

NEW JERSEY COURT OF ERRORS AND APPEALS.

|                                                                                            |   |           |
|--------------------------------------------------------------------------------------------|---|-----------|
| JOHN N. SCHMIDT and<br>CATHARINE F. SCHMIDT,<br>Plaintiffs below,<br>(Defendants in error) | } | On Error. |
| vs.                                                                                        |   | In Tort.  |
| GODFREY F. SPAETH,<br>Defendant below,<br>(Plaintiff in error)                             | } | 10        |

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STATE OF THE CASE.

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Appearances:—

|                          |    |
|--------------------------|----|
| BLEAKLY & STOCKWELL,     | 20 |
| For Plaintiff in Error.  |    |
| STACKHOUSE & KRAMER,     |    |
| For Defendants in Error. |    |

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|----------------------------------|----|
| 1. Notice and Grounds of Appeal. |    |
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CAMDEN COUNTY CIRCUIT COURT.

JOHN N. SCHMIDT, et al,  
Plaintiffs,  
Defendants in Error.

vs.

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GODFREY F. SPAETH,  
Defendant,  
Plaintiff in Error.

In Tort.  
Notice and Grounds  
of Appeal.

To Stackhouse and Kramer Esquires.  
Attorneys for Plaintiff:

Take notice that the defendant appeals to the Court  
of Errors and Appeals of the State of New Jersey from  
20 the whole of the judgment entered in this cause, on the  
following grounds:

1. Because the Court charged the jury as follows: "It  
is further claimed that the city ratified, through its  
municipal body, the acts of the Street Committee in deal-  
ing with this street as a highway, and that there was,  
from all of those acts, at least, sufficient to require a jury  
to find that there has been an acceptance on the part of  
the city. The case is not so clearly an acceptance that the  
30 Court feels it can deal with it as a matter of law, but it  
leaves the question for you to determine."

2. Because the Court refused to make the following  
charge upon request of the defendant:



“That French’s Court as shown on the illustration map and including the locus or land in dispute in this case was a public highway ever since the deed made by Archer to Schmidt in 1902. That since that time it has been accepted by the City impliedly if not expressly by virtue of the actions of the Street Committee, City Council, the Street Commissioner and City Engineer as narrated by the defendant’s witnesses.”

3. Because deed, George F. Archer, et ux., to John N. 10 Schmidt, et ux., dated June 6, 1910, recorded in Book 349 of Deeds, pages 55, was admitted in evidence (Exhibit P 3, page 5), over objections made.

4. Because the Court refused to charge that “1. That the conveyance by George Archer and others, heirs of B. F. Archer, gave the plaintiff no right to close up French’s Court or fence it in as private property.”

5. Because the Court refused to direct a verdict for the 20 defendant.

6. Because the verdict rendered in this cause was contrary to the evidence therein taken, and particularly as to the amount of damages.

BLEAKLY & STOCKWELL,  
Attorneys for Defendant.



(Endorsement)

CAMDEN COUNTY CIRCUIT COURT.

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JOHN N. SCHMIDT, et al.,  
Plaintiffs,

vs.

10

GODFREY F. SPAETH,  
Defendant.

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In Tort.

Notice and Grounds of Appeal.

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BLEAKLY & STOCKWELL,  
Attorneys for Defendant,  
317 Market Street,  
Camden, N. J.

Service of the within notice and  
grounds of appeal is hereby acknowl-  
edged this 18th day of July, 1913.

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STACKHOUSE & KRAMER,  
Attorneys for Plaintiff.

FILED.

July 19, 1913.

F. F. PATTERSON, JR.,  
County Clerk.



## RETURN.

STATE OF NEW JERSEY,  
COUNTY OF CAMDEN :

I, Francis F. Patterson, Jr., Clerk of the County of Camden, do hereby certify that the foregoing is a true copy of the notice and grounds of appeal in the case of filed, July 19, 1913, in the Clerk's office, of the County of Camden. 10

(seal) IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at Camden, this twenty-fifth day of July A. D. 1913.

F. F. PATTERSON, JR.,  
Clerk.

## CAMDEN COUNTY CIRCUIT COURT.

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As yet of the twentieth day of March A. D., Nineteen hundred and eleven.

Witness, Frank T. Lloyd, Judge.  
Stackhouse & Kramer, Attorneys.  
F. F. Patterson, Jr., Clerk.

Judgment entered on the fifteenth day of May, A. D. Nineteen hundred and thirteen.

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|                   |          |
|-------------------|----------|
| Damages . . . . . | \$125.00 |
| Costs . . . . .   | 70.32    |
|                   | <hr/>    |
|                   | \$195.32 |



## DECLARATION.

CAMDEN COUNTY, ss:—

Godfrey S. Spaeth, the defendant in this suit, was summoned to answer unto John Schmidt and Catharine F. Schmidt, the plaintiffs therein, in an action in tort, and thereupon the said plaintiffs by Stackhouse & Kramer, their attorneys, complain for that the said defendant, on  
 10 the tenth day of June, nineteen hundred and ten, and on divers other days and times between that day and the commencement of this suit, with force and arms, broke and entered a certain close of the plaintiffs situate in the City and County of Camden and State of New Jersey and more fully described as follows:

Beginning at a point in a line running westwardly from Broadway, said line being at the distance of one hundred and sixty feet northwardly from the northerly line of  
 20 Sycamore street and parallel therewith said point in said line being distant one hundred and eighty feet westwardly from the westerly line of Broadway, said line being also the northerly line of property of these grantees conveyed to them by deed from Benjamin Archer, trustee, and wife, dated the sixteenth day of January, 1902, recorded in the Register of Deeds office, of Camden County, in book 260 of deeds, at page 245 and extending thence westwardly along the extension of said line a distance of twenty  
 30 feet to the line of the Kaighn School lots, thence southwardly and along the same the distance of forty feet to a point; thence eastwardly and parallel with Sycamore street the distance of twenty feet to a point in the westerly line of these grantees other lands, granted to them as aforesaid; thence along said line northwardly and par-



allel with Broadway the distance of forty feet to the place of beginning.

AND then and there forced and broke open and broke to pieces, damaged and spoiled divers gates and fences of the plaintiffs of great value, to wit, of the value of Ten thousand dollars, then standing and being in and upon the said close; and certain posts, locks, staples and hinges of the said plaintiffs of great value, to wit, of the value of Ten thousand dollars, respectively affixed to the said gates 10 and fences and with which the same were then and there respectively locked and fastened; and with feet in walking thrust down, trampled upon, consumed and spoiled the grass and earth of the said plaintiffs of great value, to wit, the value of Ten thousand dollars, then and there growing and being, and with certain beasts of burden and with the wheels of divers carts, wagons and other carriages crushed, damaged and spoiled other grass and earth of the said plaintiffs, of great value to wit, of the value of ten thousand dollars then and there growing and being, 20 and with the feet of the said beasts of burden and the wheels of the said carts, wagons and other carriages tore up, subverted, damaged and spoiled the earth and soil of the said close to wit, from the day and year last aforesaid hitherto and thereby and therewith during all the time aforesaid, greatly encumbered the said close respectively and hindered and prevented the plaintiffs from having the use, benefit and enjoyment thereof, in so large and ample a manner as they might and otherwise would have done, and many other wrongs then and there did, to the 30 damage of the plaintiffs, Ten thousand dollars, and thereupon they bring their suit, &c.



## PLEAS.

And the said defendant, Godfrey F. Spaeth, by Bleakly & Stockwell, his attorneys, comes and defends the force and injury, when, etc., and says that he is not guilty of the said supposed trespasses above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said John Schmidt and Catharine F Schmidt, 10 hath above complained against him.

And of this the said Godfrey F. Spaeth puts himself upon the country, etc.

And for a further plea in this behalf the said defendant, by leave of the court here for this purpose first had and obtained, says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him, because he says that the premises described in the plaintiff's 20 declaration are now and for more than twenty years last past have been a part of the public highway of the City of Camden, known as French's Court, and this the defendant is ready to verify, wherefore he prays judgment if the said plaintiffs, ought to have or maintain their aforesaid action thereof against him.



## REPLICATION.

And the said plaintiffs, as to the plea of the said defendant, whereof he has put himself upon the country, doth the like.

And the said plaintiffs, as to the plea of the said defendant, by him secondly above pleaded, says that they, the said plaintiffs, ought not to be barred from having or maintaining their aforesaid action thereof against the said defendant, because they say that the premises described in the declaration of these plaintiffs are not now, and have not been for more than twenty years last past, a part of the public highway of the City of Camden, known as French's Court and this, they, the said plaintiffs, pray may be inquired of by the country, &c. 10

Therefore the Sheriff is commanded that he cause to come before the Judge of our Circuit Court, at Camden, in the County of Camden, on the 15th day of May, 1913, 20 twelveve, etc., by whom, etc., who neither, etc., to recognize, etc., because as well, etc., the same day is given to the parties, etc., and the jurors of the jury whereof mention is made also come who to speak the truth of the matter within contained being chosen, tried, and sworn, upon their oaths, say that they find for the plaintiffs, damages at the sum of \$125.00 and the Court doth order judgment final in favor of the plaintiffs and against the defendant for the sum of \$125.00 besides costs of suit to be taxed.



## JUDGMENT.

Therefore it is considered that the said plaintiffs do recover against the said defendant their damages, by the jurors aforesaid, in form aforesaid assessed, and also the sum of \$70.32 for their costs and charges, by the said court, before the Judge thereof, now here adjudged, of increase to the said plaintiffs, and with their assent which said damages, costs and charges in the whole amount to  
 10 the sum of \$195.32.

And the said defendant in merch, etc.

Judgment entered and signed this fifteenth day of May, 1913.

FRANK T. LLOYD,  
 Circuit Judge.

STATE OF NEW JERSEY,  
 20 COUNTY OF CAMDEN:

I, Francis F. Patterson, Jr., Clerk of the County of Camden hereby certify, that the foregoing is a true copy of the Judgment in the case of  
 filed May 15, 1913, and recorded in the Clerk's office of the County of Camden, in Book J of Circuit Court Judgments page 469, & c.

30 (seal) IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at Camden, this twenty-fifth day of July, A. D., 1913.

. F. F. PATTERSON, JR.,  
 Clerk.



## CAMDEN COUNTY CIRCUIT COURT.

|                         |   |          |
|-------------------------|---|----------|
| JOHN N. SCHMIDT, et al, | } | In Tort. |
| vs.                     |   |          |
| GODFREY F. SPAETH,      |   |          |

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April Term, 1913.

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Apearances:

For the Plaintiff, STACKHOUSE & KRAMER, Esqs.

For the Defendant, BLEAKLY & STOCKWELL, Esqs.

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Before LLOYD, J. and a Jury.

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THE CASE FOR THE PLAINTIFF.

(Mr. Kramer opens the case for the plaintiff to the jury.)

MR. KRAMER. It is admitted, if the Court please, that this is a map of the locus in quo, so it will not be necessary to testify to it. This part marked in red here shows the 30 locus, and there is not any physical line where this figure 20 is; this alley runs all the way up.

(Mr. Bleakly opens the case for the defendant to the jury.)



MR. STACKHOUSE. We offer in evidence Deed Book 255, page 431.

MR. BLEAKLY. Did you offer this deed before?

MR. STACKHOUSE. We did not.

MR. BLEAKLY. What is it?

MR. STACKHOUSE. It is a Sheriff's deed to Benjamin F. Archer.

MR. BLEAKLY. All right; there is no objection to it.

THE COURT. Just give the date.

10 MR. STACKHOUSE. The deed is dated the 19th day of July, 1901, recorded July 19, 1901, in Book—

THE COURT. Well, you have given the book. Now, what does it purport to convey?

MR. STACKHOUSE. It conveys a piece of land fronting 160 feet on Broadway—

THE COURT. Just point out, Mr. Stackhouse, if you can—here is the pointer; just stand on this side and point out what it conveys, to the jury.

MR. STACKHOUSE. It conveys this piece of land including the Schmidt property, running along to this line and 200 feet to the Kaighn School lot.

THE COURT. Does it include the alley?

MR. STACKHOUSE. It includes the alley.

THE COURT. The whole alley?

MR. STACKHOUSE. The whole alley.

THE COURT. Then it includes that square, does it?

MR. STACKHOUSE. The locus in quo?

THE COURT. No, I say the deed includes this square. the whole square?

30 MR. STACKHOUSE. The whole square, yes, including the alley.

THE COURT. As made on the plan there, except, I suppose, that which belongs to Spaeth, or was that included, too?



MR. STACKHOUSE. No, it stops at this line. We also offer in evidence deed dated the 16th day of January, 1902, from Benjamin F. Archer, Trustee, to John N. Schmidt and Catharine F. Schmidt, recorded on the 22nd day of January, 1902, in Book 260, page 245, and conveys a piece of land commencing at this point, running forty feet along Broadway and running back 180 feet to the east line of the alleged alley. We also offer in evidence a deed from George F. Archer and wife and others to John N. Schmidt and Catherine F., his wife, bearing date the 6th 10 day of June, 1910, and recorded on the 16th day of June, 1910, in Book 349 of Deeds, at page 55, conveying the premises in question and in controversy in this suit.

THE COURT. In red?

MR. STACKHOUSE. In red.

MR. BLEAKLY. One minute: that was objected to and ruled out at the last trial.

MR. KRAMER. No, it was admitted.

MR. BLEAKLY. No, I think this was ruled out.

MR. STACKHOUSE. It was ruled out because we at-20 tempted to put it in in rebuttal and not as part of our main case, but from the opinion of the Court of Errors it was admitted afterward and it seemed to have been properly admitted.

MR. BLEAKLY. I do not see that it makes any difference.

THE COURT. Have either of you got the opinion of the Court of Errors here?

MR. BLEAKLY. I have it.

MR. STACKHOUSE. I have it here in the Atlantic 30 Reporter.

THE COURT. Well, let me have the Atlantic Reporter, I can read it better.

MR. BLEAKLY. Here is the objection I have to this



last deed; I want to make this clear to your Honor. Mr. Stackhouse is wrong about the admission by your Honor. The objection is this—

MR. STACKHOUSE. That is not the quit-claim deed there.

MR. BLEAKLY. Well, what is this deed?

MR. STACKHOUSE. That is from the heirs of Archer to Schmidt and wife.

MR. BLEAKLY. Oh, well, this is the quit-claim; that  
10 is the one I objected to.

MR. STACKHOUSE. Well, you had the other deed when you were talking.

MR. BLEAKLY. Yes. Now, they have offered the deed from Benjamin F. Archer, Trustee.

THE COURT. That is in evidence; that is January 16, 1902.

MR. BLEAKLY. Yes, to Schmidt and wife. Now, they come later on with this quit-claim deed dated June 6, 1910, from the heirs of Mr. Archer to Schmidt, and that is  
20 objectionable for the reason that the very deed from Mr. Archer under which they claim originally dedicated this as a highway. It says, "Beginning at the west side of Broadway at a distance of 120 feet north of the north side of Sycamore street and running thence northward, &c., 180 feet to the east side of a twenty foot wide street opening into Sycamore street."

THE COURT. I understand your objection is that it conveys the bed of the street?

MR. BLEAKLY. That is all; it does not convey a pos-  
30 sessory right as against the bed of the street.

THE COURT. Yes, it would be good for that purpose, wouldn't it?

MR. BLEAKLY. I suppose so.

THE COURT. I cannot refuse it if it is admissible for



any purpose. I do not rule upon its ultimate effect now; I can only rule upon its admissibility. It is admissible now as showing that the plaintiffs have title in the bed of the street on your theory that it is a street.

MR. BLEAKLY. Well, I object now generally.

THE COURT. Well, Mr. Bleakly, that won't do you any good. Under the case of Hill vs. Maxwell, you will have to get at it in another way. 10

MR. STACKHOUSE. Have these been admitted?

THE COURT. Yes, they are received.

MR. STACKHOUSE. I ask that the deed from Archer to Schmidt and wife be marked Exhibit P. 1.

THE COURT. Was it marked before, Mr. Stackhouse? 20

MR. STACKHOUSE. It wasn't marked before; I suppose we did not offer it before. And the quit-claim deed from George F. Archer and wife to be marked Exhibit P. 2.

THE COURT. Gentlemen, are substantial damages claimed in the case or is it to determine the right?

MR. KRAMER. We are simply seeking to recover the damages we have been put to and determine the right to this piece.

THE COURT. Well, the primary object is to determine 30 the right, I presume. Proceed.

MR. BLEAKLY. Deed, Sarah Kaighn—

THE COURT. Mr. Bleakly, before you offer any evidence let the plaintiff prove the trespass.



JOHN N. SCHMIDT, sworn.

THE COURT. Mr. Kramer, just go far enough with this witness to establish a trespass, unless it is admitted, Mr. Bleakly, that the acts complained of were done, is it?

MR. BLEAKLY. Yes, we will admit that on June 10, 1910, we knocked down a fence.

MR. STACKHOUSE. And we were in possession of the land?

10 MR. BLEAKLY. Oh, no, I don't admit you were in possession of the land. You put a fence up there and we will admit that we knocked it down.

THE COURT. Just ask him after getting this deed if they went into possession.

By MR. KRAMER.

Q. On June 10, 1910, were you in possession of the piece of land which is marked red on this map?

A. I was.

Q. What were you using it for?

20 A. I used it for my business.

Q. What did you place there?

A. Wagons, and in hot weather I put my horses out, if the stable was too hot, I put in the morning the horses out so that they would get fresh air and so on.

Q. Had you built any portion of your stable or anything appurtenant to your stable at that point?

A. A manure pit.

Q. How big was that manure pit?

A. That manure pit was about three feet wide and  
30 twelve feet long.

MR. KRAMER. I think Mr. Bleakly will agree that he and I measured that and the measurement was four feet wide and fifteen feet long.

MR. BLEAKLY. Oh, yes, he put the manure pit there.



Q. Had you put any fence across there?

MR. BLEAKLY. We admit he did.

MR. KRAMER. You admit that fences we put over there were torn down?

MR. BLEAKLY. Yes.

Q. And as result of these fences---

MR. KRAMER. We have a number of bills here that were paid, Mr. Bleakly, as a result of their being torn down.

MR. BLEAKLY. These are for the erection of fences,<sup>10</sup>  
aren't they?

MR. KRAMER. Sure; if they were torn down we put up new ones.

Q. Were you compelled to go to any expense to restore the work that had been torn down by this man Spaeth?

A. Yes.

Q. The witness is shown three bills and is asked whether those bills are the bills which represent part of the expense that he was put to?<sup>20</sup>

(Objected to).

THE COURT. No, it cannot be shown by bills, Mr. Kramer.

Q. What was the amount of money paid by you for the restoration of your fence Spaeth tore down?

MR. BLEAKLY. Well, that is not a damage, if the Court please; we object.

THE WITNESS. Thirty-six dollars.

MR. BLEAKLY. That don't show damage, that he built a fence there, the cost of the fence. The lumber<sup>30</sup> and material—he still had the lumber and material and everything else.

THE WITNESS. The lumber was all busted up.

THE COURT. That is a matter of cross-examination.



Q. Did you pay any bills?

A. Yes.

Q. To any person to restore your property?

A. Yes.

Q. To whom did you pay it?

A. Frank Harder, one bill \$15, one bill \$9.35 and one \$9.20.

Q. Have you receipts for those bills?

A. Yes, sir.

10 THE COURT. What do they amount to altogether, \$33.55?

THE WITNESS. \$33.55.

Q. Are they receipts that you are shown, Mr. Schmidt?

A. Yes, sir.

MR. KRAMER. We offer those now.

THE COURT. Mr. Kramer, I want you to show prima facie case only. If the case is to be tried out later on---

MR. KRAMER. I am trying to your Honor.

THE COURT. Well, this, I think, establishes your prima  
20 facie case.

MR. KRAMER. Well, we will simply offer these in evidence and have them marked.

#### CROSS-EXAMINATION.

BY MR. BLEAKLY.

Q. Mr. Schmidt, I read you a notice signed "L. Mohrman, Street Commissioner," dated September 24, 1909, "John N. Schmidt, Esq., Camden, New Jersey. Dear Sir:-

30 THE COURT. Mr. Bleakly, let's have the case in its order. This is not cross-examination.

MR. BLEAKLY. What, whether he got this notice?

THE COURT. No.

MR. BLEAKLY. I think I can prove this, identify it.



THE COURT. I know, but let's proceed with the case regularly.

MR. BLEAKLY. Can I ask him another question?

THE COURT. Anything that is relevant to his examination, of course.

MR. BLEAKLY. Well, but this is the plaintiff himself, if the Court please.

THE COURT. I understand; that does not make any difference.

PLAINTIFF RESTS.

10

THE COURT. Now, Mr. Bleakly, I understand from your opening there is an acceptance; let's see what it is.

MR. BLEAKLY. These deeds that I have offered—of course, there is that deed; then there was this other deed we had in the case before. Do they go in, Mr. Kramer?

MR. KRAMER. Yes, I don't know of any objection to those.

MR. BLEAKLY. Now, the ordinance of the City of Camden I want to offer here, sections 51, 52 and 58.

THE COURT. Pages or sections?

20

MR. BLEAKLY. And 61—no, those are sections; sections 51, 52, 58 and 61.

MR. KRAMER. Passed when?

MR. BLEAKLY. Oh, they are the ordinances of the city.

THE COURT. Are they old ordinances?

MR. BLEAKLY. Yes.

THE COURT. Prior to this title?

MR. BLEAKLY. Yes, prior to this title.

MR. KRAMER. 1906.

30

MR. BLEAKLY. Yes, but they are old ordinances; they have been ordinances for twenty years.

THE COURT. What are those ordinances, Mr. Bleakly, conferring authority on the Street Commissioner?



MR. BLEAKLY. And City Engineer, yes, the Street Commissioner to remove obstructions and the City Engineer to make plans and records of city streets.

LEWIS MOHRMAN, sworn.

By MR. BLEAKLY.

Q. Were you Street Commissioner of the City of Camden, September 24, 1909?

A. Yes.

Q. I show you a book and ask if that is—

10 MR. KRAMER. I want to object to the offer of this ordinance, because the passage of such an ordinance is illegal. The ordinance is contrary to the charter of the City of Camden; the charter of the City of Camden, section 84, provides: "And be it enacted"—this is an act of the Legislature—"that the said City Council shall have power and may from time to time cause the said city or such parts thereof as they may think proper to be surveyed and mapped, and may survey and make maps of all such roads, streets, alleys and public passageways as  
20 have been dedicated to the public as they shall think proper, and all such streets, roads, alleys and ways when surveyed, and such surveys approved by the City Council and filed, shall be deemed and taken to be public streets or highways and be treated as such in all respects; also to cause to be made, &c." Then it goes on and provides further what shall be done when streets are not open. Now, I respectfully submit that the City Council of the City of Camden has no right to delegate to officers of the City of Camden those acts and rights which the charter says  
30 they must do, and when they come along with an ordinance of this sort, they are offering something which is improper.

THE COURT. Mr. Kramer, wasn't that passed on by the Court of Errors?



MR. KRAMER. No, sir; this is the first time it has been raised.

THE COURT. I do not mean actually, but wasn't it legally?

MR. KRAMER. Oh, in some other matter?

THE COURT. No, wasn't it in this case necessarily? You see, the Court up there was bound to know the law. It knew whether this ordinance was illegal or not.

MR. KRAMER. That matter was not raised before the Court of Errors.

10

THE COURT. I know it wasn't; neither was the question of the acceptance raised here, but it was error just the same. Nobody knew anything about it.

MR. KRAMER. The Court of Errors only passes on those questions which are raised in the lower Court.

THE COURT. Yes, but they passed on all the legal questions involved in a question that is presented. They have said here that the question of acceptance by the City was a question for the jury. If, in point of fact, the only way the City could accept was by pursuing the course stated 20 in the statute there, the Court of Errors would itself be in error, which of course cannot be so.

MR. KRAMER. The Court of Errors is only human. Here we have a statute printed in the books; it cannot be misread. Somebody has passed an ordinance contrary to the statute.

THE COURT. But we find every once in a while that there is some law we have over-looked that the Court of Errors says we must know.

MR. KRAMER. I will go further. You see how easy 30 it will be for City Council, which is said to be a deliberative body, presumably is, to delegate to other men the right to do certain things. It gives this man the right to go on my property or your property or any other property



and draw maps. The law don't contemplate any such thing.

THE COURT. Isn't there another question back of that, though? Assuming that you are right in the theory which has been suggested, isn't there another theory, and that is that that is only a manner in which a conclusive acceptance is established? Aren't there many ways in which a party benefitted may accept the benefit of an act for his benefit?

MR. KRAMER. Yes, sir.

10 THE COURT. User and acts of the City showing the intention to use it.

MR. KRAMER. Yes, they will show us no acts in this case. I will anticipate the defense; they will show us no acts in this case. They have never done anything with this piece of ground. But I respectfully submit that the admission of this ordinance and the testimony which is going to follow by these various officials is improper.

THE COURT. I am inclined to think, Mr. Kramer,  
20 that the act, even assuming that that was not contemplated in the opinion, that it is only a manner in which the City may act; that it may act in any other lawful manner which shows its purpose. I will admit the ordinance.

(Exception noted for the plaintiff).

MR. KRAMER. For the benefit of the jury, don't you think it would be wise if you read these sections?

MR. BLEAKLY. Certainly, I will. 51 states: "The  
30 city surveyor and assistants shall make all maps, surveys and measurements and levels of streets, avenues, highways, public lanes and alleys in the city, and plans and profiles of the same, and shall do and perform such other surveying and engineering duties as may be required by the city council or any committee thereof; all



such maps, plans, papers, drawings, books, records, etc., appertaining to the business of said city, made by the suveyor of said city shall be the sole and exclusive property of said city, and shall be kept by the suveyor in his office subject to the inspection of any member of city council, or any city officer gratis, and at the expiration of his term of office the said suveyor shall hand over the same to his successor, or to such person or persons as city council may designate.” Section 52: “He shall keep an accurate and complete record of all the streets, avenues, 10 roads, highways, public lanes and alleys in the said city, in a suitable book to be provided for that purpose, wherein shall be entered the true and lawful survey and description thereof, specifying in each case the date of the survey, or the time when the same was duly laid out and opened according to law; he shall also keep an accurate and complete record of all the grades of streets and highways established by order of the city council.” Section 58: “The street commissioner, under the direction of the committee of city council on streets and high- 20 ways, shall have supervision over all the streets, avenues, roads, highways, public lanes, and alleys, sewers and drains, bridges, wharves, docks and slips and public places of the said city, and over all improvements thereon and the repairs thereto made under and by virtue of any ordinance of said city council, or any authorized committee thereof.” Section 61: “He shall have the power, and it shall be his duty, to remove, or cause to be removed, any obstructions, encumbrances or en- choachments upon any of the streets, avenues, roads, 30 highways, public lanes, sidewalks, and alleys, bridges, wharves and public places in said city, and to institute the necessary proceedings. He shall report the person causing such obstruction or encumbrance to the mayor



of said city.”

Q. Now, Mr. Mohrman, you say you were Street Commissioner in September?

MR. KRAMER. Now, if the Court please, I renew my objection on the ground that the procedure is not proper inasmuch as the sections which have just been read provide that the Street Commissioner shall under the supervision of the Street Committee of City Council do certain things, and inasmuch as the Street Committee is  
10 a subsidiary body of City Council and its acts must be approved by City Council before they become operative, it seems to me that my friend on the other side must first prove that the City Council directed certain things to be done or approved of the action of the Street Commissioner before the Street Commissioner was allowed to do certain things.

THE COURT. You mean this was approved by order of the Street Committee?

MR. KRAMER. I mean to say the Street Commissioner has no authority, except by order of the Street  
20 Committee to do anything.

MR. BLEAKLY. Under section 61 he has, if the Court please, but in this particular case we have it both ways, so I will comply with the suggestion of my friend.

Q. I call your attention, Mr. Mohrman, to the minutes of the Street Committee of September 21, 1909: “On motion of Mr. Saunders, the Street Commissioner was instructed to notify the party who erected the fence in French’s Court to remove it in five days or he will  
30 proceed to take it down.” Were you present when that was passed?

A. Yes.

Q. Pursuant to that resolution of the Street Committee, did you serve or cause to be served this notice



entered in your letter book of September 24, 1909?

MR. KRAMER. I object to this testimony on the ground that it is not shown it was the action of the body having charge of such matters, to wit, of City Council.

THE COURT. Yes, that comes within the same ruling, I think, that the Court has already made. Note an exception.

MR. BLEAKLY. I will show that this was all reported.

THE COURT. You mean confirmed by Council? 10

MR. BLEAKLY. Yes, all approved by the Council I can't do but one thing at a time.

Q. Is this your signature to that notice?

A. Yes.

MR. BLEAKLY. Now, may I read this notice?

THE COURT. Yes.

MR. KRAMER. Of course we renew our objection to all this testimony.

THE COURT. MR. KRAMER, I think it is better to object to anything as you go along. Some of it may 20 be objectionable. I cannot carry it in my mind.

MR. KRAMER. I understand. We object to the introduction of this paper.

MR. BLEAKLY. Will this be marked then for identification?

THE COURT. It can be identified, yes.

MR. KRAMER. I do not object to it being read to the jury, but I do object to the admission of this record, on the ground that it was not properly authorized by the proper body having charge of such affairs under the 30 City charter.

THE COURT. All right; proceed to read it then.

MR. BLEAKLY. Reading: "Camden, N. J., September 24, 1909. John N. Schmidt, Esq., Camden, New



Jersey. Dear Sir: In pursuance to resolution passed by the Committee on Streets and Highways at a meeting held Tuesday evening, the 21st, you are hereby notified to remove within five days a fence erected by you in French's Court. On failure on your part to comply with this notice in the time specified, I will proceed and remove the same. Respectfully yours, L. Mohrman, Street Commissioner."

THE COURT. That you say was served, Mr. Kramer,  
10 on the defendant?

MR. KRAMER. Yes, sir.

Q. Now, do you know whether he took the fence down pursuant to this notice?

A. My recollection is that he did subsequently.

THE COURT. What is the date of that notice?

MR. BLEAKLY. September 24, 1909.

#### CROSS-EXAMINATION.

20 BY MR. KRAMER.

Q. Now, will you tell us on the map so the jury will know, Mr. Commissioner, where French's Court was? Point to it.

A. The Schmidt property fronts on Broadway. Here is the other property; here is Broadway here. This is the Schmidt property here, running back to this alley, which has a blind end here to the other property coming through from Chestnut Street. Now, this alley-way was all open always all the years until —

30 MR. KRAMER. I object to the statement "always" unless it is shown that the witness knows.

THE WITNESS. During the time that I was Street Commissioner, I was going to add, and the fence erected was erected just as close to this brick wall as it was pos-



sible to get it. It wasn't located here; it was located up against the road as close to this brick wall as you could possibly get it. That was the location of the fence.

MR. BLEAKLY. That was the Spaeth property?

THE WITNESS. Yes, the Spaeth property here fronting on Chestnut Street.

Q. Do you know, Mr. Commissioner, who put it there?

A. I do not.

Q. Did you pursue the matter to see whether the fence was removed? 10

A. My recollection is that I did; I went and saw——

Q. You don't remember——

MR. BLEAKLY. Let him finish.

A. I went and saw Mr. Schmidt personally, aside from having the notice served upon him, and my recollection is that Mr. Schmidt removed the fence and it was subsequently re-erected.

Q. Do you know when that fence was first put there, Mr. Mohrman?

A. Why, I can't fix the exact date, no, but I think 20 it was some time during the middle of the year 1909; to the best of my recollection.

Q. You were Street Commissioner for about ten years, weren't you?

A. Yes, sir.

Q. Do you ever remember the City of Camden by any act of City Council accepting this street from Mr. Archer?

THE COURT. Just a moment, Mr. Kramer; that would be a matter of record of the action of Council. 30

MR. KRAMER. Well, in the absence of record?

THE COURT. Don't you see if there is one it would show by a record, and if there is not one the records would also disclose that there is none?



MR. KRAMER. Well, that helps us a great deal.

THE COURT. Yes, I wouldn't bother with that now. It is up to the other side to show such acceptance as they rely on.

BY MR. BLEAKLY.

Q. During your incumbency as Street Commissioner, can you recollect any period, say between 1902 and 1909, when this fence was erected, your exercising jurisdiction  
10 as Street Commissioner over this street?

A. None until the one in question here, according to that notice.

Q. There was no question came up then previous to this that you recall?

A. No, sir.

BY MR. KRAMER.

Q. Do you recall the night on which this resolution was passed by the Street Committee, generally speaking?

A. No, not specially, Mr. Kramer. I attend many  
20 meetings.

Q. Mr. Bleakly, the counsel for the plaintiff here, is City Solicitor, isn't he?

A. Yes.

Q. And was City Solicitor at that time?

A. Yes.

Q. And attended most of the meetings of the Street Committee?

A. Yes, sir.

Q. And prepared such resolutions and informed it  
30 as to its——

MR. BLEAKLY. Now, wait a minute; you are wrong on that.

MR. KRAMER. If I am wrong you can cross-examine and show I am wrong.



MR. BLEAKLY. I object, your Honor; this is not pertinent.

THE COURT. No, I do not think this is cross-examination. I do not think it is pertinent to this inquiry. The question is what the Street Committee did, not what the Solicitor did.

MR. KRAMER. I want to find out what the Street Committee did and how it did it and why it did it. If the Street Committee acted on the advice of some person who might be interested in some way other than the 10 City's welfare, I think it is pertinent to show that it was not such an act as would amount to a dedication or acceptance.

MR. BLEAKLY. I want to say this, Mr. Kramer; I was not Counsel for Mr. Spaeth in 1909 or 1910, and I was not even present at this meeting.

MR. KRAMER. You were counsel in 1910 because you had him arrested.

MR. BLEAKLY. I beg pardon; I never did.

MR. KRAMER. I will show it.

20

THE COURT. Apart from that, Mr. Kramer, how can the motives of the Council in taking such action as it chose on behalf of the City be raised here?

MR. KRAMER. Well, only this far, if the Court please, that the acceptance by the City must be an acceptance in good faith and not an acceptance by influence of some small insignificant incident which has no bearing whatever upon the great broad question of whether the City wanted this for a street, and I think I might be permitted to go that far.

30

THE COURT. Isn't the real test the question as to what they actually did?

MR. KRAMER. Well, I am free to admit that this is a deep problem and there might be new light upon it.



THE COURT. It certainly would not go so far as to go back into the motives that actuated the advisor of the city.

MR. KRAMER. I think it might help this jury to ascertain whether there was an acceptance and how that acceptance was arrived at. However, Mr. Bleakly's explanation that he did not represent this man in 1909 would seem to——

MR. BLEAKLY. I was not even present at the meeting; I didn't know anything about it.

---

ALFRED L. SAYERS, Sworn.

MR. KRAMER. We will admit that he was arrested and complaint was made.

MR. BLEAKLY. I call on the other side for the production of a notice or complaint served on Mr. Schmidt  
20 about July 14th or 15th, 1910.

MR. KRAMER. We think that it was turned over to the Justice of the Peace at the time of the hearing or left there among the papers; we admit that it was served.

MR. BLEAKLY. And do you admit then that he came before him and was fined?

MR. KRAMER. Yes, and afterwards you threw up the case on certiorari.

MR. BLEAKLY. No, I afterward caused the fine to be returned, because I was in the wrong Court. Well, I  
30 want proof by Mr. Sayers, the Street Commissioner, that he made complaint July 15, 1910, against Mr. Schmidt.  
BY MR. BLEAKLY.

Q. Were you Street Commissioner in July, 1910, Mr. Sayers?



A. Yes, sir.

Q. Are you familiar with this French's Court?

A. Yes.

THE COURT. Did you make it as Commissioner, Mr. Sayers?

THE WITNESS. Yes.

Q. Who did you make it before?

A. 'Squire Baldwin.

Q. And what happened there?

A. He was fined.

10

Q. And what was the complaint.

A. The complaint was that he was blocking the street with a fence and wagons.

Q. Was he blocking it?

A. Yes.

Q. And subsequent to that complaint, did you cause—  
did he remove them?

A. Yes, I think that he removed the fence himself.

Q. And wagons?

A. Wagons and all.

20

Q. Well, you made this complaint as Street Commissioner?

A. I did not make the complaint; I sent Mr.—

THE COURT. Well, you caused it to be made.

THE WITNESS. I caused it to be made, yes.

THE COURT. As Commissioner?

THE WITNESS. As Commissioner, yes, sir, under section 61.

MR. KRAMER. Have you got a copy of the complaint, Mr. Bleakly?

30

MR. BLEAKLY. No, I have not; I thought you had it.

MR. KRAMER. Oh, we didn't have it at the last trial even.



MR. BLEAKLY. Mr. Kramer, Mr. Shivers was subpoenaed but he is sick, and I want you to let Mr. Sayers speak for him as clerk.

Q. Have you the record here?

A. Yes, I have the record, yes. Mr. Shivers is sick.

Q. I call your attention to the minutes of September 1, 1912.

THE COURT. Minutes of Council?

THE WITNESS. No, Street Committee.

10 THE COURT. September what, 1912?

MR. BLEAKLY, September 16, 1912.

THE COURT. 1912, did you say?

MR. BLEAKLY. Yes, and call your attention to a resolution——

MR. KRAMER. I object to anything that happened after the beginning of this suit. This was in 1910. I don't know what they may have been doing out at the City Hall all this time.

THE COURT. No, I don't think they could make up a  
20 title then.

MR. KRAMER. What do you want to prove there, Mr. Bleakly?

MR. BLEAKLY. I don't want to prove anything now.

MR. KRAMER. Have you changed your mind?

MR. BLEAKLY. Well, the Court has ruled it out.

MR. KRAMER. Well, maybe I will withdraw my objection if it will help the case. Will you state what it is?

MR. BLEAKLY. Well, the Court has ruled it out.

30 MR. KRAMER. Will you state what it is? It is a public record, isn't it?

MR. BLEAKLY. Yes; don't make any statement unless you want to put it in, though.

MR. KRAMER. Do you want to offer that? Show it



to the witness; I will withdraw my objection.

MR. BLEAKLY. I don't want it to go in unless it is pertinent.

THE COURT. I am not going to bother with it; if the objection is withdrawn it will be admitted.

MR. BLEAKLY. Well, the only question is—I did not notice about the date—if it is not pertinent to the issue, of course it don't affect it. It is a question about the street; if it can't be against them, of course I can't offer it.

10

MR. KRAMER. Leave it open; I will offer it after a while. Will you permit me to offer it without subpoenaing the City Clerk?

MR. BLEAKLY. Certainly.

MR. KRAMER. Very well, then.

THE COURT. It is admitted now.

# CROSS-EXAMINATION.

BY MR. KRAMER.

20

Q. Mr. Sayers, Mr. Bleakly here, the private counsel of Mr. Spaeth, is the City Solicitor, isn't he?

A. Yes.

Q. And was the City Solicitor when you had this man arrested or ordered him arrested?

A. Yes.

Q. And you usually consult Mr. Bleakly, don't you, before you take any legal steps in your Department?

A. Well, not necessarily, no.

Q. Usually?

30

A. Well, it is according to what it is on.

Q. Did you consult him in this case?

A. No, I don't think I did. I consulted the engineer, the City Engineer, and asked him—



Q. You didn't? Now, let's see. At the last trial in this case you were under oath and testified as follows, page 112: "Q. Well, you took the action at the direction of Mr. Bleakly, the City Solicitor? A. Not altogether, I took it according to Mr. Farnham's maps. Q. Mr. Bleakly had something to do with it, though, didn't he? A. I consulted Mr. Bleakly, yes." Now, that was about a year ago, which was much nearer to the time when you had him arrested. Was it true then, Mr. 10 Sayers, that you consulted Mr. Bleakly with reference to this man's arrest?

A. I don't remember whether I consulted Mr. Bleakly or not.

Q. If you said so then would that refresh your mind now?

A. If I said so then I would think so.

---

20

MORRIS ODELL, sworn.

BY MR. BLEAKLY.

Q. I want you to turn to the minutes of September 30th.

A. 1909?

Q. Yes, the Street Committee's report. In that report, Mr. Odell, page 19, was there a resolution?

A. Yes, sir.

Q. Please read it.

30 A. "Resolved that the Street Commissioner be instructed to notify the party who erected the fence in French's Court to remove it in five days or that he will proceed to take it down."

Q. I want to know whether the actions of the Com-



mittee as then reported were confirmed and approved by Council at that meeting?

A. "Mr. Francis moved that the report be received and filed and the action of the Committee confirmed, contracts ratified, bonds approved and resolutions adopted. The roll was called as follows"—

Q. How many ayes?

A. Twenty-two.

Q. Were there any noes?

A. No noes.

10

Q. Adopted unanimously then, was it?

A. Yes.

Q. And by City Council at a meeting of that date?

A. Yes, sir, September 30, 1909.

# CROSS-EXAMINATION.

Q. Mr. Odell, the average City Council pays very little attention to the routine reports of a Committee like the Street Committee, don't it?

20

(Objected to; objection sustained).

Q. Mr. Odell, do you know of any act— These proceedings are written up by you, aren't they, as the Deputy City Clerk?

A. Yes.

Q. And have been for a great many years?

A. Since 1901.

Q. So that you are very familiar with the proceeding of Council?

A. Yes.

30

Q. Do you know of any act, any resolution or ordinance ever adopted by City Council of the City of Camden accepting this street?

(Objected to as leading).



THE COURT. Mr. Kramer, I think that that, as I stated, is a matter that the records should disclose, but apart from that the burden is not on the plaintiff in this case to show that; it is on the defendant, and in the absence of an acceptance the presumption is that it was not accepted.

MR. KRAMER. Well, I am seeking to assist him by his own witness before he gets away.

THE COURT. Oh, you let him help himself.

10 Q. Have you been asked by any one——

THE COURT. Again, I do not think it is cross-examination.

Q. Have you been asked by any one in this case to search the records of City Council for the purpose of showing an acceptance of this strip?

A. No, sir.

Q. As a street?

MR. BLEAKLY. I object; that is not cross-examination.

20 (Objection sustained).

MR. KRAMER. May I ask on what ground that objection is made?

THE COURT. The objection is sustained on the ground that it is not cross-examination. He has simply been asked here to identify as City Clerk an ordinance of Council and he simply identifies the record, whatever the record is, read into the case.

30

LEVI E. FARNHAM, sworn.

BY MR. BLEAKLY.

Q. Mr. Farnham, are you the City Engineer of the City of Camden?



A. I am.

Q. Been City Engineer for how long?

A. About twenty years.

Q. I ask you whether you have got the survey and plan book of the city there?

A. I have in the 6th Ward.

Q. Have you got a public highway there known as French's Court?

A. Shown on the City plan, yes, sir.

MR. KRAMER. I object to the form of that question 10  
on the ground that it is a conclusion that he asks the witness to testify to.

THE COURT. If there is any doubt about it, Mr. Bleakly, it ought not to be——

MR. BLEAKLY. There is no question but what this is a public highway, I guess.

MR. KRAMER. Well, you prove it.

THE COURT. I mean, if there is any question about its identification on the map, the witness ought not to have it put to him in that form. 20

MR. BLEAKLY. I did not suppose there was any question about it.

Q. Where is it located, Mr. Farnham, this so-called French's Court?

A. It begins on the north side of Sycamore Street 180 feet west of Broadway and runs northeasterly 160 feet.

Q. How far does that bring it?

A. To the south side of Mr. Spaeth's lot,—the extreme north line of Mr. Spaeth's lot. 30

Q. Just show on this illustration map, just show the Court and jury if you had transposed this from your plan, then run your pointer over the lines.

THE COURT. That is perfectly clear. That is marked



on that plan, is it?

THE WITNESS. Yes, except that it carries through the red to the north side of Spaeth's land.

Q. And what is this plan book, a private record or public record of the City?

A. A City record.

Q. Under what authority is that kept by you and made up?

A. Under the authority of the charter and ordinances  
10 of the City of Camden.

Q. I call your attention to sections 51 and 52 of the City ordinances; are you familiar with those sections prescribing your duties and how you should make up these surveys?

A. Yes.

#### CROSS-EXAMINATION.

BY MR. KRAMER.

20

Q. Mr. Farnham—

THE COURT. Was this map offered before?

MR. BLEAKLY. A copy of it was; I don't want this particular book marked.

THE COURT. Oh well, there is no trouble about that.

MR. BLEAKLY. It is offered, but we can put a copy in at any time you want it.

Q. Mr. Farnham, you testified that you made the plan which shows this street?

30 A. The plan on the boards, you mean?

THE COURT. No, the one before you on the map.

A. Yes, sir.

Q. You made the plan, did you?

A. Yes.



Q. Whose book is that you have got there?

A. The City book.

Q. And as Engineer you have charge of it?

A. Yes, sir.

Q. At whose request did you go to Broadway and Sycamore Street for the purpose of outlining this piece of land?

A. Mr. James Baker, agent for Mr. Archer.

Q. Was Mr. Archer there?

A. I think he was in the morning. 10

Q. Had a conversation with you, didn't he, about this land?

A. Yes, sir.

Q. And you gentlemen talked over among yourselves the way in which they wanted this land laid out—is that true?

THE COURT. What land are you talking about?

MR. KRAMER. The land in question, all of this land that Mr. Archer bought.

Q. Well, I will go back—strike out that question, Mr. 20  
Stenographer. Mr. Archer, representing the Camden National Bank, had bought all of this piece of land, hadn't he?

MR. BLEAKLY. Of course, you are making the witness your witness now.

MR. KRAMER. No, I am now trying to find out how the plan got on the books.

THE COURT. The witness has stated this is part of the City plan. Counsel has a right to find out how it was made up, by what authority. It is admissible. 130  
think, in view of that.

Q. Archer had bought this land from Sycamore Street to Schmidt's north line, from thence back to the school house and then south to Sycamore Street.



A. He bought 160 feet; he didn't buy it to the school line.

Q. How do you know he didn't?

A. By the deeds.

Q. What deeds?

A. The original deeds of the subdivision of the land.

Q. Did you ever see the deed which is in evidence here from the Sheriff to Mr. Archer?

THE COURT. The deed here appears to carry back  
10 to the School house, the deed to Archer.

MR. KRAMER. Now, I ask that the witness' answer be stricken out as not responsive.

THE COURT. Yes.

MR. KRAMER. And that he be cautioned not to interject remarks here which are not competent.

THE COURT. Well, he will avoid that.

Q. Now, Mr. Farnham, you say that you were there with Mr. Baker and with Mr. Archer, the owner of the land, in the morning?

20 A. I am not certain that Mr. Archer was there. Mr. Baker was there. I think Mr. Archer was present.

Q. But you are not sure he was there?

A. I am not positive.

Q. Have you been giving this case any consideration since the last trial?

A. Not particularly.

Q. Sir?

A. Not particularly.

Q. Do you remember testifying at the last trial,  
30 speaking of Mr. Archer: "He, Mr. Archer, decided"—page 42, Mr. Bleakly,—"decided to make the old alley twenty feet in width so that perspective purchasers could use the rear entrances for mercantile purposes and the lots were so made."?



A. That is true.

MR. BLEAKLY. Read 49, too.

Q. As a result of that instruction from Mr. Archer, you drew the plan which appears on the City map?

A. No, sir.

Q. Well, what did you do?

A. The court was there before Mr. Archer bought it.

Q. Did you ever go in there and survey it, Mr. Farnham?

10

A. Yes, sir.

Q. At whose direction?

A. I think we made a rough plan for Mr. Leatherbury, showing the location of a house in the interior, to my recollection; it was many years ago.

Q. Now, why did you say the court was there?

A. Because I have known it for over twenty years, and I know the original deeds called for a court.

Q. Do you know, Mr. Farnham, how far the court extended in the original days? Just tell the jury on the map, won't you? You have got a pretty good idea of this thing.

A. Two hundred feet.

Q. Two hundred feet from where?

A. From Sycamore Street.

Q. Which way?

A. North.

Q. North, eh?

A. Yes.

Q. So that the street that you speak of, so the jury will understand this, went north two hundred feet from this point up that way, didn't it?

A. No, 160 feet to the north line of—

Q. Why did you say two hundred feet?

30



A. Well, I will have to go into a lot of testimony that maybe you don't want.

Q. Well, never mind; answer my question. Why did you say two hundred feet? You were positive about it.

A. Because five original lots were made 180 feet in depth.

Q. Now, then, why do you say now that it ran north 160 feet; did you measure it?

A. Because a fence to my earliest recollection was  
10 on that line.

Q. Did you measure it, Mr. Farnham?

A. Yes.

Q. And you are positive now to-day that this fence ran 160 feet north from Sycamore street?

A. Yes.

Q. Which would bring it to the south line of Spaeth's lot?

A. Yes, sir.

Q. All right. Now, let's see what you said before.  
20 Now, then, Mr. Bleakly, turn to page 44. At the last case, you testified in answer to a question: "There was an alley there that was used up as far—I can't state whether it went exactly to Spaeth's line or not, but there was an alley there as I recall it, fifteen or sixteen feet wide; there were four dwelling houses in the interior of the lot and wagons drove up there to these dwelling houses, and then it was open along the side of the house up further north toward Spaeth's line, but whether it reached Spaeth's line or not I am unable to say." You were City Engineer when  
30 you gave that testimony, weren't you?

A. Yes.

Q. How is it you are so sure?

MR. BLEAKLY. Don't make an argument.

THE COURT. This is proper; go on.



Q. How is it that you are so sure a year later that those conditions existed twenty years ago, to wit, 160 feet, when you were not able to say a year ago that they did exist? Can you tell us, please?

A. Well, there is a very few feet difference. I said nearly, as near as I could recollect.

Q. You said 160 feet after first making it 200, Mr. Farnham; now, I want to know why you changed your mind from the last trial?

A. I haven't changed it.

10

Q. I ask you why you are so positive to-day when you could not tell a year ago?

A. I did tell a year ago.

Q. Then your testimony one year ago was correct, was it?

A. Yes.

Q. Then the testimony to-day is not accurate?

A. Yes, it is correct.

Q. Mr. Farnham, you were appointed and served in City Council—served as City Engineer under an ordinance of City Council which provides that a salary shall be paid in lieu of all fees, is that true?

A. Yes.

Q. Were you acting as City Engineer or as a private engineer on the day that you went down there to lay this land out?

A. I can't tell you.

Q. You sometimes act in response to invitations from private parties in your own time as an engineer, don't you—your advice is sought?

30

A. No, not in the last seven or eight years.

Q. Well, this was more than seven or eight years ago, wasn't it?

A. Occasionally I have, yes.



Q. Now, Mr. Farnham, we subpoenaed you to produce here your records showing the receipts and disbursements of your office at the time this survey was made—have you those records here?

A. No, sir.

Q. Why didn't you bring them?

A. Why didn't you ask for all the books of the office?

Q. I ask an answer to my question—answer it?

A. I didn't know which books you wanted.

10 Q. The subpoena called for the records of your office showing the receipts of your office at the time the survey was made for Mr. Archer.

A. I understood that it was all the books in the office, I asked Mr. Kramer as soon as I got here what books he wanted, and I asked Mr. Bleakly's permission to go back to the Hall and get them. Mr. Bleakly says, "We will open in five minutes and you can't go."

Q. You were told, Mr. Farnham, that I wanted this morning the receipts of your office at the time this survey  
20 was made for Mr. Archer?

A. Yes.

Q. And you were told by me this morning that I was seeking to establish whether you made that survey as a city official or as a private engineer?

A. Very true.

Q. Will you produce those records here after lunch?

A. I will. The book was locked up in my desk, and I would have to go back to the Hall for it, and it was too far, I couldn't go.

30 Q. So that if you made this examination for Mr. Archer the receipts of your office will show a charge made to him for such work, will it not?

A. If I did it on City time, it will; if I did it Saturday afternoon or a holiday it would not show.



Q. If you did it on any time which does not appear on those records, then you did it as a private engineer, didn't you?

A. Exactly.

MR. KRAMER. I would like to ask permission to have Mr. Farnham recalled after lunch for this purpose.

THE COURT. Yes.

By THE COURT.

Q. Mr. Farnham, what is that book which you have? 10

A. The cash book, you mean?

Q. No, I mean the map, the book of maps that you have before you? It appears to be a large book, indexed and—

A. It is a record of the streets and lots in the sixth ward of the City of Camden used by the Assessors for their assessing purposes.

Q. Now what official sanction has that from the City that you know of?

A. It is made under an ordinance of the City which requires the City Engineer to keep a record of the streets and lots within the City on a plan for the use of any one, principally the Assessors. 20

By MR. KRAMER.

Q. Has that plan ever been submitted to the City Council or any part thereof, for its acceptance?

A. Never to my recollection.

Q. When you take a private plan and make it, as was done in this case, Mr. Farnham do you report to City Council the fact you have made such a plan for them to consider approving or rejecting it? 30

A. No, sir.

Q. So that as far as the City Council of the City of



Camden is concerned it at the time in question knew nothing of your transactions with Mr. Archer?

MR. BLEAKLY. One moment; don't answer the question.

Q. Unless they appear as receipts from him for work done by you as a city official?

(Objected to.)

THE COURT. I do not see how that could be determined by this witness.

10 MR. KRAMER. I want to show by this witness on cross-examination that he made this plan offhand, and that he has never reported it as far as City Council which has charge of these matters is concerned.

THE COURT. Well, so I understand; I think it will have to obtain its official sanction from such facts as are actually disclosed, and not from such as are not disclosed.

MR. KRAMER. In other words, your Honor still rules that it is up to the other side to prove that this City plan has been accepted?

20 THE COURT. I rule that they must make out a case, must make out an acceptance. What I wanted to get from the witness was how far in practical usage it was a City record or—

THE WITNESS. It has been used since January 1, 1886, as a City record.

Q. The witness is shown a paper entitled a notice of intention, and is asked whether or not this is the legal notice usually given when the City intends to open streets?

30 MR. BLEAKLY. I think, if the Court please,—

THE COURT. Yes, I think that is irrelevant,

MR. KRAMER. Hold on a minute; the witness has testified that he knew that there was a street here for years gone by. I am now going to show that the City in-



tended to open another street right there, and that this could not have been a street by his own testimony.

MR. BLEAKLY. Do you mean to say that there actually was anything done?

MR. KRAMER. I mean to say that here is a notice prepared by this witness—

THE WITNESS. You are wrong; this is two hundred feet west, and of course there is no distance there shown.

MR. KRAMER. I ask the Engineer to answer my question. 10

MR. BLEAKLY. I object if it is used for this purpose.

(Objection sustained.)

MR. BLEAKLY. If he wants to put that in before the jury, I have no objection to it.

Q. Did you prepare the description which is given on that notice, Mr. Farnham?

A. I don't think so.

Q. Where does the Highway Commissioner or Street Commissioner get descriptions of land which are used by the city? Don't he get them from your office? 20

A. Usually gets them from our office.

Q. Don't they always get them from your office?

A. No, sir; sometimes write them themselves.

Q. Where do they write them from, from what information?

A. They ought to write them from these books.

Q. Would they write them from any other books?

A. I don't think so.

Q. Now, do you recall the proceedings under which that notice was served? 30

A. There has been two attempts to push that street through to Chestnut street.

Q. What street, please, this street?

A. French's Court.



THE COURT. Chestnut Street on the other side of Spaeth?

THE WITNESS. Yes, one attempt was to carry it from Chestnut Street clear into Kaighn Avenue.

By MR. KRAMER.

Q. French's Court—you are speaking of this street here?

A. Yes. One attempt was made to take it off the school yard, because it was easy to have the school pay for  
10 the ground. The other attempt was to carry French's Court through north.

Q. Now, this one you are talking about, you prepared that description, didn't you?

A. The description is in error; that is the reason I don't think I prepared it. It is not my handwriting there.

Q. I know it is not. Whose handwriting is it in?

A. It looks like Mr. Shivers'.

Q. And who is Mr. Shivers?

A. Clerk of the Highway Committee.

20 Q. And what was the Clerk of the Highway Committee trying to prepare there?

MR. BLEAKLY. It speaks for itself.

THE COURT. Gentlemen, I think this is entirely irregular and improper.

MR. KRAMER. He did not object to it upon that ground.

THE COURT. I am trying to keep the case within its proper bounds.

MR. BLEAKLY. I do object; it has nothing to do  
30 with this case. The witness had nothing to do with it, and how can he be cross-examined?

MR. KRAMER. Mr. Shivers is sick, isn't he? Will you allow me the same courtesy I allowed Mr. Sayers? They are all under your direction.



MR. BLEAKLY. No, that is not so.

MR. KRAMER. Will you allow him to testify the same as I did Mr. Sayers?

(Question repeated.)

A. I think this was to widen French's Court, in the effort to get the street through to Chestnut street, between Sycamore and Chestnut street.

Q. How much were you going to open there, Mr. Farnham?

A. Fourteen feet six inches additional. 10

Q. That would make it how wide?

A. Thirty-four feet six inches.

Q. Will you read that description, please?

A. "Beginning at a corner in the north line of" —

MR. BLEAKLY. This is entirely irrelevant.

THE COURT. I don't know what your attitude is; I understood you a few moments ago to agree that the paper should go in evidence.

MR. BLEAKLY. For what purpose?

THE COURT. That is another matter; if it is in it is in 20 for any lawful purpose.

MR. BLEAKLY. I don't want the record cumbered up by something that has nothing to do with it. It shows on its face it does not apply to this locus; it is an entirely different description.

THE COURT. Well, then, it ought not to be in. It is in and I cannot limit the examination on it.

MR. KRAMER. Do you object to it?

MR. BLEAKLY. Certainly I do, because it is not relevant to the case. 30

MR. KRAMER. And you won't let this man testify as to what this man Shivers has done?

MR. BLEAKLY. Yes.

Q. Then go ahead, Mr. Farnham.



THE COURT. He does not object on the ground that you have not called Shivers, but I understand he does object on the ground that it is not relevant.

MR. KRAMER. In order that your Honor may understand my position, he has testified that this street was always a street. I want to show that the City of Camden wanted something else down there, and this man drew this description or it was drawn in his office.

By THE COURT.

10 Q. Mr. Farnham, was this done under your direction?

A. I don't think so, because of an error there.

Q. Well, the drawing may be an error, but was the thing that was intended under your direction as Engineer?

A. I don't know what that refers to, not knowing the date. I know there was an effort made to get the street through by Mr. Isaac Lord, then Councilman from the Sixth ward, from Chestnut to Sycamore street on the line of French's Court, and he wanted the street wider than  
20 twenty feet, because twenty feet was not wide enough.

MR. BLEAKLY. Fourteen feet, you mean.

THE WITNESS. Yes, additional.

MR. BLEAKLY. Well, now, what has that got to do with this locus?

THE COURT. Mr. Kramer, is it your contention that this contemplated the opening of the bed of this alley as well as the additional fourteen feet?

MR. KRAMER. No, sir.

THE COURT. What is your theory about it?

30 MR. KRAMER. I know that the City of Camden has for years wanted to open up a street down there from Fifth street south, and that this petition—this is unquestionably an error—to show that the City intended to open this street from the old line here two hundred feet, which



was deeded by John W. Sell, Sheriff, to this man Archer, and the City—this fourteen feet six inches is an error, that is their trouble—but I want to show that the City was not going to build a street like this and then come here and go through that way.

THE COURT. What do you say they were going to do from that description?

MR. KRAMER. They were going to build a street right through there. It is a matter of common history in the City of Camden—

10

THE COURT. Does this notice show it?

MR. KRAMER. I want to show by this witness now that here was a description which started right but got wrong in the middle of it, which showed that the City intend to start here, that it did not recognize this as a street.

THE COURT. The description actually does start on the east side, doesn't it?

MR. KRAMER. If he will just read that I will follow that. Where does that begin?

20

THE WITNESS. 200 feet west of Broadway thence north parallel with Broadway 118 feet.

MR. KRAMER. That would bring it about 118 feet there, you see; there is where the error starts. Doubtless some clerk has taken the wrong description, but the starting point shows that the City intended to open a street that way. Here is Fifth street over here, but the 200 feet is what I am getting at, and I want to show by this witness that they recognize this land as belonging to Mr. Archer, never intended to use his land, did not recognize it as a street. It would be absurd to say the City when it had the power would take and build a street like that, a serpentine line, and this is the official notice served on the former owner of this land.

30



THE COURT. Mr. Kramer, I think you have to take, when you get into explanations of the description, you will have to take the witness' statement about it. He says the purpose was to widen French's Court to make it thirty-four feet six inches wide.

BY MR. KRAMER.

Q. I want to ask Mr. Farnham in that connection. You say there were two efforts made to open Fifth Street?

10 A. Yes, sir.

Q. Open Fifth Street?

A. Yes, this over here the other side of Chestnut comes over here and comes down to Newton Avenue.

Q. Is it purported to be a continuation of French's Court?

A. No, Spaeth comes in there.

Q. I mean, projected would it be?

A. No, it might be if Spaeth was out of the road.

MR. BLEAKLY. I do not see that it is pertinent to  
20 this case.

MR. KRAMER. I won't go any further with it except to ask that this be admitted because the witness' mind is hazy as to which of these proceedings it was.

MR. BLEAKLY. I think it ought to go out as irrelevant, now, under the statement of the Engineer; I move to strike it out. It is only confusing; it does not prove anything in the case.

THE COURT. Well, Mr. Bleakly, I don't think you can let it in—

30 MR. BLEAKLY. Well, I did not understand, your Honor; I thought it had something to do with this at first; if it had anything to do with this particular piece of ground I did not want to keep anything out, but it is very clear that it don't, right on the face of it.



THE COURT. Well, it seems to start at the upper side of it. It is of very slight importance either way.

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At this point a recess was taken until 1.30 P. M.

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Trial of the cause resumed after recess in the presence 10  
of Counsel for the respective parties.

(The City map heretofore referred to by the witness is marked Exhibit D. 1).

MR. BLEAKLY. I offer deed, Sarah Kaighn to John Hopple, marked Exhibit D. 2.

(Said deed is marked Exhibit D. 2):

MR. BLEAKLY. Also deed Hopple to Metz.

(Said deed is marked Exhibit D. 3).

20

MR. KRAMER. What about D. 2; what is your object in offering that?

THE COURT. Gentlemen, isn't this case now within a very narrow compass? It is conceded, isn't it, that the plaintiff holds the title to the fee? The only question remaining now is whether or not there has been a public highway created.

MR. BLEAKLY. Well, this tends to show it.

MR. KRAMER. No, you are going back to 1819.

THE COURT. Is there anything in that deed which 30  
indicates——

MR. BLEAKLY. Yes, it goes 180 feet back from Broadway.

MR. STACKHOUSE. But not to any street.



THE COURT. Did the owner own the alley?

MR. BLEAKLY. Yes, Sarah Kaighn owned the whole thing.

THE COURT. The mere fact that she conveyed one part without another would not indicate anything, would it, unless she calls it a street or alley or something of that sort? Don't cumber the record up with things that are not——

MR. BLEAKLY. No, we had it the last time showing  
10 that she owned all this property, the whole thing.

THE COURT. I know, but the only importance can be where the owner has dealt with it indicating a public use or some other character of use inconsistent with private ownership or some other character of ownership.

MR. BLEAKLY. Here is a deed, Sarah Kaighn to John Conrow then.

THE COURT. What does that show?

MR. BLEAKLY. That is June 11, 1823, 180 feet to a twenty foot wide alley.

20 MR. STACKHOUSE. I object to the offer of that deed on the ground that it does not cover the premises in question. It commences at a point north of Schmidt's present line. There is nothing which shows——

MR. BLEAKLY. A point north of Schmidt's line?

MR. KRAMER. Yes.

THE COURT. What is the description in this deed?

MR. STACKHOUSE. It conveys a property here running back here; it says 180 feet to an alley, but it does not allege the alley is 180 feet; the alley may have been  
30 two or three hundred feet back.

THE COURT. Well, I will take it as far as it goes.

MR. KRAMER. We will withdraw the objection.

MR. BLEAKLY. Deed, Sarah Kaighn to Joseph Kaighn and others, March 8, 1821, the school house lot.



That is the school house lot, the Kaighn School lot.

THE COURT. That is to whom, the City?

MR. BLEAKLY. Well, it is to the trustees of the school.

THE COURT. Well, I will mark it the City. What does that show?

MR. BLEAKLY. It begins at an angle of a twenty foot wide alley and Cooper Creek road, then by the north side of said alley east to the corner of another twenty foot wide alley, thence northward by the west side of 10 said alley to the south side of Chestnut Street until it intersects the eastern—

MR. KRAMER. There is an omission there in that description which is referred to in Vice Chancellor Pitney's opinion in *Dell v. The School Board*; there is a hiatus in the description.

THE COURT. Well, it seems to abut on this alley or alleged alley. I do not understand, Mr. Bleakly, that there is any denial that this is an alley, but I understand their denial to be that it is a public alley, isn't it? 20

MR. KRAMER. That is it exactly; Mr. Archer never intended it for anything else, according to Mr. Farnham's testimony.

THE COURT. Now, go on with your offer; is that all?

MR. BLEAKLY. That is all.

THE COURT. Go on with such other testimony as you have.

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JOHN C. SLOAN, sworn.

30

BY MR. BLEAKLY.

THE COURT. Mr. Bleakly, on this question of acceptance, is there any more evidence? Are you through



with that now on the question of acceptance? Is there any more evidence before the Court now than there was on the previous trial?

MR. BLEAKLY. Oh, yes.

THE COURT. Well, what is it?

MR. BLEAKLY. The action of the Street Commissioner, two Street Commissioners, the action of the Street Committee and the action of the City Council in reference to this notice and in reference to the obstructions  
10 that Schmidt put in the street, and the bringing of the suit. The bringing of the suit against Schmidt for the obstruction itself is an acceptance; the cases are clear on that; that one thing is an acceptance. Whenever the City brings a suit, one suit in reference to a highway—

THE COURT. Now, show me the authority on it, will you? That appeared in the case before, though.

MR. BLEAKLY. No, I beg your pardon.

THE COURT. The arrest of Schmidt?

MR. BLEAKLY. Yes, but the proof was brought in by  
20 the other side. The question of acceptance, your Honor, wasn't up, and it came in inferentially only with no idea of proving what the City was doing. In fact, it was brought out, I think—Well, I can show you exactly how it came in; it was in Mr. Schmidt's cross-examination; I will show you exactly how it came in.

THE COURT. Mr. Bleakly, why is it the city has not accepted this street formally?

MR. BLEAKLY. Well, there are two ways of accepting it, your Honor, by implied acceptance or express ac-  
30 ceptance.

THE COURT. Yes, but why is it, if it wants the street, it does not take it? It can take it now.

MR. BLEAKLY. Well, it has done it.

MR. KRAMER. But it has done it since this suit has



been decided, since the Court of Errors has reversed it.

THE COURT. Then the only question here is one of damages, isn't it?

MR. KRAMER. No, because we say at the time—

THE COURT. No, I mean to say even under the most favorable aspect of it, it is only one of damages?

MR. KRAMER. Yes.

THE COURT. Otherwise it is academic?

MR. KRAMER. Yes.

THE COURT. Well, it is not possible this suit is being<sup>10</sup> tried out for fifty dollars, is it?

MR. BLEAKLY. I don't know; I don't know what they are ever bringing it for.

MR. KRAMER. No, we have a perfect right to bring it.

THE COURT. That is right; you had a perfect right to maintain it.

MR. KRAMER. And I will argue to the jury how the street was opened when the time comes,

THE COURT. But what I mean to say is, the purpose,<sup>20</sup> as I understood it, was to establish the plaintiff's right in the tract. Now, if, as a matter of fact, the City has actually accepted the street, as it can do at any time after dedication, why, he cannot possibly get that right; all he can get is his damages for the unlawful destruction of his—

MR. KRAMER. Well, the verdict may be guilty as of a trespass at that time.

THE COURT. That is what I mean.

MR. KRAMER. And the damages can be fixed as of<sup>30</sup> that time. Then comes the next question as to whether or not this has become a cul-de-sac, and whether or not the upper courts would hold, which must be in a later suit now, whether they would hold that this man Spaeth



still has the right to come over this man's property even in the event of them urging that the City has accepted, whether there was anything to accept.

MR. BLEAKLY. That was their main point, your Honor, before—

THE COURT. The question has been foreclosed as to whether or not— As I remember, I held in this case that the deed and so forth established a dedication by the owner, and overlooked the fact that there was no conclusive proof of an acceptance by the City. The Court of Errors held that that was right except in so far as it treated the acceptance of the City as an accomplished fact; that was for the jury. Now, in that situation it would be proper for the City at any time to accept this dedication, which the Court of Errors has already declared, and if so the rights of the owner, to block it off would be nullified, but of course it would not cover the damages that he sustained at the time of the bringing of this action; he then would have a right to damages if the jury concludes there was not then an acceptance. But aren't we contending over a very small trifle as the matter now stands?

MR. BLEAKLY. As far as the cul-de-sac question, that is absolutely settled.

MR. STACKHOUSE. I beg your pardon, Mr. Bleakly.

THE COURT. At all events, it cannot arise in this case.

MR. STACKHOUSE. Why not?

THE COURT. Because the Court of Errors has settled the question of the dedication.

MR. STACKHOUSE. Only so far as the testimony in the former suit was concerned.

THE COURT. Oh, well, I know.

MR. STACKHOUSE. And that rested very largely



upon Mr. Farnham's testimony. They did not hold that the mere delineation or the reference to the street—

THE COURT. Well, I did, and the Court of Errors held I was right. I said that when a man makes a deed abutting on an alley, that is a dedication under the law as I understand it.

MR. STACKHOUSE. That is not what the Court of Errors said.

THE COURT. It said the Court was right in that conclusion.

MR. STACKHOUSE. That the conclusion of the trial judge that the delineation of the street upon the City plan at Archer's instance constituted a dedication?

THE COURT. That is what the opinion says, I think, if you will look at it. No, it goes further than that; it mentions that, of course, but it undoubtedly rested upon the fact that here was a deed— "We concur in the view of the trial court that the act of Mr. Archer in causing this '20 foot wide street' to be delineated upon the City Plan Book, and his conveying of lots by descriptions which call for this street as their rear boundary, constituted a dedication of it by him to public use." You did not state it all, that is all.

MR. STACKHOUSE. But the conveyance was made after the alleged portrayal upon the City Plan at his instance.

THE COURT. I do not apprehend, Mr. Stackhouse, that there can be serious question that when one conveys abutting on a street, calling it such, there can be any question that that is a dedication as far as he is concerned and those holding under him.

MR. STACKHOUSE. That is, whether it is a *cul-de-sac* or not?



THE COURT. Well, if he calls it a street, he is estopped from afterward denying that it is a street.

MR. BLEAKLY. In connection with that, I have another deed which I offered the last time; I offered the original in the record, and I want to offer it now, by Mr. Archer to Elizabeth Smith, dated January 8, 1902, recorded in Book 261, page 214. This begins in the west line of Broadway, sixty feet north of Sycamore Street and runs back 180 feet to a twenty foot wide alley.

10 THE COURT. Gentlemen, can't you compose this case? If that is all there is between you, it seems to me that it is too small a matter to contend over in the Circuit Court.

MR. BLEAKLY. We have no desire to contend, if the Court please; there is nothing to it, as we see. Of course they have a right to bring suit for a trifling matter or not.

THE COURT. I know, but it is now only a question whether this fence should be paid for, practically.

20 MR. BLEAKLY. Well, of course, we claim that in 1909 the action of the Street Commissioner, the City Council and the Street Committee itself, all having jurisdiction, ended the controversy; that made a public street out of it; that is an acceptance of it. Of course, they could not make the original—we accepted the dedication that way, by exercising jurisdiction and control, and immediately we did that, it was a public highway, removing an obstruction from it. There could not be anything more specific than that in an implied way. Now, Elliott,—that is  
30 the latest work—says it can be either expressed or implied.

THE COURT. Yes, but usually an implied acceptance becomes a question for the jury; what acts usually amount to an acceptance is generally a jury question.



MR. BLEAKLY. Instituting a suit, asserting jurisdiction over it as such. That is settled in our own courts, *Atlantic City v. Groff*, that is the leading case in our State, 45 *Atlantic*; "Acceptance by some formal act or by long continued public user may be necessary to cast upon the municipal authorities the duty of repairing and maintaining the street in proper condition for public travel. This is what was intended by the expressions used in the language of the Supreme Court in *Long Branch Railroad Co. v. Borough of South Amboy*, 57 *Law*, p. 252, 10 where the sole question was as to the right of the municipality to pass an ordinance directing the removal of alleged obstructions upon land claimed to have been dedicated to public use as a street." Here is a long line of cases. Now, here is the official action taken by the Street Commissioner himself to clean this street off after an attempted obstruction there, and he hails this man before the Court—

MR. KRAMER. At your direction.

MR. BLEAKLY. No, not by my direction.

20

MR. KRAMER. He testified to that.

MR. BLEAKLY. I beg your pardon.

MR. KRAMER. And this man is private counsel at this time in this case, and here he is posing as City Solicitor.

MR. BLEAKLY. That has nothing to do with this case.

MR. KRAMER. It is a fact in this case, and the fact that they have slipped through a resolution since is proof of it.

THE COURT. Well, it is in anyhow by conversation of 30 counsel.

(At this point Counsel and the Court consulted together at side bar).



LEVI E. FARNHAM, recalled for further cross-examination.

MR. KRAMER. As your Honor has just intimated, we won't go back of the date when this drawing was made.

BY MR. KRAMER.

Q. Do I understand you to testify that as a result of your making this plan, drawing this plan after your  
10 conversation with Mr. Archer and Mr. Baker, that you simply put it in the Plan Book without any resolution or action by the Street Committee of City Council or any other body? Did you submit it to any one for approval?

A. No.

MR. KRAMER. Then I ask that this witness' testimony concerning the Plan Book and the plan book which delineates this street be stricken out as being improperly—

20 THE COURT. Mr. Kramer, I understood him to say that he had put it in at the instance of Archer. While the City would not be sanctioning that in the sense of doing it by the municipal body, nevertheless it would be the act of Archer himself which for whatever it is worth would be evidence on the point of dedication.

MR. KRAMER. Archer's intention was that that should be used for the people who purchased the lots from him on Broadway.

THE COURT. Well, that may be ulteriorly his purpose.  
30

MR. KRAMER. This man puts it on the plan as a public street. Now, what he did was improper.

THE COURT. But you are asking him, as I understand it, whether or not the municipal body as a Council



had any knowledge of this matter, and he answers no. That does not exclude it; it is still relevant as a part of the act of Archer in putting it in. It may be available to argue on the question of acceptance; I am not excluding that, and you have got it for all it is worth on that point.

Q. Were you there as a private engineer on that occasion or as a public officer?

A. A private engineer.

Q. And your acts were all those of a private employee of Mr. Archer?

10

A. Yes.

MR. KRAMER. Of course, my motion is in and denied that all of this testimony be stricken out.

THE COURT. Yes, I will deny the motion.

BY MR. BLEAKLY.

Q. Now, Mr. Farnham, you have been asked about the conversation between yourself and Mr. Baker or Mr. Archer. In that conversation did the question arise as to an acceptance of an alley prior to the Archer purchase and conveyance?

20

THE COURT. Well, Mr. Bleakly, why do we want to go into that?

MR. BLEAKLY. Well, I didn't really think it would be pertinent except that they are attempting to bring out—

THE COURT. I do not think this is re-examination.

MR. BLEAKLY. Well, he asked him about what he testified to before, and that is what I was coming to.

THE COURT. Yes, I know he did; we want this case kept within its bounds; it is too small to fight over here.

30

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BOTH SIDES REST.



Schmidt v. Spaeth.

CHARGE OF THE COURT.

LLOYD, J.

The questions involved in this case have been very much narrowed by the agreements of Counsel made in the other room, the result of which is to present to you  
10 a single question and that is whether or not the piece of ground marked in red upon that map had at the time of this suit been accepted by the City as a public highway. That is the single question that you are now to solve. When the case was formerly presented, another question was involved, but that is eliminated here as a matter of evidence upon which to base such conclusion as you might reach.

A public highway may become such in a number of ways; it may become such by long user on the part of the  
20 public, whereby the owner is supposed to have parted with that much of his ownership in the property and the public to have accepted it. He may make a conveyance which specifically deeds it to the public through its municipal bodies, or he may make a conveyance which describes it as a street. The uncontradicted evidence in this case shows that when Mr. Archer in 1902, being then the owner of this tract of ground, made conveyance to the plaintiff here, he made it to abut on its westerly end on the street called French Street; it is not named  
30 here, but it is described as a twenty foot wide street opening into Sycamore Street, and its identity is not in question. That was followed by this being placed upon the map which is in use by the City Engineer, and which has been produced before you. The map that is



on the easel is a map used by Counsel in the case to illustrate; that is not the City map, nor is it any map used by City officials. In that situation, in 1910, the heirs of Mr. Archer made a deed to the plaintiff in this case for the tract which you will notice on the map on the easel designated in red—we will call it red, that is a poor definition. Obviously they could convey no more than they had. Mr. Archer, the father, by his previous deed and by directing the placing of this plan upon a map for public use effectually divested himself of the right 10 to recall this highway from being a street so far as he was concerned, but in order to effectuate it as a street there must have been an acceptance by the city, and it is that question that you are called upon to determine here preliminary to the question as to whether or not the plaintiff is entitled to damages for the tearing down of this fence, which is not denied.

An acceptance by a city may be by the public authority itself, the municipality, by its governing body, in which the body should pass a formal legislative act of 20 acceptance, which would then complete the creation of the highway to the intent and purpose that it should be made a public street. Or that acceptance may be by such acts and treatment by the city through its authorized officials as fairly indicates an acceptance by the city. In this case, since this action was begun, there has been introduced into the case a resolution of City Council formally accepting this street, so that from the time in 1912 when that resolution was passed the street undoubtedly became a public highway. These acts of the 30 defendant, however, in tearing down this fence occurred before that formal acceptance by the city took place. Such an acceptance is just such an one as the Court has mentioned as being a formal acceptance by the muni-



cipal body, but it is claimed on behalf of the defendant that they had a right to tear down this fence because the defendant was specially aggrieved, being an abutting owner with an outlet in that direction, and was especially damaged in a way peculiar to himself apart from the rest of the public, and that he had a right to abate the fence that had been erected across the end of this alleged highway. Now, in order to sustain that, the defendant must establish the acceptance by the city of  
10 the highway prior to the bringing of this action, or at least, at a time prior to the time of the occurrence of the taking down of this fence. The question before you is, has the city done that? That is the sole question.

I am not going to go over in detail all the evidence that the city relies upon to establish such a result, but it is claimed in the first place that the city was a party to having this street, so-called, delineated on its map, that the map that was in use in the Surveyor's office was to all intents and purposes, a city map, and that  
20 that of itself was a recognition by the city through its officials of the fact of its being a highway, from which you could infer an acceptance. That there was after that treatment by the city with respect to obstructions on the alleged street which indicated an acceptance by the city; that there was a direction from the street committee, which was carried out by an officer of the city, to have effectually removed a fence which had been placed substantially where this one was, and as I recall the testimony it was that the fence was removed in con-  
30 sequence of that notice. Other steps were taken—it seems the plaintiff was arrested once for putting this fence up—and it is claimed that that was done at the instance of the city and that that showed an intention on the part of the city to accept it. Perhaps I have not



gone over all the elements, gentlemen, that the city relies upon, but a number of them I have enumerated, and the principal ones.

It is further claimed that the city ratified, through its municipal body, the acts of the Street Committee in dealing with this street as a highway, and that there was, from all of those acts, at least sufficient to require a jury to find that there had been an acceptance on the part of the city. The case is not so clearly an acceptance that the Court feels it can deal with it as a matter of law,<sup>10</sup> but it leaves the question for you to determine. The street having been dedicated by Archer was complete as far as the owner was concerned, and he could not afterward recall it, but in order to make a street, a highway so the erection of a fence such as the plaintiff put upon it would be an obstruction to the highway, the city had to accept it, and the question for you to determine is, Did the city, before the taking down of this fence, accept the street as a public highway?

Mr. Bleakly, I think I have covered all these except<sup>20</sup> the last, haven't I, the one you just handed me?

MR. BLEAKLY. I don't know; there are some of them there I would like to have charged as requested. About that notice, it should have been ruled out; the jury might be confused about it.

THE COURT. I have already charged the second and have charged the first, I think, substantially, haven't I?

MR. BLEAKLY. I haven't got a copy of it, your Honor.

THE COURT. Gentlemen, there is a paper that will<sup>30</sup> go out to you dated in 1909 before the deed from Mr. Archer to the plaintiff was made, and as the city does not rely upon a question of prior user of this highway that becomes irrelevant on the question as to whether or



not it has been accepted since 1902. The rest are all denied except as I have charged them.

MR. KRAMER. Will your Honor indicate what that paper is?

THE COURT. It is the only paper in the case which meets that description.

10 MR. BLEAKLY. It is the notice of description; P. 8, I think it was.

THE COURT. Well, it was the only one in 1909; a notice it was instead of a letter.

THE COURT. The plaintiff's claim here is for damages; I have not made the position on that quite so clear as it should be. The claim is for taking down this fence unlawfully. Whether the defendant had a right to do that depended upon whether it was a public street, and that in turn depended upon the acceptance. If he had  
20 a right to do it, then the plaintiff is without remedy in this action; if he had no right to do it, then the plaintiff can recover such damages as he has shown to you to have been caused by this repeated taking down of the fence, and as I recall the testimony the plaintiff said that he expended \$33.55 for that purpose.

MR. KRAMER. Wouldn't your Honor charge that he would be entitled to damages for the disturbance of his possession, and so forth there if the jury should find it?

30 THE COURT. Gentlemen, that is only evidence from which you can infer what the damage was. He is entitled to whatever actual damage he sustained, but that is all I recall as being given in figures as to what actual damages there were.



## DEFENDANT'S EXCEPTIONS.

The defendant, by its Counsel, prays a bill of exceptions to the charge of the Court in each of the following particulars, viz.:

1. To that portion of the charge where the Court said the matter was not so clearly an acceptance that he could deal with it as a matter of law; and a bill of exceptions is allowed and sealed accordingly.

FRANK T. LLOYD. 10

Circuit Court Judge.

(Seal).

2. To the refusal of the 1st, 2nd, 3rd, 4th and 5th of the defendant's requests to charge; and a bill of exceptions is allowed and sealed accordingly as to each such request so refused.

FRANK T. LLOYD.

Circuit Court Judge.

(Seal). 20

---

 DEFENDANT'S REQUESTS REFUSED.

1. That the conveyance by George Archer and others, heirs of B. F. Archer, gave the plaintiff no right to close up French's Court or fence it in as private property.

2. That the deed in 1902 by Archer to Schmidt dedicates this Court as a twenty feet wide highway to public use. 30

3. That the alleged notice of intention signed by Mr.



Kramer as City Clerk in 1909, or thereabouts, is irrelevant and you should not consider the same in deciding, whether after 1902 the City accepted this street.

4. That French's Court as shown on the illustration map and including the locus or land in dispute in this case was a public highway ever since the deed made by Archer to Schmidt in 1902. That since that time it has been accepted by the City impliedly, if not expressly  
10 by virtue of the actions of the Street Committee, City Council, the Street Commissioner and City Engineer as narrated by the defendant's witness.

5. The Court is requested to direct a verdict for the defendant.

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PLAINTIFF'S EXHIBITS.

20

EXHIBIT P. 1.

DEED.—Sheriff to Benjamin F. Archer.

Dated July 19, 1901,

Recorded July 19, 1901.

Book 255, page 431 of Deeds.

Conveys piece of land fronting 160 feet on Broadway,  
200 feet back to the Kaighn School lot.

30

EXHIBIT P. 2.

DEED.—Benjamin F. Archer, Trustee, to John N. Schmidt and Catharine F. Schmidt.

Dated January 16, 1902.

Recorded, January 22, 1902.



# Illustration map

Exhibit P1

Copy by  
J. Stockhouse.

Chestnut Street.

Plan of Property  
Camden City  
N.J.

Scale  $\frac{1}{8}" = 5'$   
(original Scale  $1" = 10'$ )  
James F. Lennon, C.E.

May 5-1911

Survey<sup>rd</sup> Plan  
By

Earl Thomson, C.E.

Spaeth.

Kaighn School.

fence

Schmidt  
Loews in Quos

fence

20' wide alley

20'

40'  
Brick  
Stable

Schmidt  
260-245

40'

180'  
Ketterer  
180' 281-290

20'

Limroth  
317-27

20'

74.50'

106.50'

34'

Broadway Theatre.  
335-661

Camden Nat-  
ional Bank  
65.80'

44'

110.50'

320'

Sycamore Street

Broadway







Book 260, page 245.

Consideration, \$400.00.

Special Warranty.

Conveys premises in Camden, New Jersey, beginning in the west side of Broadway, 120 feet north of Sycamore street, north along Broadway 40 feet by west parallel with Sycamore street 180 feet to the east side of a 20 feet wide street opening into Sycamore street.

EXHIBIT P. 3.

10

DEED.—George F. Archer and wife, et al., to John N. Schmidt and Catherine F. Schmidt.

Dated June 6, 1910.

Recorded June 16, 1910.

Book 349 of Deeds, page 55.

Consideration, \$1.00.

Conveys all of the right, title and interest of the parties of the first part to premises situate in Camden, New Jersey, Beginning at a point in a line running westwardly from Broadway, said line being at the distance of 160 feet northwardly from the northerly line of Sycamore street and parallel therewith, said point in said line being distant 180 feet westwardly from the westerly line of Broadway, said line being also the northerly line of property of these grantees conveyed to them by deed from Benjamin F. Archer, trustee, and wife, dated the 16th day of January 1902, and recorded in the Register of Deed's Office of Camden County, in book 260 at page 245, and extending thence westwardly, along the extension of 30 said line a distance of 20 feet to the line of the Kaighn School lot; thence southwardly and along the same the distance of 40 feet to a point; thence eastwardly and parallel with Sycamore street the distance of 20 feet to a



point in the westerly line of these grantees' other land granted to them as aforesaid; thence along said line northwardly and parallel with Broadway the distance of 40 feet to the place of beginning.

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DEFENDANT'S EXHIBITS.

10 Camden City Ordinances.

Section 51. The city surveyor and assistants shall make all maps, surveys, and measurements and levels of streets, avenues, highways, public lanes and alleys in the city, and plans and profiles of the same, and shall do and perform such other surveying and engineering duties as may be required by the city council or any committee thereof; all such maps, plans, papers, drawings, books, records, etc., appertaining to the business of said city, 20 made by the surveyor of said city shall be the sole and exclusive property of said city, and shall be kept by the surveyor in his office subject to the inspection of any member of city council, or any city officer gratis, and at the expiration of his term of office the said surveyor shall hand over the same to his successor, or to such person or persons as city council may designate.

Section 52. He shall keep an accurate and complete record of all the streets avenues, roads, highways, public 30 lands and alleys in the said city, in a suitable book to be provided for that purpose, wherein shall be entered the true and lawful survey and description thereof, specifying in each case the date of the survey, or the time when the same was duly laid out and opened according to law;



he shall also keep an accurate and complete record of all the grades of streets and highways established by order of the City Council.

Section 58. The street commissioner under the direction of the committee of city council on streets and highways, shall have supervision over all the streets, avenues, roads, highways, public lanes and alleys, sewers and drains, bridges, wharves, docks and slips and public places of the said city, and over all improvements thereon and 10 the repairs thereto made under and by virtue of any ordinance of said city council, or any authorized committee thereof.

Section 61. He shall have the power, and it shall be his duty, to remove, or cause to be removed, any obstructions, encumbrances or encroachments upon any of the streets, avenues, roads, highways, public lanes, sidewalks and alleys, bridges, wharves and public places in said city, and to institute the necessary proceedings. He shall report 20 the person causing such obstruction or encumbrance to the mayor of said city.

EXHIBIT D. 1

CITY MAP.

EXHIBIT D. 2.

CERTIFIED COPY OF DEED.—Sarah Kaighn to John Hopple.

30

Dated May 20, 1819.

Recorded June 1st, 1819.

Book DD, page 551 (Gloucester County Clerk's office).

Consideration, \$300.



## General Warranty.

Conveys premises situate in Kaighnton, Gloucester County New Jersey, designated as Sarah Kaighn's Square No. 7, and marked on the plan thereof numbers 13, 14, 15 and 16, bounded southward by a 20 feet wide alley, westward by other ground of said Sarah Kaighn, northward by lot No. 17, and westward by the Woodbury Road, leading from thence to Cooper's Ferries. Containing in breadth north and south 160 feet, making four lots each 10 40 feet front on said road and in length east and west 180 feet with ingress, egress and regress to and along the said alley and all the lanes, &c., belonging to Kaighnton.

## EXHIBIT D. 3.

CERTIFIED COPY OF DEED.—John Hopple and Elizabeth, his wife, to Mary Metz.

Dated July 4, 1839.

20 Recorded September 14, 1839.

Book W3, page 141 (Gloucester County Clerk's office).

Consideration, \$500.

General Warranty.

Conveys the four following described lots of ground, situate in Kaighnton, in the City of Camden, County of Gloucester, and State of New Jersey, designated as Sarah Kaighn's Square No. 7, and recorded on the plan thereof, numbered 13, 14, 15 and 16. Bounded southward by a 20 feet wide alley, westward by land of late Sarah Kaighn, 30 northward by lot 17 and eastward by the Woodbury Road leading from thence to Cooper's Ferries. Containing in breadth north and south 160 feet, making four contiguous lots each forty feet front on said lots and in length east and west 180 feet with ingress, egress and regress to



and along the said alley and all the lanes, &c., belonging to Kaighnton.

## EXHIBIT D. 4.

DEED.—Sarah Kaighn to Joseph Kaighn, John Kaighn, John M. Kaighn, Joseph Boggs, Joseph B. Cooper.

Dated March 8, 1821.

Recorded January 15, 1822.

10

Gloucester County Clerk's office.

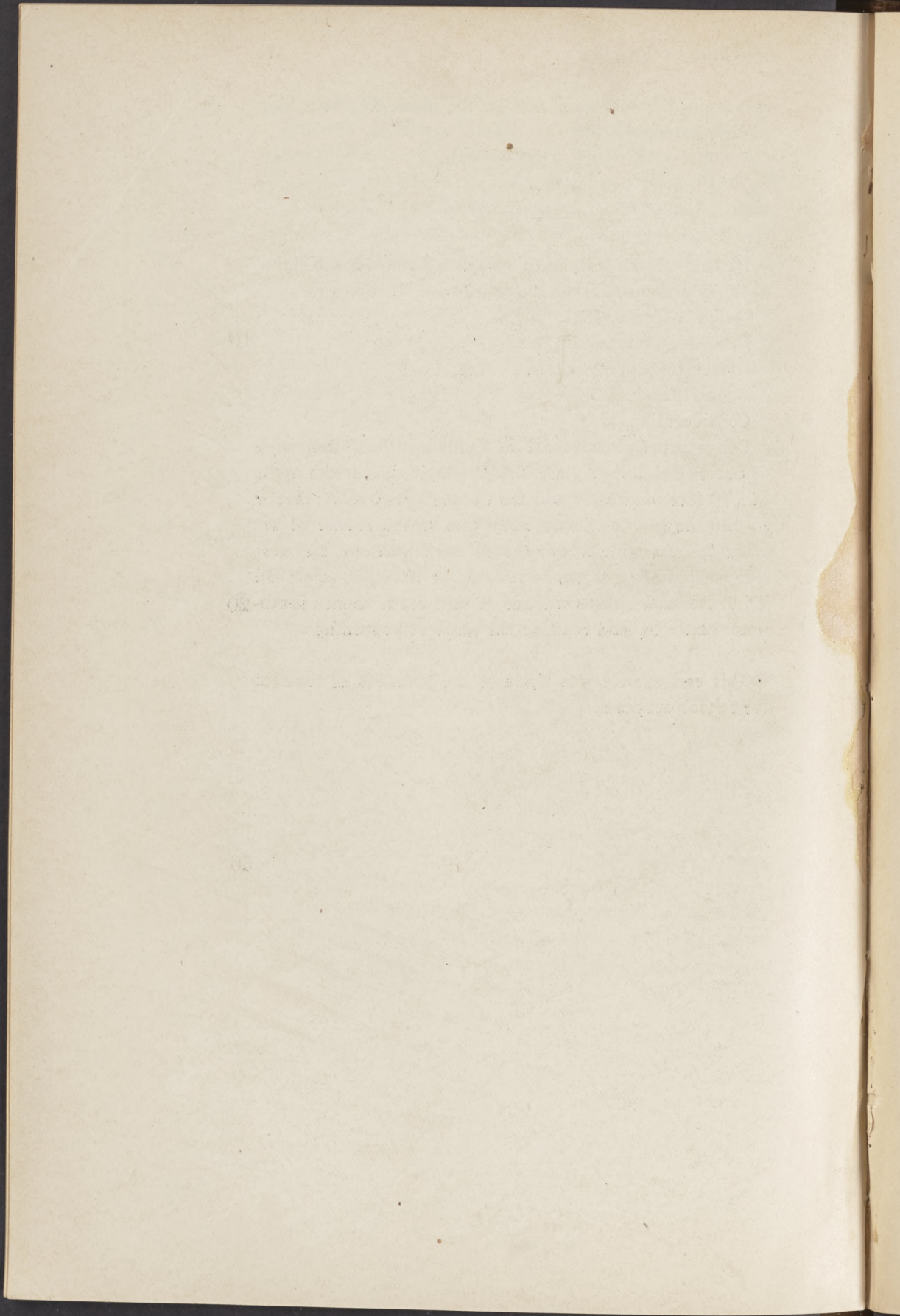
Book II, Page 152.

Consideration, \$1.00.

Conveys premises situate in Kaighnton, in Subdivision of Sarah Kaighn's Square No. 1. Beginning at the angle of a 20 feet wide alley and the Cooper Creek road; thence by the north side of said alley east to the corner of another 20 feet wide alley; thence northward by the west side of said alley to the south side of Chestnut street till it intersects the eastward line of said road; thence south-20 westwardly by said road, to the place of beginning.

This conveyance was made to the grantees as trustees for school purposes.







NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN N. SCHMIDT and  
CATHARINE F. SCHMIDT,  
Plaintiffs below,  
(Defendants in error)

vs.

GODFREY F. SPAETH,  
Defendant below,  
(Plaintiff in error)

In Tort.

On Error.

Brief for Plaintiff in  
Error.

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**STATEMENT OF THE CASE.**

This is an action of trespass, based upon the claim that the defendant entered upon the plaintiffs' alleged close and there destroyed the plaintiffs' fence. The defendant justifies the removal of the fence by the fact that it was an unlawful obstruction across a public street, which adjoins the defendant's property.

On July 19, 1901, the Sheriff of Camden County conveyed to Benjamin F. Archer a tract of ground, (including the land on which the fence was later erected), situated in the City of Camden, at the northwest corner of Broadway and Sycamore Street, having a frontage of 160 feet on Broadway and 200 feet on Sycamore Street.

Shortly after this conveyance, Mr. Archer caused the rear portion of the land acquired to be set apart as a street, twenty feet in width, opening on Sycamore Street and running parallel with Broadway for the full length of



the tract, 160 feet. Desiring that this street should be properly delineated, Mr. Archer, through his agent, James Baker, requested the City Engineer of the City of Camden to visit the tract to make the observations necessary for setting off the desired street. The city engineer made this inspection partly in the presence of Mr. Archer, and indicated on the city map a street 20 feet in width, opening upon Sycamore Street, 180 feet back from Broadway and running parallel therewith 160 feet. (Case, p. 37). This street on the map was designated French's Court, that being the name of a street or alley existing at the same place for some years before Mr. Archer purchased the tract of the Sheriff. At the end of this street a tract of ground owned by the defendant Spaeth is located.

A map of the locus is found on page 71 of the State of the Case.

On January 22, 1902, Mr. Archer, having laid out the tract in lots, with a frontage of 20 feet each on Broadway, sold two of them to the plaintiffs, their deed calling for a parcel of ground 40 feet in width on Broadway and extending back for a distance of 180 feet "to a twenty foot street opening into Sycamore Street." This 20 feet wide street is French's Court, which had, by Mr. Archer, been assigned definite limits and placed upon the city plan book by the City Engineer.

About the middle of 1909, (case, p. 27), the plaintiff, John Schmidt, built a fence across French's Court, directly behind the 40 feet wide tract conveyed to him by Mr. Archer, as already stated. The plaintiffs' purpose in doing this, obviously, was to exclude the public from the upper end of French's Court, and to use the section



of the street in the rear of his property as if it was his own. This fence, however, the plaintiffs themselves removed on the order of the Street Commissioner of the City, (case, p. 27). The plaintiffs later erected another fence in the same place, and this the defendant removed. His doing so is the alleged tort for which the plaintiffs now ask damages.

When the judgment for the defendant given upon a former trial of this case was before this Court for review at the November term, 1911, (82 N. J. L., 578), it was expressly held that Mr. Archer's causing the twenty feet wide street to be delineated upon the city plan book, and his conveying lots by descriptions which called for that street as their rear boundary, constituted a dedication of the street by him to public use. That point, therefore, is settled. At the former trial of the case, however, neither the Court nor Counsel raised the question of the acceptance of this street by the City. The entire controversy was limited to the subject of dedication, and the question of proving acceptance was overlooked in the lower court. Consequently, the former judgment was reversed, but solely because the acceptance of the street by the City had not been clearly shown.

This Court in the former case, (82 N. J. L., p. 578), held acceptance may be indicated by public user of the dedicated land. The character of the user of the alley or street, both before and after the dedication, was, at the first trial, a matter concerning which the testimony was contradictory. The trial Court, therefore, should have left the question—whether an acceptance of this dedicated street by the public was indicated by the character of the user to which it had been subjected after the dedication—to be resolved by the jury.



In the present trial, however, there was no evidence of user offered by either side, and this contradictory element in the former case was eliminated. The only evidence on the subject of acceptance was that produced by the defendant.

This evidence was ample and undisputed. There was no evidence of non-acceptance, and, the question of dedication having already been decided in the defendant's favor by this Court, it was proper for the trial Judge to instruct the jury that acceptance had been shown, and that their verdict should be for the defendant. Such a charge and direction of verdict were, however, refused, and the question of acceptance (about which there was no contradictory evidence) was submitted to the jury. By their verdict in favor of the plaintiffs, the jury necessarily found that there had been no acceptance. This is the fundamental error in the second trial.

#### **GROUND OF APPEAL.**

1. Because the Court charged the jury as follows: "It is further claimed that the city ratified, through its municipal body, the acts of the Street Committee in dealing with this street as a highway, and that there was, from all of those acts, at least, sufficient to require a jury to find that there has been an acceptance on the part of the city. The case is not so clearly an acceptance that the Court feels it can deal with it as a matter of law, but it leaves the question for you to determine."

2. Because the Court refused to make the following charge upon request of the defendant: "That French's Court, as shown on the illustration map and



including the locus or land in dispute in this case was a public highway ever since the deed made by Archer to Schmidt in 1902. That since that time it has been accepted by the City impliedly, if not expressly by virtue of the actions of the Street Committee, City Council, the Street Commissioner and City Engineer as narrated by the defendant's witnesses."

3. Because deed, George F. Archer, et ux., to John N. Schmidt, et ux., dated June 6, 1910, recorded in Book 349 of Deeds, pages 55, was admitted in evidence (Exhibit P 3, page 5), over objections made.

4. Because the Court refused to charge that "1. That the conveyance by George Archer and others, heirs of B. F. Archer, gave the plaintiff no right to close up French's Court or fence it in as private property."

5. Because the Court refused to direct a verdict for the defendant.

6. Because the verdict rendered in this cause was contrary to the evidence therein taken, and particularly as to the amount of damages.

#### **FIRST, SECOND AND FIFTH GROUNDS OF APPEAL.**

The first, second, and fifth grounds of appeal involve the same question: Was there such proof of acceptance of the dedicated street that there was no question for the jury? This is the point involved in the first ground of appeal, because the Court charged, over the defendant's



objection, that the case was not so clearly an acceptance that it could be dealt with as a matter of law; it is the point involved in the second ground of appeal because the Court refused to charge, as requested by the defendant, that the dedicated street had been accepted by the acts of the City Engineer, Street Committee, Street Commissioner and City Council; it is involved in the fifth ground of appeal because the Court refused to direct a verdict for the defendant.

**Acceptance of the dedicated street was proven by ample and undisputed evidence. There was no evidence of non-acceptance. Judgment, therefore, should have been for the defendant.**

The defendant contends that the acceptance of the dedicated street was shown by ample evidence, which was not only not contradicted by the plaintiffs, but was not offset by any evidence of non-acceptance. There was, therefore, no question for the jury on the subject of acceptance, and the question of dedication having already been decided in the defendant's favor, judgment should have been given for the defendant.

**The undisputed facts showing acceptance by the City are as follows:**

### **1. The City Plan.**

The City Engineer of the City of Camden appeared at the trial as a witness and produced the city plan book, which was kept in his custody as City Engineer, (case, p. 39). The section of the book material in the case was that showing the streets and lots in the Sixth Ward of the City of Camden. (case, p. 45). The book had been in use since January 1, 1886, as a City record (case, p. 46);



and was made by, and kept in the custody of the City Engineer under an ordinance of the City of Camden, (case, p. 45). This ordinance, (case, pp. 22-23), was enacted in 1906 (page 19, line 30), and specifies the duties of the City Surveyor or Engineer. He shall make all maps, surveys, measurements, and levels of streets, avenues, highways, lanes and public alleys in the City, and shall perform such other surveying and engineering duties as may be required by the City Council or any committee thereof. The maps, plans, drawings, etc., are to be kept in the engineer's office. The City engineer must keep in a suitable book an accurate and complete record of the streets, avenues, roads, highways, public lanes and alleys in the City. This is the "city book," or city plan book, produced by the witness.

The City Engineer further testified that he had known French's Court, the street in question in the suit, for over 20 years, and that original deeds had called for such a place, (case, p. 41). It was in existence when Mr. Archer bought the tract at Broadway and Sycamore Street in 1901. Mr. Archer, after this purchase, through his agent, James Baker, requested the witness, the City Engineer, to visit the tract in question and lay out the street later mentioned in the plaintiff's deed, (case, p. 39). The street was, in fact, simply an enlargement of the old court or alley, called French's Court, which had been in existence for some years before Mr. Archer bought the tract in question, (case, pp. 40 and 41). Mr. Archer necessarily knew of the existence of the old street; what he desired was that the City Engineer should definitely and permanently fix its width at twenty feet, (case, p. 40). This was done by the City Engineer as requested, and the street delineated upon the city plan book as a public highway.



This was done under the city ordinance aforesaid, and was an express duty of the City Engineer under that ordinance.

**2. Action of the Street Committee, the Street Commissioner, and the City Council of the City of Camden.**

French's Court having been thus enlarged and dedicated, and having been assigned definite limits by the City Engineer, upon request, and having been delineated upon the city plan book as a public highway, the Street Commissioner, the Street Committee of City Council, and the Council itself regarded the street as a part of the city street system, and admittedly, clearly, and unequivocally dealt with it as a public highway. This is a necessary conclusion from the remaining admitted facts; viz.:

In the middle of the year 1909, the plaintiff, John Schmidt, built the first fence across French's Court, (case, p. 27). When notice of this obstruction was given to the Street Committee of the City Council of Camden, the following resolution was adopted by the Committee at a meeting held on September 21, 1909, (case, p. 24):

"On motion of Mr. Saunders, the Street Commissioner was instructed to notify the party who erected the fence in French's Court to remove it in five days, or he will proceed to take it down."

Pursuant to this resolution, the Street Commissioner, Mr. Mohrman, on September 24, 1909, caused the following notice to be served upon the plaintiff, (case, p. 25):

"Camden, N. J., September 24, 1909. John N. Schmidt, Esq., Camden, N. J. Dear Sir: In pursuance to resolution passed by the Committee on



Streets and Highways, at a meeting held Tuesday evening, 21st, you are hereby notified to remove within five days a fence erected by you in French's Court. On failure on your part to comply with this notice in time specified, I will proceed and remove the same. Respectfully yours, L. Mohrman, Street Commissioner."

This notice was duly served upon the plaintiff, (case, p. 26).

The City Council of Camden met on September 30th, 1909, six days after the date of the notice, and the Street Committee made a report of its action in regard to the plaintiff's fence. The portion of the Committee's report dealing with the subject is as follows, (case, p. 34):

"Resolved, that the Street Commissioner be instructed to notify the party who erected the fence in French's Court to remove it in five days, or that he will proceed to take it down."

This report was heard, approved, and confirmed by the City Council at this meeting. The minutes of the meeting of Council contain this express reference, not only to the report, but to the action of the Highway Committee in reference to the fence, (case, p. 35):

"Mr. Francis moved that the report be received and filed and the action of the Committee confirmed, contracts ratified, bonds approved and resolutions adopted. The roll was called as follows—"

In pursuance of the resolution of the Street Committee, embodied in its report to Council, and by Council expressly confirmed, the Street Commissioner took further steps to effect the removal of the fence in the street in question; and, after sending the written notice above quoted, personally called upon Mr. Schmidt in regard to the obstruction. After this visit, the plaintiff



removed the fence. The Street Commissioner testified as follows, (case, p. 27):

A. "I went and saw Mr. Schmidt personally, aside from having the notice served personally upon him, and my recollection is that Mr. Schmidt removed the fence and it was subsequently re-erected."

and again, on p. 26:

Q. "Now, do you know whether he took the fence down pursuant to this notice?"

A. "My recollection is that he did, subsequently."

### **3. Street Commissioner Makes Complaint Against Plaintiff.**

During the early summer of the following year, 1910, the defendant erected another fence across French's Court, whereupon formal complaint was brought against him by the Street Commissioner of the City, then Mr. Sayres (p. 30), acting under the authority of an ordinance of the City authorizing him to take necessary action to keep the public highways free from obstructions, (case, p. 23, line 30). The plaintiff was arrested on the charge that he was obstructing a public street with a fence and wagons. This fence the plaintiff likewise removed (case, p. ).

#### **The undisputed facts establish acceptance.**

Not one of the foregoing facts was disputed. The action of the City Engineer in placing the street upon the city plan of public streets and highways; the action of the Street Committee authorizing the Street Commissioner to cause the immediate removal of the plaintiffs' fence; the notices served upon the plaintiff by the Commissioner; the express ratification of the action of the



Street Committee by the City Council itself; the removal of the obstruction by the plaintiff in obedience to the peremptory notices; his prosecution for again obstructing the street—all these facts were admitted by the plaintiffs. They did not put forth the slightest effort to controvert any one of them. They were not even denied. More than this, the plaintiffs offered no competent evidence tending to show non-acceptance of the Street in question.

With these facts before the Court, undisputed, and not offset by any facts tending to show non-acceptance, it was, we submit, the duty of the Court to hold that an acceptance of the street by the city had been conclusively shown. There could not have been, and cannot be, two interpretations of these facts; they mean that the City Council, the Street Committee, the Street Commissioner, and the City Engineer, (all of the officials of the municipality having jurisdiction over streets), regarded French's Court as a part of the city street system, assumed and exercised jurisdiction over it, and acknowledged a duty resting upon them to keep it open for public use. Such conduct necessarily means acceptance.

In the case of *Atlantic City vs. Groff*, (64 N. J. L., 528) the Supreme Court said:

"An action by municipal authorities to obtain possession of land dedicated to such public uses has been repeatedly approved by our Courts, and it is impossible to conceive how acceptance of such dedication could be more plainly disclosed than by such action."

In the case of *Hohokus vs. Erie R. R. Co.* (65 N. J. L., p. 362) the Supreme Court said:



“Bringing an action of ejectment is plenary evidence of an acceptance by the public authorities of a dedicated street.”

To the same effect is the case of *Atlantic City vs. Snee*, (68 N. J. L., p. 40, 1902).

The principle of these decisions obviously is that where the municipal authorities take action to assert the public right of way over a dedicated street, they necessarily accept that street, if it has not already been accepted. Their action is unintelligible on any other assumption.

In the case at the bar, the Street Committee of the City of Camden expressly ordered the Street Commissioner to remove the plaintiffs' obstruction in French's Court. This action the governing body of the city, the City Council, expressly ratified and confirmed. As a result of the action thus taken, the plaintiffs removed the first obstruction. When a second one was put up, there followed a prosecution by the Street Commissioner, on behalf of the City. Such facts, we submit, show conclusively that the city had accepted the street. Like an action of ejectment, these facts also are a positive, unequivocal assumption by the municipality of the right to possession of the street in the interest of the public.

It makes no difference, we submit, whether the action taken be ejectment, or a summary proceeding to remove an obstruction; the important fact is that the municipality takes clear-cut, positive action asserting dominion and control over the dedicated street. Such action, whatever its form, necessarily means acceptance by the municipality. Action of this kind is present and admitted in the case now before the court. There is no evi-



dence of non-acceptance. A verdict, therefore, should have been directed for the defendant.

### THIRD AND FOURTH GROUNDS OF APPEAL.

The third and fourth grounds of appeal deal with the quit claim deed from Mr. Archer and wife to the plaintiffs, dated June 6, 1910, purporting to convey to them the fee to that portion of French's Court situated directly behind the lots of the plaintiffs. This was the ground on which the fence had been erected.

The defendant objected to the admission of this deed in evidence; and, later, in order that the jury might not be misled by it, requested the Court to charge that this conveyance did not give the plaintiffs the "right to close up French's Court or fence it in as private property."

The defendant's contention is that the Court should have forbidden the use of this deed as evidence, or should have instructed the jury substantially as requested, in order that the defendant's case should not be unfairly prejudiced by the apparent effect of the conveyance.

The natural effect of this deed upon the minds of the jury would be to persuade them that the plaintiffs, having acquired the fee in the land directly behind their lots, could therefore use the locus as their own. The jury could not be expected, in the absence of explicit instructions, to bear in mind the established rule of law, that the dedication of a street to public use is irrevocable; and that the party making the dedication cannot, thereafter, defeat its effects by any kind of conveyance; and that persons buying dedicated land take it subject to the



right of the public to accept it, and thereby transform it into a public highway. Upon the question of acceptance, which was the only real issue in the case, the deed was, in law, meaningless; and yet its apparent effect was to justify the conduct of the plaintiffs in closing up the street as private property. Obviously, the deed was offered for that purpose, and must be assumed to have had some effect upon the jury in leading them to the erroneous conclusion that French's Court was not a public highway. It was, we submit, the duty of the Court, either to exclude the deed altogether, or, having admitted it over objection, to explain that it had no bearing whatever upon the question of acceptance, that it did not revoke or impair the admitted dedication, and did not give the plaintiffs any right whatever to close up the street.

That the dedication of a street to public use is irrevocable, and cannot be defeated by later conveyances, and is at all times open to acceptance by the municipal authorities, are propositions of law firmly established by our decisions.

In the case of *Trustees of M. E. Church vs. Hoboken*, (33 N. J. L., 20), the Supreme Court said:

“After dedication the owners of the fee cannot authorize its use for any private purpose.” *State vs. Wilkinson*, 2 Vermont, 480; *Comm. vs. Olburger*, 1 Wharton, 469.

In the case of *Mayor of Jersey City vs. Morris Canal and Banking Company*, (12 N. J. E., 555), one of the questions was the nature and extent of the public right in dedicated land under tide water. The Court of Errors and Appeals said:



"the acts set up in defendant's answer as done by the associates in connection with the Mangin map, amounted to an immediate dedication of the whole ground under water marked upon that map as Hudson Street, and whenever any part of it is filled up, it becomes, ipso facto, a public highway, and that the right to enclose it and exclude the public cannot be acquired by a mere conveyance of the fee of the land by the associates."

In the case of Hoboken Land and Improvement Co. vs. Mayor of Hoboken, (36 N. J. L., 545), the Court of Errors and Appeals said:

"It was argued that the dedication had not been consummated when the suit was brought, by reason of the absence of an acceptance or user by the public of that part of the street in controversy. That question has been set at rest in the courts of this state. Acceptance by a formal adoption by the public authorities or by public user is necessary to impose on the public the duty to amend or repair, but is not essential to the consummation of the dedication so as to cut off the owner from the power of retraction, or subject the dedicated lands to the public use, whenever, in the estimation of the local authorities, the wants or convenience of the public require it for that purpose."

#### **SIXTH GROUND OF APPEAL.**

The sixth ground of appeal is the fact that the verdict in favor of the plaintiff, for \$125.44 and costs, cannot be supported upon any view or interpretation of the evidence, and is, hence, legally incapable of sustaining the judgment entered upon it.

The only evidence relating to the question of damages appears on pages 17 and 18 of the state of the case. The plaintiffs offered to show that they had received bills for \$36.00, which was the amount alleged to



have been paid out by them for the restoration of the fence in question. Upon remark by the Court that the damages could not be shown by bills, the following answers to questions were given by the witness John Schmidt, one of the plaintiffs:

Q. "Did you pay any bills?"

A. "Yes."

Q. "To any person to restore your property?"

A. "Yes."

Q. "To whom did you pay it?"

A. "Frank Harden, one bill \$15.00, one bill \$9.35, and one \$9.20."

Q. "Have you receipts for those payments?"

A. "Yes, sir."

The Court: "What do they amount to all together, \$33.55?"

The witness: "\$33.55."

The judgment is for \$125.00 and \$70.32 costs, (case, p. 5).

There was no other evidence on the subject of damages, aside from general statements that the fence had been removed. Upon what facts the jury reached the conclusion that the plaintiffs' damages were \$125.00 does not appear. There is, we submit, not a line of evidence in the case that could, even under the most liberal interpretation, support a verdict and judgment for that amount and costs.

The plaintiff's damages in this case were the subject of exact calculation, and were dealt with by the plaintiffs' attorneys on the assumption that the three bills presented constituted the total amount of the plaintiffs' claim. Aside from the expenditures represented by these bills, there was no suggestion even of any item of damages. The difference between \$35.55, the alleged damages proven, and \$125.00, the damages given, represents, there-



fore, an amount arbitrarily assessed against the defendant without the slightest pretense of justification in the evidence. A judgment based upon such a verdict, with no facts even tending to support it, should not be allowed to stand.

While it is true that this Court will not review the findings of the lower courts upon disputed facts, or review the verdicts of juries reached upon conflicting evidence, yet this Court has unquestioned jurisdiction to reverse a judgment where there is no evidence capable of sustaining it. In the case of *Weger vs. Delran*, (61 N. J. L., 225), one of the questions was whether there was "sufficient evidence to warrant the finding that" a certain tract of ground had been dedicated to the public. The Court said:

"If any evidence was presented capable of supporting it, the finding is as unassailable on error as the verdict of a jury would be."

Again, in the case of *Bogert vs. MacChesney*, (77 N. J. L., 798), this Court said:

"It is only in those cases in which the finding of fact by the judge is without support from the proofs in the case that such finding will be reversed on error."

The verdict of the jury, in other words, as well as findings of fact by the Court, to be "unassailable on error," must be accompanied by "evidence presented capable of supporting it." There is no such evidence in the case at bar, and its absence is a defect apparent upon the record. The present case, we submit, contains no support whatever for the assessment of damages at \$125.00,



and the judgment based upon such an unauthorized verdict should be set aside.

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### REPLY TO APPELLEES' BRIEF.

Counsel for the Appellees, in part IV of their brief, assert that because the City Engineer was not acting officially when laying out French's Court, at Mr. Archer's request, his delineation of the Street upon the City Plan Book does not tend to prove an acceptance of the Street by the municipality.

This contention is not sound. It is true that the City Engineer was not acting in his official capacity while engaged in establishing the boundaries of French's Court, under Mr. Archer's direction; but when, thereafter, he placed the Street upon the City Plan Book, his act was exclusively that of an official of the City of Camden, acting in the performance of his duty. As Mr. Archer's private surveyor, Mr. Farnham had no right to make any entry of any kind whatsoever upon the records of the City; but as City Engineer, it was one of his specific duties to indicate upon the official records the streets and highways of the City. The important fact in this connection, therefore, is not that the City Engineer was acting unofficially while on the ground of French's Court, but that **he did act officially**,—and could not have acted otherwise,—when he delineated French's Court upon the City Plan Book.

Among the duties of the City Engineer are the following (case pp. 23, 72):



Section 52. "He shall keep an accurate and complete record of all the streets, avenues, roads, highways, public lanes and alleys in the said City, in a suitable book to be provided for that purpose, wherein shall be entered the true and lawful survey and description thereof, specifying in each case the date of the survey or the time when the same was duly laid out and opened according to law, etc."

In part VI of the Appellees' brief the statement is made that there was no duty resting upon Mr. Farnham, as City Engineer, to place French's Court upon the City Plan Book. This assertion is erroneous, as appears from the preceding quotation from the Camden City Ordinances.

In part VII of the Appellees' brief, the contention is made that the action of the Street Committee, Street Commissioner, and City Council, discussed on pages 8, 9, 10, 11 *supra*, do not constitute an acceptance of the locus in quo as a public highway. It will be remembered that the admitted facts in this connection are:

1. Resolution of Street Committee instructing the Street Commissioner to notify the party who erected the fence in French's Court to remove it in five days or to proceed to take it down.

2. Written and personal notices by Street Commissioner to the plaintiff to remove fence within five days in accordance with resolution.



3. Express recognition, approval, and ratification of the Street Committee's resolution by the City Council of the City of Camden.

4. The removal by the plaintiff of first fence in French's Court, in accordance with notices.

5. Prosecution of plaintiff by Street Commissioner for again maintaining a fence across the Court; and plaintiff's removal of the fence after his conviction.

These facts, it is argued, do not constitute a formal acceptance of French's Court, because, it is asserted, the fence might have been objectionable for reasons (not suggested), other than being an obstruction to a highway, and because it does not appear, so it is said, whether Schmidt erected the fence on the rear of his own land or whether he erected it at some point south thereof.

These objections, we submit, are without merit, in view of the uncontested fact that the Street Committee, Street Commissioner, and City Council, by their admitted action, clearly and unequivocally asserted control over French's Court as one of the highways of the City. Whether the fence was objectionable as an obstruction, or whether it was erected above or below a certain point are alike immaterial; the conclusive fact is that all the officers of the City of Camden, having authority over streets, including the City Council itself, treated the fence in question as **illegally located "in French's Court,"** and held it to be the right and duty of the municipal authorities to compel the removal of the fence from the dedicated land. Such action means that the City Council, the Street Committee, and the Street Commissioner regarded the rights of the public in the locus in quo as prejudiced by the **existence of the fence in French's Court at the place where the plaintiffs put it.**



This action by the proper municipal authorities, in behalf of the public, constitutes a sufficient acceptance of the locus in quo, if it had been previously dedicated. That it **had** been dedicated is one of the admitted facts in the case.

The cases of *Atlantic City vs. Groff*, *Hohokus vs. Erie R. R. Co.*, and *Atlantic City vs. Snee*, above cited, establish a doctrine which necessitates, we submit, the conclusion that the municipal authorities had, by their admitted action in the public interest, accepted the dedicated land on which the fence was erected.

In part VIII of Appellees' brief attention is called to a resolution of the City Council of the City of Camden said to have been admitted in evidence. Pages 33 and 55 of the State of the Case are mentioned as proving admission of this resolution. Reference to these pages of the record will show, however, that what was offered in evidence, and what the Court said was admitted, was not a resolution of the City Council, but a resolution of the Street Committee, adopted at its meeting of September 16, 1912. This appears beyond question from the testimony (p. 32).

Q. I call your attention to the minutes of September 1, 1912.

The Court: Minutes of Council?

The Witness: No; Street Committee.

The Court: September what, 1912?

The reference to the resolution of Council, appearing in the charge of the Court on page 65 of the record, is clearly a mistake, as appears from the testimony. The resolution to which the Court refers was not a resolution of the City



Council at all, but a resolution of the Street Committee. The result is that the resolution, printed under the eighth part of the Appellees' brief, is no part of the record, was not brought into the case, and is not before the Court.

Under point IX, counsel for the Appellees contend that the prosecution against the plaintiff by the Street Commissioner for obstructing French's Court with a fence and wagons, loses its evidential force because the proceeding was brought in the wrong court.

The fact that a technical error was made in selecting the court in which to make complaint does not at all dispose of the fact that the Street Commissioner, in the performance of his duty, distinctly asserted the rights of the public over the locus in quo by an action against the defendant for maintaining an obstruction in the highway.

One of the duties of the Street Commissioner (p. 23), is to keep the public highways free from obstructions. The intention, therefore, to regard the locus in quo as a part of a public highway is just as clearly expressed in this proceeding before a Justice of the Peace as it would have been had the proceeding been in the proper forum.

The fact that the prosecution was not renewed is at once explained by the fact that the defendant again removed the fence and wagons after his conviction (p. 31), thereby again admitting the rights of the public over the locus in quo.

The assertion made under part X of the Appellees'



brief that the cases cited on pages 10 and 12, *supra*, show a "formal action by the municipality itself" is misleading, if the intention is to distinguish those cases, in principle, from the present case. In each of the cases cited in support of the Appellant's contention, the acceptance of the dedication by the municipality rests exclusively upon the action taken by the municipal officials to assert the rights of the public over the locus in quo. The **form** of the action, we submit, is of no importance so long as it manifests the intention of the municipality to claim the benefit of the dedication for the public.

In the case of *Hohokus vs. Erie R. R. Co.* (65 N. J.L., at p. 362), it was held that the "bringing" of an action of ejectment established acceptance. It is the import of what is done that is the material point. Hence it has been held that where public officers put dedicated land in condition for travel, acceptance is established (*Lyons v. Mullen* 110 N. W., 744, Supreme Court of Nebraska; *Hruska v. Minneapolis Ry. Co.*, 119 N. W., 492, Supreme Court of Minnesota). An ordinance of Council granting to a railroad company the right to lay tracks upon dedicated ground, in consideration of a promise to pave, constitutes an acceptance (*Cincinnati Ry. Co. v. Carthage*, 36 Ohio, 634, Supreme Court of Ohio). Recognizing dedicated land as a street in official maps constitutes acceptance (*Schade v. City of Albany* 16 N. Y. S., 262; *Smith v. Narasota*, 10 S. W., 416, Supreme Court of Texas).

In the present case the street was delineated upon the official map of the City. Later, when the defendants built the fence, the Street Committee, Street Commissioner, and City Council all took action requiring, as a matter of right, that the fence be removed—and the plaintiffs com-



plied with the demand. This, we submit, is clear proof of acceptance, entirely apart from the fact that when the plaintiffs erected another fence, a prosecution followed.

We submit, therefore, that **any** official action by proper municipal officers to assert the public right over dedicated land necessarily means acceptance. When a Street Committee formally orders a Street Commissioner to direct the removal of a fence across an admittedly dedicated street, and the action of the Committee is expressly confirmed and adopted by the City Council, and the person that erected the fence removes it in compliance with the resolution, there is, we contend, positive and unmistakable acceptance of the dedication. Clearly, if the City of Camden had brought an action of ejectment against the plaintiffs, the present case would be identical with the New Jersey cases above cited, and the question of acceptance would not be open for discussion. Shall the rights of the public, then, be prejudiced because an action of ejectment was rendered **unnecessary** by reason of the plaintiffs' compliance with the demands of the City at the very outset?

Moreover, the plaintiffs are not in a position to assert any equitable or moral rights against the public or against the defendant. The plaintiffs' original deed **expressly** mentioned the twenty feet wide street at the rear of their lots. The street was adjacent to, not within, their grant. They did not get their quit-claim deed from George F. Archer until **after** the first fence had been erected and removed by them under the notices from the Street Commissioner, as required by the resolution of the Street Committee, expressly adopted and confirmed by City Council.

It is also argued under part X of Appellees' brief that the resolution of September 16, 1912, taken in



connection with the admitted acts of the Street Commissioner, Street Committee, and City Council, made the question of acceptance one for the jury. This contention is without force.

In the first place, there was no resolution of City Council relating to the acceptance of the Street in question introduced in the case. In the second place, the resolution of the Street Committee of September 16, 1912, in no way contradicts the clear facts upon which acceptance of the locus in quo is predicated. The action of the Street Committee, Street Commissioner and City Council are in no way affected by the later resolution of the Street Committee, whatever its purpose might have been. The uncontested facts of the case, in respect to the action of the Street Committee, Street Commissioner, and City Council, necessitate the conclusion that the municipal authorities in control of public streets acted on the assumption that French's Court, before the defendant removed the fence, was a part of the city street system. And the removal of the first fence by the plaintiffs in compliance with the demand of the municipal authorities is a clear admission of the rights of the city over the locus in quo.

The contention made in part XI of the Appellees' brief, that the City of Camden, under its charter, cannot accept a dedicated street by formal act otherwise than by having a map of the dedicated road or street made, is unreasonable and entirely unsupported by authority.

Under Section 84 of the Charter, the City Council may, in the exercise of its discretion, authorize the making of



maps of such roads, streets and alleys as have been dedicated to the public, and as Council shall think proper; if Council orders a map of a dedicated highway to be made and the same is approved and filed, then, under the provisions of the charter, the dedicated land becomes a public highway. But this is, we submit, only one of the means by which City Council can accept a dedication. The charter, by prescribing one method of transforming a dedication into a public highway is to be presumed to create an addition to the powers of the City in respect to highways, rather than a limitation. There is no authority whatever, we contend, for the argument that the City of Camden is precluded from asserting the acceptance of a dedicated highway in a manner similar to that illustrated in the cases of *Atlantic City v. Groff*, *Atlantic City v. Snee*, *Hohokus v. Erie*, *supra*, pp. 10, 11.

In part XIV of the Appellees' brief, counsel contend that the amount of damages awarded by the jury is proper under the evidence; but no evidence whatever supporting the verdict beyond \$33.55 and costs is cited.

The contention seems to be that the plaintiffs are entitled to damages for the disturbance of their alleged possession of the locus in quo. This argument, however, fails, because there is no evidence whatever in the case to show that the plaintiffs' possession was, **in the slightest degree**, disturbed or interrupted. The defendant knocked down the fence put up by the plaintiffs; it cost the plaintiffs \$33.55 to restore the fence. That is the whole case on the subject of damages. There is not a line of evidence to



show that the possession of the land enclosed by the fence was in any way disturbed by the defendant.

The charge of the Court, quoted by Counsel on page 10 of their brief, to the effect that the plaintiff "is entitled to whatever actual damage he sustained, but that is all I recall to be given in figures as to what actual damages there were," does not and can not serve as **evidence** of damages over and above the plaintiffs' expenses in restoring the fence. These expenditures, expressed in exact figures, constitute the only evidence of damages in the entire case.

We submit, therefore, that the evidence, in no view of the case, warrants a verdict greater than \$33.55 and costs.

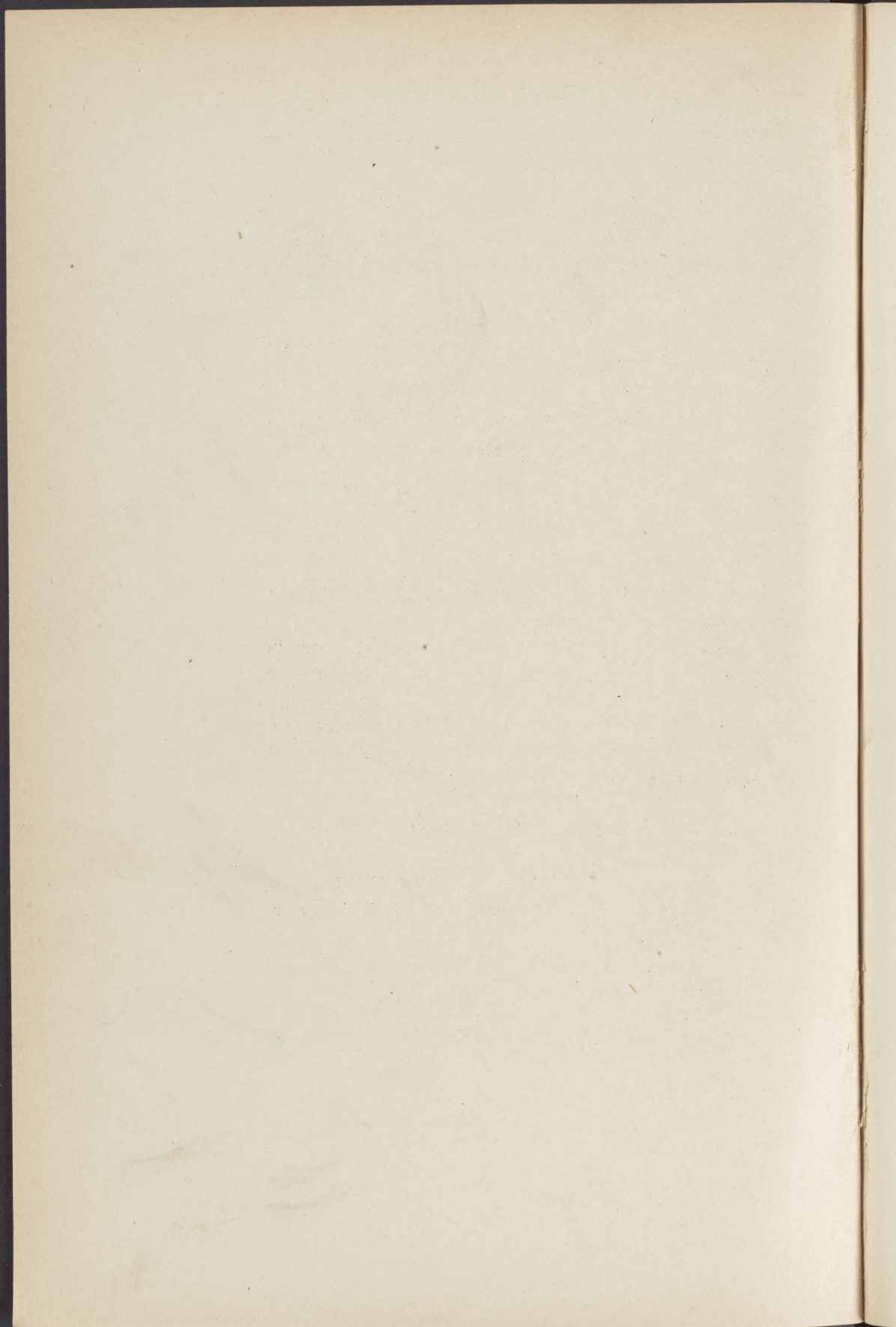
In conclusion, therefore, we contend that the judgment should be reversed because:

1. The acceptance by the municipality of the locus in quo was established by uncontested facts, opposed to which there was no evidence of non-acceptance; and,
2. Because there is nothing in the record that can, upon the most liberal interpretation, support a judgment for \$125.00 and costs.

Respectfully submitted,

BLEAKLY & STOCKWELL,  
Counsel for Plaintiff in Error.







## New Jersey Court of Errors and Appeals

JOHN N. SCHMIDT, ET UX  
*Appellees,*

VS.

GODFREY F. SPAETH,  
*Appellant.*

ON ERROR.

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### BRIEF OF APPELLEES.

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#### I.

The facts in the case are substantially set forth in the statement of the case contained in the brief of the appellant, save that we take exception to the statement on page two that Mr. Archer requested the City Engineer, as such, to set off the street, a part of which forms the *locus in quo*. While it is true that the surveyor who was employed by Archer was the city engineer, yet he acted not in his official but in his private capacity and was employed by Archer solely as a private employee (page 63).

A former trial of this case was before this Court (*Schmidt vs. Spaeth*, 82 Law 578; 83 Atl. 242) and the disposition made by this Court of the case as then under consideration, and the fact that the trial



Court in the present case requested counsel to eliminate the question of user, narrows the question down to whether there was any formal acceptance by the City of Camden of the street.

The rule laid down by the former case was as follows:

“A dedication of land for the purpose of a public highway does not *ipso facto* create such a highway. There must be not only a dedication by the owner for that purpose but an acceptance of that dedication by the public in order to create it. Such acceptance may be indicated by *formal* action on the part of the representatives of the public having authority over highways, or by *public user* of the dedicated land.”

## II.

We agree with the statement by the attorney for the appellant (page 56), that an acceptance may be expressed or implied. Regarding this in connection with the rule laid down in the former review of this case, an implied acceptance would be shown by public user, and an express acceptance by a formal act on the part of the municipal authorities. The question of user having been eliminated it therefore remains only to consider whether there has been any *formal* acceptance by the City of Camden of the dedication.

## III.

We also agree with the appellant in his statement that the first, second and fifth grounds of appeal in-



volve the same question. The appellant, however, claims that acceptance of the dedicated street was proven by ample and undisputed evidence and in support of this contention refers to, first, the city plan book; second, to the action of the street committee, street commissioner and city council; and third, to the complaint made by the street commissioner against the appellee, John N. Schmidt.

#### IV.

With reference to the delineation of the street upon the city plan book, we think that this is disposed of by the statement of the city engineer (page 63), as follows:

“Q. Were you there as a private engineer on that occasion, or a public official?

A. A private engineer.

Q. And your acts were all those of a private employee of Mr. Archer?

A. Yes.”

#### V.

The statement in the brief of the appellant that the city engineer testified that the street in question had existed for more than twenty years previous to the alleged dedication is not warranted entirely by the facts. It is true that Mr. Farnham did testify that there was formerly a court which ran north 160 feet (page 42), but this testimony is rendered ambiguous and untrustworthy by the fact that the witness contradicted his testimony as given at the former trial (pages 42 and 43).



The statement that Mr. Archer ever requested Mr. Farnham to delineate the street upon the city plan in his official capacity as city engineer is entirely without warrant. Any act done in this respect by Farnham was done without the knowledge of Mr. Archer or without any authority from the city, as is shown by the above testimony.

Further, there is no testimony in the case which shows that Mr. Farnham ever submitted the plan to any one on behalf of the city for its approval and there is no more proof in the present case than there was in the former case "that the delineation of the street therein was done under its sanction or even with its knowledge."

*Schmidt vs. Spaeth, supra.*

## VI.

There was no duty on the part of Farnham to delineate this street upon the city plan book.

The ordinance (page 72) specifies the duties of the city engineer and states that he and his assistants shall make "all maps, &c." and "shall do and perform such other surveying and engineering duties as may be required by the city council or any committee thereof." It would appear, therefore, that his acts became acts of the city only when they were done at the request of the city council or a committee thereof or under its supervision.

## VII.

The appellant next claims that the act of the street committee of the Camden city council instructing the



street commissioner "to notify the party who erected the fence in French's Court to remove it in five days," and notice by the street commissioner to John N. Schmidt, on September 24, 1909, together with the subsequent resolution of city council, constituted a *formal* acceptance of the *locus in quo* as a public highway.

We submit that these acts were no formal acceptance of the alleged dedication. The fence referred to might have been objectionable for a number of reasons other than being an obstruction to a highway. Neither is there any testimony in the case as to the location of the fence. It does not appear whether Schmidt erected the fence in question on the rear of his own land or whether he erected it at some point south thereof. Assuming, but not conceding that a street or court did exist south of Schmidt's line running into Sycamore Street, the inference would be that the fence was erected on that part of the street which was south of Schmidt's line because that was the only street of which council had any knowledge. It has never been shown that the street as delineated by Farnham on the city plan book was ever brought to the knowledge of the street committee or of city council. Therefore the action of the street committee, the street commissioner and city council wholly fails to show any *formal* acceptance of the alleged street by which it could become a public highway. Surely something further than these impromptu and perfunctory acts of various officials and bodies is required to cast upon a municipality the duty of lighting and repairing an alleyway when the person most to be benefited would be the appellant, who is also the private client of the city solicitor.



## VIII.

It is significant that after the formal trial of this case was reviewed by this court, and the requisites of an acceptance had been made clear, city council made the first formal acceptance of the street. The logical inference to be drawn from this circumstance is that the appellant's attorney, who is also the city solicitor (page 28), realizing that the prior *informal* acts which he now claims constituted a *formal* acceptance were not sufficient to give his client, Spaeth, any but precarious rights over the *locus in quo*, acted the part of a wise and prudent lawyer and procured council to formally accept the street. This resolution was admitted in evidence (pages 33, 65), but omitted from the book, so we have inserted it in our brief, as follows:

Resolved that the Committee recommend to City Council that the public street or highway known as French's Court running Northward from Sycamore Street between Broadway and Fifth street, as shown on the City plan in the City engineer's office be accepted by the City.

Mr. Haines moved that the report be received and filed, action of the committee confirmed, contracts ratified, resolutions adopted, bonds approved and dedication accepted. Motion carried 19 to 0.

The above resolution was passed September 26th, 1912, some considerable time after the institution of suit.

## IX.

With respect to the complaint of the street commissioner against the plaintiff, there is nothing to



show where the fence complained of was located. We have already discussed this point. In addition to this, the case was never prosecuted and the fine imposed by the justice of the peace was returned (page 30), and the case abandoned by the city solicitor when it was certiorated by Schmidt.

If this testimony had any evidential force it is fully dissipated by the outcome of the proceeding testified to.

## X.

The three cases cited by the appellant in his brief (appellant's brief, pages 11 and 12) upon examination will show a *formal* action by the municipality itself with respect to the matters referred to in these cases.

We further submit that the question of the acceptance was for the jury, because it might draw two different inferences from the testimony produced, *i. e.*, whether, assuming that the informal acts by the street commissioner, street committee and city council went to show any acceptance, the resolution of September 16, 1912, did not, in fact, and in the judgment of the city authorities, constitute the only *formal* acceptance of the alleged street.

## XI.

Section 84 of the Revised Charter of the City of Camden provides as follows:

That the said city council shall have power, and may from time to time, cause the said city, or such parts thereof as they may think



proper, to be surveyed and mapped, and may survey and make maps of all such roads, streets, alleys, and public passageways as have been *dedicated to the public*, as they shall think proper; and all such streets, roads, alleys and ways, when surveyed, and such surveys approved by the city council and filed, shall be deemed and taken to be public streets or highways, and be treated as such in all respects. \* \* \* \*

It would seem, therefore, that the *formal* act which is required as an acceptance of a dedicated street could only be performed by the City of Camden in the manner indicated in its charter, since the statute has prescribed the manner in which the acceptance of dedicated streets shall be made. It is admitted, however, by Farnham, that he never submitted his plan of the street to any one on behalf of the city (page 45). We do not maintain that it would be absolutely necessary for city council to meet and formally approve the surveys, but it must do some formal act as such legislative body, adopting the plan and acting with reference to it. An approval of the plan might be made by inference as well as directly, but we do maintain that none of the acts upon which the appellant relies as being a formal acceptance have that effect.

## XII.

We submit, therefore, that if the Court made any error in submitting the case to the jury, such error was committed in not directing a verdict for the appellees.



## XIII.

The third and fourth grounds of appeal deal with the admission of a quit-claim deed from the heirs of Archer to the appellees, conveying the fee of the *locus in quo*. This deed was admitted in evidence in the former suit over objection but reference was made to it in the opinion of this Court and was an element in the decision of the case, so that it is evident that this Court considered that it had been properly admitted. It was offered and admitted in the present case under the same circumstances, the purpose of the offer being not to prove that the appellees had any right to close up the street if in fact it had been accepted, but merely to show that they had acted in good faith in exercising ownership over the *locus in quo*, and further to show that if the street had not actually been accepted by the city under Archer's dedication, that they had other rights in the *locus in quo* than those of mere trespassers. If the city had actually and formally rejected the dedication, then we submit that the title acquired by this deed would have given the appellees the right to exercise dominion over the *locus in quo*. At any rate, if the question of acceptance or non-acceptance was in the case, then the deed was properly admitted, and in any event the substantial rights of the appellant were not affected by the admission of this deed.

In addition to this it was practically admitted by consent of the appellant's attorney (page 14):

"The Court: I understand the objection is that it conveys the bed of the street.

Mr. Bleakly: That is all; it does not convey a possessory right as against the bed of the street.



The Court: Yes, it would be good for that purpose, wouldn't it?

Mr. Bleakly: *I suppose so.*

The Court: I cannot refuse it if it is admissible for any purpose. \* \* \* \*

We think that this colloquy is sufficient to dispose of any objection to the admission of the deed.

#### XIV.

As to the sixth ground of appeal on the question of damages, we submit that this court is not the proper forum to test this question if it has any merit. We deny, however, that there is any merit in this contention.

The following colloquy took place between the Court and the attorney for the appellees (page 68):

"Mr. Kramer: Wouldn't your Honor charge that he would be entitled to damages for the disturbance of his possession, and so forth, if the jury should find it?

The Court: Gentlemen, that is only evidence from which you can infer what the damage was. He is entitled to whatever actual damage he sustained but that is all I recall as being given in figures as to what actual damages there were."

Under this ruling the jury might assess such damages in addition to actual damages as the appellants suffered by reason of the disturbance of his possession. If they had the right to assess the damages to the possession at six cents, then the appellant cannot complain in this court that the damages are



excessive. If there was any evidence whatever from which the jury would find *any* damages above the actual expenditures, then a finding of such damages even though excessive will not be disturbed on a strict appeal.

## XV.

We therefore submit that there was no error in the proceedings at the trial and that the judgment should be affirmed.

STACKHOUSE AND KRAMER,  
*Attorneys for Appellees.*



The first of these is the fact that the  
 system is not a simple one, and that it  
 is not a simple one, and that it is not a  
 simple one, and that it is not a simple one.

The second of these is the fact that the  
 system is not a simple one, and that it  
 is not a simple one, and that it is not a  
 simple one, and that it is not a simple one.