regard to attacking the return upon this ground, after this length of time, but I shall ask you to return such a verdict as will prevent, if possible, future litigation. I shall ask you to return whether you find this road includes part of the dwelling house. Upon that question, if you find that this red line, or this Lippincott line, which the plaintiffs claim to be the middle of the road, then the road never reached the old dwelling house and if the new Clawson line is such I think it could not have reached the old dwelling house. If the old Clawson line, then the road runs ten or fifteen feet back of the defendant's front, and if you believe the Clawson house stood within that distance of the present location of the store it would touch the dwelling house.

I do not know that I have anything further to say except to recapitulate what I have already said, and ask you to pass upon two questions as important questions in this case, to prevent further litigation. If you find generally for the plaintiffs it would be impossible to ascertain on what grounds you base it, and the legal objections arise in regard to the second branch of the case.

I want you to determine, first, and return as a matter of fact this question, whether the place in dispute was within the limits of a public street for a period of at least twenty years anterior to the erection of the railing and cellarway of the defendant in 1865, and if you find yes, that ends the case; you need not go any further. If you find no, and if you find that the place in dispute was within the limits of the public road laid out by the surveyor in 1820, did the limits of that road include any part of the Clawson dwelling-house? You will answer the first question, and if you answer that yes, of course, as I have said, the verdict will be for the

plaintiffs. If you answer that no, then I want you to answer the second question—I might say further, that if you answer the first question no, and if you find there is no evidence that this road included the *locus in quo*, that would also end it and your general verdict would be for the defendant. If you find no to the first question and yes to the second, and find that this road as laid out runs over the *locus in quo*, then I want you to answer the question whether it runs through the house.

It is upon the defendant on that branch of the case to show that the old dwelling house, or part of it, was within the public road.

I am requested to charge you upon two questions, one of which is: Was the road used where the *locus in quo* is, on March 24th, 1839, and if so, within what period since that time? This question is submitted for the same reason as the other questions, and it is upon the legal question raised that this road was open, worked and used for twenty years previous to 1859. The contention of the defendant is, that if this place was not actually used for twenty years from 1839 to 1859 it was vacated by that fact. I charge you as a matter of law that that would not vacate it. You are to assume that is the law, but the counsel wants you to find out as a fact whether it was open, worked and used from 1839 to 1859. That will depend upon your finding of the other questions, because if you find this place was from 1845 to 1865 in a public street, the evidence being that this fence was in the same location, it must have been so used from 1839 on. If, on the other hand, you find from 1845 to 1865 that this road was not within the public street, inasmuch as the fence was in the same position it never could have been used before that time. I think you will have no difficulty in finding one question and hanging the other upon it.

And thereupon, the said defendant, by his counsel, did make exceptions to the refusal of the said Judge to charge the said jury according to the said several requests of the said counsel of said defendant, and prayed that a bill of exceptions might be allowed and sealed, and it is sealed accordingly.

ALFRED REED, J. [L. S.]

It is stipulated that the present return is signed with the understanding that an additional return of any portion of the proceedings in the cause omitted in the present return shall be made hereafter, if in the opinion of the trial Justice, upon suggestion of counsel, or upon assignment of errors, such omitted portion shall be material in the cause upon the argument upon the writ of error.

December 17th, 1885.

E. S. FOGG,
Att'y for Plaintiff in Error.

COURT OF ERRORS AND APPEALS, &c., IN STATE OF NEW JERSEY.

EDWARD B. HUMPHREYS, Pltff. in Error, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF WOODSTOWN.	IN EJECTMENT. ASSIGNMENT OF ERRORS.

Afterwards, that is to say, on the fourteenth day of January, eighteen hundred and eighty-five, comes the plaintiff in error, by E. S. Fogg, his attorney, and says that in the record and proceedings aforesaid, and in the giving of judgment aforesaid, there is manifest error in this:

1st. That the said Judge (before whom, and the said jury the said cause was tried,) at and upon the trial of the said issues so as aforesaid joined between the said parties, admitted and received illegal and incompetent evidence.

2d. That the said Judge erroneously declined to charge the said jury that if the said jury believe the road of 1820 (Book C of Roads, page 213,) was not opened, used or worked over the *locus in quo* for twenty years or more next before the 24th day of March, 1859, then that road is, by the acts of March 24, 1859, and of the Revision of Laws of 1877, p. 1010, § 78, to the extent of the *locus in quo*, vacated, and the plaintiffs cannot recover under the right to said road as returned by the surveyors when so requested by the defendant below.

3d. That the said Judge erroneously declined to charge said jury, when so requested by the plaintiff in error, that if the jury believe that the road of 1820 (Book C of Roads, p. 213,) was not opened, used or worked over the *locus in quo*, for twenty years or more next after the same was laid out by the surveyors, then that road is, by act of March 24, 1859, to the extent of the *locus in quo* vacated, and the plaintiffs, defendants in error, cannot recover under the right to said road as returned by the surveyors.

4th. That the said Judge erroneously declined to charge said jury, when so requested by the plaintiff in error, that if the jury believe that when the road returned on August 19th, 1820, was laid out by surveyors, Woodstown was a village of the State of New Jersey, and that Bullet Lane was a street of that village, and that said road, or any part of it, was laid out over said Bullet Lane, and that such laying out operated to widen or alter said street (Bullet Lane) and thus include the *locus in quo*, then that said return was inoperative to lay out or open a public road along or over the said street, Bullet Lane, and over the *locus in quo*, and that plaintiffs (defendants in error) cannot recover under such return.

5th. That the said Judge erroneously declined to charge said jury, when so requested by the plaintiff in error, that if the jury believe that the north side line of the road returned on August 19th, 1820, as laid out by the surveyors, ran through the shed attached to and part of the Clawson dwelling house, or any portion of said dwelling house, then that said road was not lawfully laid out across the *locus in quo*, and the plaintiffs (defendants in error) cannot recover under said return.

6th. That the said Judge, after the said jury had returned their verdict on the said trial, and after the

said jury had been discharged, did alter, amend and change the said verdict in matter of substance, and did cause the said verdict, so altered, amended and changed, to be entered on the record.

7th. That said judgment by the record appears to have been given for the defendant in error, and against the plaintiff in error, whereas, by the law of the land, said judgment should have been given for the plaintiff in error against the defendant in error.

And the said Edward B. Humphreys, plaintiff in error, prays that the judgment aforesaid, for the errors aforesaid, may be reversed, and that the plaintiff in error may be restored to all things which he hath lost by occasion of said judgment.

E. S. FOGG,
Atty. of Pltff. in Error.

Commonwealth in Error: