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NEW-JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH SMITH *ads.* THE STATE,	*On Indictment.*

STATE OF THE CASE.

Be it remembered, that at the term of September, A. D. 1849, of the Court of Oyer and Terminer and General Jail Delivery of the county of Passaic, an indictment for a nuisance was found against Joseph Smith, the defendant, by the grand jury of said county (*pro ut* the same); and the said defendant, being arraigned before the court upon the said indictment, and the same being read to him, pleaded thereto not guilty (*pro ut* the said plea); and thereupon afterwards, *to wit*, at a Court of Oyer and Terminer, held on the fourteenth day of June, in the year eighteen hundred and fifty, at Paterson, in said county, before Henry W. Green, esquire, chief justice of the Supreme Court of the state of New Jersey, and Cornelius G. Van Riper and David Burnett, esquires, and others, their fellow justices of the said Court of Oyer and Terminer, the said indictment upon the said plea of the said defendant caused to be tried by a jury of the said county of Passaic, for that purpose duly empannelled.

And the state of New Jersey, to maintain the charge in the said indictment, gave in evidence as follows:

EVIDENCE OF THE STATE.

Andrew Parsons, being sworn, testified—I know the property in question, and have been acquainted with it since April, 1815, or thirty five years ago, at which time I became a permanent resident of Paterson. I have measured the lots where the defendant's building has been erected; my first purchase there was in 1820, of John Winans, of New York, of the south lot, being forty feet front on Main street, by one hundred feet deep. I had been agent of John Winans for the property before the purchase. This lot commenced one hundred and fifty-five feet from the corner of Main street and Broadway, the south of the lot being one hundred and ninety-five feet from the corner. In 1815, the Winans lot had two two story buildings on it. The next lot north of it was fifty-five feet

front on Main street, and had a barn upon it, and, with the corner lot, fifty feet by one hundred feet, then belonged to Simeon Van Houten. At this time there was an old building on the south side of the corner lot, which I understood had been occupied as a tavern; and on the north line of the corner lot there was a picket fence, which then stood exactly where the north line of the old store was before the defendant built there. The south line of the corner lot was then on a range with the rear of the lots east of it fronting on Broadway, and which lots were one hundred feet deep. The picket
10 fence on the north side of the corner lot stood in a line with the fronts of the lots on Broadway; on the north of that picket fence it was used as a public highway; it was so used up to the picket fence as highways in a town are always used. That fence was then an old one, about five feet high, I think; it was nearly worn out, at any rate it had been there several years. Garrabrant Van Houten took down that picket fence, and moved an old building from across the river upon the corner lot, and put the north side of it on the line where the fence stood. Garrabrant Van Houten owned the lot then. The same building remained there, as a store,
20 until the fire in 1848. When Van Houten put up the store, there was a building on the next lot east on Broadway, then owned by William Berry; that building joined the eastern line of the corner lot. The front of Berry's building was exactly on a line with the Van Houten store, kept by Henry Van Geison at the time of the fire, and on a line with the picket fence, and also on a range with the buildings east of it, to St. John's Hall. I think the north front of Van Geison's store was the same exactly as the front of the Berry house. I don't remember when the old Berry house was altered, nor what was done to it, but the front remained the same.
30 I know that the Berry house was on a line with the picket fence, because the corner store was put on the line of that fence, and the store was on a line with the old Berry house and with all the buildings to St. John's Hall. While I owned the corner lot, I never occupied or claimed farther than the line of the picket fence. I owned it for fourteen years. I owned the Winans lot over fifteen years; I sold in December, 1835.

Witness proves the deed from John Winans and wife to Andrew Parsons, dated 17th May, 1820, being for lot. Also, the deed from Garrabrant Van Houten and wife to Andrew Parsons, dated 5th
40 March, 1821, for two lots.

Witness continues, and says—that the Broadway lots, to St.

John's Hall, bounded on the north line of the fifty-five feet lot, and were divided from it by a straight line. John Brown now owns the Berry lot, a part of the present fences now stand on the same line; a part of the rear fence of the Broadway lot, near St. John's Hall lot, is now the same as it formerly was; that fence is now one hundred feet from Broadway, and one inch over; I measured the distance this morning. While I owned the fifty-five feet lot, I never altered the north line, and at that time the lots fronting on Broadway were sold by different persons. I never knew any owner of the corner lot occupy or claim where the defendant now claims, or 10 beyond the line of the picket fence. I sold all these lots, as I held them, to Messrs. Pennington, Ogden, and others. The houses on Broadway, between the corner lot and St. John's Hall, have been exactly where they now are for thirty-five years past. The turnpike to Aquackanonk, now Main street, was opened before I came here. The south line of the Winans lot was the same as the present south line of the Dr. Magee house; I can identify it now. I built the Craig tavern on the fifty-five feet lot, the north of which came up to the Peter Wilson house, which had been added to by Simeon Van Houten. The tavern was forty feet front, leaving an 20 alley way of about fifteen feet. The north side of that tavern was exactly in a line with the rear of the Broadway lots. I have lately measured from the south corner of the Winans lot to the corner of defendant's, on Broadway, and it is about two hundred feet, which is five feet longer than formerly. I found the east corner of defendant's store, on Broadway, to be four feet and four inches farther out than the same corner of Van Geison's store. I also measured the one hundred feet on the rear line to Broadway, which is the line to John Brown's lot. I have never known any of the owners between the corners and St. John's Hall occupy or claim be- 30 yond the line of the houses on Broadway. I bought St. John's Hall about the same time that I bought the other lots, and my attention was called to the line of the lots on Broadway. The St. John's Hall was held by the masonic lodge, of which I was an officer. There are one hundred and sixty feet from the defendant's lot to St. John's Hall.

Being cross-examined, says—I have now lived in Paterson for eighteen years past, and I own no property in that part of the town. There are no old landmarks about the property; they were all burnt down in 1848. While I owned the corner property, I claim- 40 ed to bind on Broadway, wherever it was. I don't recollect

whether there was a gate in the picket fence on corner lot at that time; there was no regular sidewalk or curb in Broadway; opposite the picket fence was an old store house, on north side of Broadway with a yard in front of it, where Brant Van Blarcom has built his brick store within about fifteen years. St. John's Hall was built in 1820; the front of it does not range with the front of the Berry house, it is farther in Broadway. I don't think the houses east of St. John's Hall ranged in front with the house west of it. I had no interest in the corner lot when the old store was put on it, nor was my attention especially directed to the fact of the store being placed on the same line with the fence. I think I placed a stoop of four or five feet wide along the whole of the store on Broadway, and a door on Broadway, and one on Main street; at first that stoop was three steps above the ground; there was a stoop with two or three steps and a portico to the Berry house. I and my tenants occupied by the stoop the same as other persons in Paterson put their stoops in the street; but I never claimed that part, it was part of the public road. I always knew that Broadway was a road laid out by surveyors. While I owned the property, I never had occasion, or any call, for claiming or not claiming beyond the old store on Broadway. I never heard of any contention in Broadway, except on the other side of Main street; I never lived on any part of the property, nor possessed it, except through tenants; nor have any of the owners possessed it, except by tenants, until Ogden, Pennington, and Wallace's representatives sold out. The fence on Berry's lot was on a line with the front of Berry's house; I think it was so.

Aaron S. Pennington, a witness produced on the part of the state, being duly sworn, on his oath, saith—I was part owner of the property at the corner of Broadway and Main streets, in the town of Paterson, being the same lots owned by Andrew Parsons.

Witness proved the deed from Andrew Parsons and wife to Aaron S. Pennington, dated 14th December, 1835, for lot.

When we bought, there was a building at the corner, which was used as a store, and continued there until the fire in October, 1848, when it was burned down. We owned the corner until it was sold to defendant, the 5th of May, 1849. After the fire, there was a partition made of the property, by order of the chancellor; the corner was set off to Laura Collet, daughter of Mark W. Collet, for whom Dr. Marsh was trustee. I was executor of Mrs. Wallace's will, and I, as executor, or Dr. Marsh, as trustee, had charge of

the corner lot after the partition until it was sold to defendant. While we had the property, we kept the corner building precisely as it was when we bought it. I know that James W. King had advanced his line five, six, or seven feet into Broadway, beyond our line at the corner. King's corner is on the west side of Broadway. We had our lots measured for the purpose of making the partition. By that measurement, beginning in Main street at our south corner, the length of our front on Main street was a little over 195 feet to the corner of the buildings which had been at the corner. Before the partition, we had sold off forty feet at the south end, on 10 Main street, to Dr. Magee. Besides this forty feet, we had a foot or more over 155 feet from the north line of Magee's lot to the corner of the old store. We did not measure beyond the point of the old store at the corner. While we owned the property, it was used as a public street beyond the store in Broadway; we considered it the street to the side of our house. We knew of the dispute as to that line, but we had our land, and made no investigation, and we never took any steps to extend the building farther into Broadway, although we knew that there was a question there about the line. The property at the corner was sold at public sale, 20 having been advertised. The measurement from the corner of the old store, at the corner of Broadway and Main streets, to the north line of the Winans lot, which had been sold to Dr. Magee, is 156½ feet. I never knew where that line of Broadway was; we never shifted our line in Broadway. Questioned. I always understood the line to be uniform on both sides of Main street, and it can't be right on both sides as it is. We would have taken this four feet, if we could have been satisfied that we had a title to it; it was worth too much to let go; it would have been worth some $600 more. 30

Cornelius H. Post, being sworn, testifies—That he lived in Paterson since 1814. I remember where the old building was put, on the corner of Broadway and Main streets, by Judge Van Houten; as near as I can recollect, the building was put on the same line on which the fence stood before. I am satisfied that the fence stood on a line with the front of the Berry house; I know the store was put on a line with the front of the Berry house. Cornelius Earl dug a cellar for the corner building. In 1814, and before, there were only two houses between the corner and the tavern of Van Blarcom at Congress street, on the east of Main street; at that time the Mitchell 40

houses, next west of St. John's Hall, were there; as near as I can recollect, that picket fence ranged in a line with the front of the Berry house; it was then used as a street to the houses there, along Broadway, from the time I can recollect until the fire in October, 1848. The part where the defendant is said to be beyond the line was used as a road.

Being cross-examined, says—I was then twenty-two or twenty-three years old; I will be fifty years of age the 24th of next June. I believe the fence extended a little way along Main street, from
10 the corner, and that there was a fence running from Van Houten's house to the present Congress Hall, at the south corner of the second block above. While the defendant was building his house, I told him that, if Broadway was straight, he was right, as his house seemed to me to be in the line of the houses some distance beyond.

John Brown, being sworn, testifies—I recollect the property since 1822. I have owned the Berry lots for nineteen years, and own them now; my lots extend one hundred feet from the line of Broadway. When I bought them, there was a range of fences in the rear, from Main street buildings to the St. John's Hall lot; and part of
20 the old fence of that range is still standing on the lot next east of mine, now owned by Mr. Kohler. It is one hundred feet from that fence to Broadway; I have measured it. When I bought the Berry lots, there were two old houses on them. I built on the top of the old house up Broadway, but the front was not changed. I remember William Berry.

State offers in evidence the deed from Jacob K. Mead, sheriff, to John Brown, dated June 2d, 1831.

The store on the corner lot was put up to the Berry house, and in a line with the front of it. When I came to Paterson, Broad-
30 way was built up from the corner of Main street to St. John's Hall, except on my eastern lot, and they all stood in the same places until the fire of 1848; and the road was always used by the public up to the fronts of the houses. The fronts of my present new stores are at the same line, on Broadway, with the front of the old buildings.

Being cross-examined, saith—Mr. Kohler built on his lot before the fire, and his front extended farther north than my old store. There was always a stoop of three or four feet wide in front of my store, and one step high, which was kept in order by me, the public did not use, except to go in and out of the place.

Cornelius S. Van Wagoner, being sworn, testifies—I have measured the front of the different lots on Main street formerly occupied by Mr. Pennington and others; Andrew Parsons was with me, and showed me the point where to measure from at the south line of the whole property, being the south line of Dr. Magee's lot. It was 200 feet 7 inches from that point to the corner of defendant's house; I measured it before Magee's house was built, and the old foundations were gone. From the old fence, in the rear to the front of Kohler's house in Broadway, it measured 100 feet. Joseph Jackson held one end of the tape line in measuring it. I made the map, 10 now shown, of the different lots, the description of which, I think, was taken from the abstracts of the deeds. Said map is offered in evidence *(pro ut* the same). The defendant's front, on Main street, is twenty-five feet and six inches; I measured it lately. Said map is offered in evidence *(pro ut* the same).

Brown King, being sworn, testifies—I have known the premises in question a little over fifty years. When I first knew the corner lot, there was a two story building on it, erected by Dr. Wilson, on Main street, but it did not extend to the corner lot on Broadway. There was a riband fence at the corner, or board strips nailed on 20 horizontally; there was then no house on the Berry lots. I recollect when the house was built on the Berry lot; it was built in 1804, or a year or two earlier; the front of the house was built on a line with the riband fence. The Berry house had been so altered before the fire of 1848, that I did not know it; I never knew of it having been altered up to the time when John Brown bought it. I do not know whether the same fence continued at the corner until Judge Van Houten put the store there; it was used as a public highway up to the fence, and beyond the fence, easterly, it was so used up to the range of the buildings. 30

Being cross-examined, testifies—There were only two houses on the south side of Broadway when I first knew it; one, the parsonage, or the old yellow Godwin tavern, on the east of St. John's Hall; the other was the Mitchell house, west of the hall. The other building on the south side of Broadway appeared to be built so as to range with those houses. I think those houses on south side of Broadway all had stoops in front of them with two or three steps. It was never used as a public highway up to the houses, but only to the front of those steps. There was not much regularity in the houses at that time. Never knew that it was usual to set houses 40

back from street for stoops; the road was open to the front of their houses.

Joseph Gledhill, being sworn, testified—I have lived in Paterson thirty-one years, and have known the corner lot during that time. When I came here there was a picket fence at the corner of Broadway and Main streets, and a house of Simeon Van Houten at the south side of the lot. There was, at that time, a small building on the Berry lot, in which Mr. Berry had a barber shop; that same building continued there until John Brown bought the lot. The
10 fence at the corner did not stand farther out than Berry's house, unless it might have been a few inches; I never had occasion to observe it particularly. There was then an old building, where Dr. Magee's house is now, in Broadway, and also the house next east of it, then belonging to Edward Mitchell, now owned by Judge Whitly; at that time those houses all ranged at the fronts. I presume Dr. Magee built the front of his present house on the same lines as the front of the old house; to all appearance it is on the same line. The first building put at the corner was the old building moved there by Judge Van Houten, and which continued there
20 until the fire in 1848. I presume that building was put on the same line where the picket fence stood, as it ranged with the other buildings east of it. If the fence had stood out to where the defendant's house now extends, I would, doubtless, have noticed and remembered the fact. It was used as a public walk up to the fence, and so continued up to that time, until the defendant erected his house. I never saw any thing to obstruct the passage up to that time.

Being cross-examined, says—I was not present at the lot when Judge Van Houten moved the old building to the corner. My attention has never been particularly called to the corner, until since
30 the fire in 1848. When I first knew the place, the store house on the north side of Broadway, and opposite to the defendant's, was farther back from Broadway, and so was the front yard fence, than the front brick buildings of Brant Van Blarcom, on the same lot. The range of the old buildings, on the south side of Broadway from that corner of Main street, if continued, would cross Broadway near Judge Dickerson's. The old fence was of pickets upright.

Peter Archdeacon, sworn, testifies—I have lived in Paterson over thirty years, and have known the lot in question during that

time; there was no building on it, but a garden fence at the corner, when I first knew it. The first building put there was an old barn, moved on it by Judge Van Houten; the same one stood there until the fire of 1848; it had once been partially burned before. Broadway was always open to the buildings. I think Berry's house stood east of the corner. I was overseer of the roads of Paterson township in 1832. We considered that we had a right to work the road up to those buildings. At the corner, and also at Berry's house, the street was open to travel up to the sides of the buildings. We worked the road up to the sides of the building, 10 when the road was up to the buildings, when the people did not do it themselves.

John Garrison, being sworn, testifies—In 1818, I bought the lot now owned by Mr. Kohler. At that time there was a small house on it, which stood about twenty feet back from the street, and back from the front of Kohler's house. The lot had no fence on Broadway; I put up a fence immediately after I bought it, in a line with the front of Berry's house, west end of Mitchell's house; I put it there, because I calculated that there was the two lines of the street. I remember when Judge Van Houten put the building on 20 the corner lot; we placed it in a line with the other buildings and my fence. The road of Broadway was then open up to that line; there was no obstruction, that I knew of. I believe my lot was 100 feet by 25 feet; I bought it of William Berry, and got the deed from Van Geison.

Proves the deed from Cornelius Van Gieson, Adrian Van Geison and wife to John Garrison, jun., dated 24th February, 1818, which is offered in evidence *(pro ut* the same.)

I never measured my lot to see if I had 100 feet deep enclosed. There was a long lot of Simeon Van Houten, extending along the 30 rear of my lot; there was a fence there then, and Mr. Parsons put up a secure fence along that line. Dr. Magee afterwards removed that fence, and I think all were put in the same place; all lots on Broadway butted in the rear on that fence.

Being cross-examined, saith—My lot extended to the line of Broadway.

Joseph Jackson, being duly affirmed, saith—In 1824, I was in Paterson for two or three months, and came to live here in 1827. I now keep the store on the east Berry lot, being the second store

east of the defendant's. In 1824, the old store was on the corner lot. In 1828–9, John Brown raised the Berry house; the foundation part always remained the same. The buildings from that corner, up to the corner of Church street, on Broadway, all ranged with the old buildings at the corner; the street always came up to those buildings. I don't believe there were any stoops or platforms to the buildings in Broadway from the corner of Main street to St. John's Hall. The remains of old fences are still at the rear of the Broadway lots; the rear fence on Garrison's lot is now the same that
10 stood before the fire in 1848, and is one hundred feet from the front of the houses on Broadway; that fence was there in 1827, when I lived a year with John Brown on the present Dr. Magee lot.

Being cross-examined, says—I took sight along the fronts of the old buildings, and they all ranged, from Main to Church street, along Broadway. The old fence that was burned stood in the same place with the present new fence on the rear of John Brown's lot; my attention was never called to it particularly before the fire. While Judge Whitly lived in the Mitchell house, he kept store there, and had his scales and weights in front of it, with a shed over
20 them; that was outside of the front of the Mitchell house.

The state offers in evidence the following deed, from Aaron S. Pennington, executor, and Elias J. Marsh, trustee, of Rachel B. Wallace, deceased, to Joseph Smith, dated May 5th, 1849, for lot. Also, deed from Peter Van Houten and wife to Garrabrant Van Houten, dated April 4, 1820, for two lots.

Also, a certified copy of deed from Peter Wilson and wife to Simeon Van Houten, dated May 1, 1807, for corner lot.

Edo Van Winkle, being sworn, testifies—I now live in Broadway, on the north side above Judge Dickerson's, where I have lived
30 since 1808 or 1809; before that time I lived on the north side of Broadway, opposite the defendant's present corner. I knew the corner lot before Berry's house was built; that house was built over forty years ago. I believe the picket fence was not on the corner before Berry's house was built at the corner; the lots were in commons before the picket fence was put up; the fences there were at that time generally gone. I think the corner was in commons before Peter Wilson bought it; I remember the picket fence, it was there while Wilson owned the lot; it stood pretty much in a line with the Berry house. The Mitchell house was there then, and the same
40 house is there now; I think part of it was built before the Berry

house, after those houses were built; the street has always been open to those houses and the fence. There was a walk there, but no sidewalk was made; people walked along there; the whole street was a path. I believe Abraham Van Houten first owned from Main street up to St. John's Hall lot in Broadway, and he sold the Mitchell lot first. He sold the whole in lots; I never saw a map of it. It was said that he sold to Simeon Van Houten 55 feet on Main street, south of the Wilson lot.

Henry Whitly, sworn, testifies—I came to Paterson in 1822, since which time I have known the corner lot. I moved upon the Mitchell 10 lots in 1825, and have been in possession of them ever since. When I moved there, the front of the house was the same as it is now. There was at that time houses from the Mitchell house to the corner, and I think the fronts were in a range with each other. At that time we considered that the street extended to the fronts of the houses, with the exception of the steps, and so it has continued to the time that the defendant built at the corner. My deed gives 100 feet in depth. There was a fence in the rear of my lot when I came there; that fence was burned down, and Dr. Magee rebuilt it, and enclosed two feet on my lot, and I consider that I lost two 20 feet. Then Dr. Magee put up the fence 100 feet south of the front of my house.

EVIDENCE OF THE DEFENDANT.

Cornelius S. Van Wagoner, being recalled, testifies—I am a practical surveyor; I have surveyed Broadway three times, the first in 1836, second in 1837, and third in 1850. I have drawn a map of the street; said map is offered in evidence on the part of the defendant (*pro ut* the same). I have known the corner in question since June, 1835. I surveyed the defendant's lot for him, before he built his house; I located his lot for him before he built. 30

The defendant offers in evidence certified copy of the return of surveyors of the highways of the county of Essex of the laying out of old York road, 22d December, 1761, (*pro ut* the same).

Before making the survey by the return, as the two first courses were indefinite, I made inquiry to ascertain what were the reputed points of Broadway. I ascertained these points, as such, from Judge Dickerson; one was, that most westerly end of the Wallace house, on the south side thereof, was the south line of Broadway; another, that the front of the Godwin house was four feet southerly from the

south line of Broadway, and that the Ellison house, opposite to it, was on the north line; and the third was, that the front of Edo Van Winkle's house was on the north line of Broadway. Those are old houses, and have always been reputed to be the true line of Broadway. These are the only points that have been designated as such, to my knowledge, except that I have heard of a hickory tree spoken of, that formerly stood opposite Judge Dickerson's. I began at a point thirty-three feet north of Wallace house, and ran to a point thirty-three feet south of Edo Van Winkle's house; according to my survey, it is thirty-three feet and two inches from the front of the Ellison house to the centre line of Broadway, as run by me, and thirty-six feet ten inches from the front of the Godwin house, opposite to such centre line. When I was a lad, the Godwin house was kept as a tavern. I have taken a great deal of pains to get the true lines of the said street. The points I have mentioned are the reputed boundaries of Broadway, and the only ones I have ever known of. According to my survey, the house of Samuel A. Van Saun, at the corner of Church street, is four inches on Broadway, and from that corner, westerly, to near St. John's Hall, the fronts of the houses and the enclosures are very nearly on the line of the street, according to the survey. The true course run by us, at this time, is S. 81° 45′ E.; the variation of the compass is reckoned 3′ a year. If the southerly line of Broadway, as it was before the fire, from the corner of Main street to St. John's Hall, should be continued in a straight line easterly, it would strike nearly the middle of the street, in the neighborhood of Judge Dickerson's. The dotted lines on the map, at the sides of the street, represent the location of the fences opposite to the defendant's corner; the red line marks the front of Brant Van Blarcom's brick buildings. Several years ago I surveyed Park property, on north side of Broadway, which survey called for the middle of old York road, and that survey brought the same within six inches of my present location of the centre of Broadway. The courses called for in that survey, and the location of the second lot, led me to believe that the old landmarks of Broadway, as reputed, are correct. Garret Van Duien and myself surveyed Broadway, in 1837, and with great accuracy.

The defendant offers map of Broadway, as made by the witness, which is received in evidence *(pro ut* the same).

Being cross-examined, says—I never began the survey of the old York road from the beginning, as mentioned in the return. The marks there called for are gone, and so is the mill; the bridge is

gone, the line of Helmagh Van Houten is gone. By taking the south Wallace house, the front of the Godwin house, and a point four feet six inches in front of Edo Van Winkle's house, as the true points of Broadway, would take the defendant's three feet and six inches on the street. The range of the fences would carry the line about one foot south of the line, as we made it, at the defendant's corner. My two surveys made about two inches difference at the Godwin house: my first, I made with a circumferenter, the last, with a telescope, and by which, from the lower end of Broadway, I could see a narrow pole placed on the hill at Judge Dickerson's. 10 I got my information, as to the reputed points of Broadway, in the main, from Judge Dickerson. I don't recollect of any person in Paterson ever claiming the true lines of Broadway, as contended for by the prosecutors in this case. I have never understood the line of the old houses, from defendant's present corner to St. John's Hall, to be the proper line of Broadway. The curb stone was laid, by the town committee, in front of those houses before the fire. There were no fences or enclosures, except stoops in front of the houses between the corner and St. John's Hall, until the defendant built. 20

Philemon Dickerson, sworn, testifies—I came to reside in Paterson in 1818, at which time there was no straight line on the south side of Broadway from Main to Church streets. The houses then on that line were the Berry house, the Mitchell house, Godwin house, and one other, to the brook beyond Church street. On the north side was the old store house at corner of Parke street, next the Ellison house, opposite the Godwin house a large house of King's, Billings' house, and Winters' hat shop, to the brook. The Godwin house and Ellison house, opposite to each other, are still standing. I commenced practising law here, and I recollect that 30 Justice Kinsey held his courts up stairs in the Godwin house, then kept as a tavern. There was a piazza in front of it, projecting four or five feet from the house, with a roof to it and columns. I bought property in Broadway soon after I came here, and a controversy very soon arose about some of the lines on that street; and I inquired from the old people then living here, most of whom are now dead, about the lines. I tried to ascertain which were the first houses built on the street. I learned that the landmarks of Broadway were reputed to be the same as I gave them to Van Wagoner,

except that the Wallace house I referred to was the one on the north side of Broadway. I know when a hickory tree stood opposite my house, some distance south of the present corner, which corner was put out by Henry Doremus several feet beyond the hickory tree. Van Wagoner's survey makes the north line of Broadway about fifteen inches north of the west corner of my fence, but it strikes the east corner of my fence on Broadway; that corner has been there twelve or fifteen years. When I got the property, the front fence stood four or five feet farther out than the present one. The first survey made was by Mr. Freeman.

Being cross-examined, says—My information was, that the houses spoken of as the marks of Broadway had been built on the line of the street, and that the south Wallace house was built afterwards. When I came here, the houses then standing between the corner lot at Main street and St. John's Hall were the same, or nearly so, as they stand at present. I had my office in the Berry house; this house stood on the street. The corner lot had a paling fence, which was on a line with the front of the Berry and Mitchell houses, which was also on the same line. The store was put up on the corner lot on the old line. Before the store was put there, the public street was open, and used to the fence and the fronts of the houses beyond. I never heard any question about that being the line of the street, until Mr. King built on the opposite corner, which he did, as I should suppose, not twenty years ago. There was a lawsuit and trial about it, and it remained in the same position until the fire of 1848, when it was burned down. I think Mr. King's house was on the same line in Broadway with the defendant's house east of Main street. When I first came here there was no house at King's corner. I drew the deed for the lot to King, and he put the first house there. I think that I was present at Van Wagoner's first survey. When I first came here the south Wallace house appeared not so old as the north Wallace house.

Aaron S. Pennington, recalled by defendant, testifies—The word "about", in the description of the deed to defendant, was put in because of the doubt as to how far the lines extended. It was also in the conditions of sale.

Being cross-examined, saith—The doubt was not as to the number of feet, but as to the line of the street. We did not give a warrantee deed.

Garret Van Dien, being sworn, testifies—I have been a land surveyor thirty-five to forty years. I surveyed Broadway, in Paterson, first in 1836 or 1837, with C. S. Van Wagoner, to find the true lines of the street. We commenced at the south Wallace house, as one of the points. We took the front of the Ellison house, and measured the width of old York road, opposite it; and at that point the overseer dug down, and found an old post in the ground, which was four feet from the front of the Godwin house. This house then had no piazza to it. The overseer of the roads and some of the town committee of Paterson were with us. We surveyed it again 10 on the 3d June, instant, according to the same landmarks, and by it the defendant's building stands thirty-four feet south of the centre line of Broadway; at this time we measured two inches farther south at the Godwin house than at first survey, which might make the line two inches farther south, as now fixed by us at the defendant's corner, than at the first survey. The variations in the courses between old and late surveys cannot be found from the descriptions of old deeds. We seldom find the variation given in old deeds, except in proprietors' deeds.

Being cross-examined, saith—I know the Edo Van Winkle 20 house, as the Paw Rutan tavern; it was an old building when I first knew it. Esquire Smith and Esquire King were with us at our first survey; we were employed by Helmagh Van Houten, then the overseer of the highways. We allowed for variation three minutes to the year; before 1796, the variation was to the east, since that to the west. If we can get one line in an old survey correctly located we can obtain the variation, and survey the whole correctly.

In answer to the court, he saith—I understood that our first survey of Broadway was at the direction of the town committee of Paterson, and they paid us for it. We then made the points of 30 Broadway as being the front of the south Wallace house, the front of the Ellison house four feet in front of the Godwin house opposite, and a mark on the fence at Judge Dickerson's, a little north of the corner; and we made the survey to ascertain and settle the correct lines of the street.

John H. Geotschius, being sworn, testifies—I am twenty years old; my father resided in Paterson, since twenty-five years ago, until his death, about three years ago, and during that time taught school and followed surveying. For many years I assisted him, and for some years before his death I attended to his surveying for 40

him. I have continued surveying since his death. I have once surveyed the old York road property; I had the return, or an abstract of it. I took the points that my father and many other persons have told me were the landmarks of the road; one was the front of the old Ellison house, on north side of the street. I measured off sixty-six feet from it for the middle of the street, and this brought me to within three feet eleven and a half inches of the front of the Godwin house. Another point I took was the south Wallace house; it stands diagonally about two or three inches, and I measured from
10 about the centre sixty-six feet, which brought me to within ten inches of the front of the engine house opposite. I took the range of the north Wallace house, and found it about thirteen inches on the street. I ran the line by the south Wallace house and the Ellison house to Church street, and found the houses there about on the same line of Broadway. I made this survey for the defendant before he began the walls of his house. I gave the defendant, at his line at the corner of Main street, thirty-three feet three inches from the centre line of Broadway, so that he would be three inches from the line of the street. There is no line there from which the correct
20 variation of the needle from the old surveys can be obtained. The variation of the compass is not regular; it is different in different places; the variation usually allowed is three minutes per year; the variation is not always at the same rate, some years it is one minute, and in some years four minutes. I have always heard every one who spoke of it say that the south Wallace house was the mark of Broadway.

Being cross-examined, saith—It is an admitted fact, that the variation of the needle is not the same in different years. The variation from an old survey cannot be obtained, unless you can get one
30 line as actually located, and then the course taken by putting the compass exactly where it was placed upon the old survey. If that can be done, and both surveys correctly made, the exact variation may be obtained for any number of years. The barns east of the south Wallace house, on the south side of Broadway, are farther into the street than that house. James W. King's house is eight inches farther in Broadway than the defendant's. I have taken a range from the mountain opposite the west end of Broadway, and found that the defendant's house ranges with Van Saun's house, at the corner of Church street, and with Van Houten's, farther east.

40 *Daniel Barkalow*, being sworn, testifies—I came to Paterson

twenty years ago. I was township attorney and counsel of the township when Van Wagoner and Van Dien surveyed Broadway. I was directed by the town committee of Paterson to take steps for ascertaining the lines of Broadway. Brant Van Blarcom and I went to Newark, and got the returns of the old York road. I was with Van Wagoner and Van Dien at their survey of Broadway; I had taken pains to ascertain what were the old landmarks of that street, and learned that these were, the front of the south Wallace house, the weather boarding of the Ellison house, and, opposite to that, the front of the piazza of the Godwin house, and the front of 10 the Edo Van Winkle house, formerly known as the Paw Rutan tavern. We took those points as the landmarks, and I have never heard of any dispute as to those being the lines of said street. I joined Van Wagoner and Van Dien in their survey at Main street, and went with them the rest of the way. At the Ellison house, the sixty-six feet was measured across from it, and at the end of that distance some person dug beneath the surface, and found the remains of a post of the piazza in front of the Godwin house. Between those points the street had its full width. At that time the line of the street at the defendant's corner was, and before that 20 time had been, uncertain. The old store was there then, with its gable end on Main street, and the width of Broadway was outside the platform stoops of the store. I think the line of the defendant's house on Broadway nearly corresponds with the outside of the old stoop. Within a few years past, the town authorities of Paterson have had Broadway graded. On the lot next east of the Godwin house, the walk was cut down about four feet; but the bank was left as before for about four feet from the fence, which is in a line with the front of the Godwin house. In front of Mrs. Van Saun's house, farther east, it was left in the same way, which now has a 30 stone wall in front of it, and so in the same way in front of the houses to Church street. I was present at the survey, by Van Wagoner, of the Parke lot, probably after the survey of Broadway; John Parke, the former owner, pointed out the old post, at the northwest corner of his lot, as being an old established corner. The stores of Brant Van Blarcom were then up opposite to the defendant's present corner. The old store house and old store of Van Blarcom had been much farther north than the fronts of his present stores; those stores have always been reputed to be over the lines of the street some five or six feet. What gave rise to the inquiry and survey of 40 Broadway was, that the overseer of the roads had been notified,

according to law, to remove obstructions caused by the market people standing on the streets and on the sidewalks; and one or two suits had been commenced against the overseers, and they wanted to ascertain the location of the street, so as to know from what part of it they could be removed. After the survey, the authorities did not undertake to interfere with persons standing with their goods on the platform stoop of the Van Geison store in Broadway. The attorney of the township is appointed by the town committee.

10 Being cross-examined, saith—The defendant consulted with me about his line before he put up his present buildings. I told him what I was satisfied was the true line of Broadway at his lot, which line was at the edge or outside of the old stoop, and where he would have a right to go; but I told him that I could not advise him, as counsel, that it was expedient for him to build up to that line. My advice about the true line was based principally upon the survey that had been made, as above stated. I think Judge Dickerson was present at our survey of the street. My information was, that the south Wallace house was a landmark. The first house of James
20 W. King was erected, and the litigation about it was over before I came to Paterson. When I first came here the old store on the defendant's corner had a stoop and platform, with two steps all around it.

Henry Van Houten, being sworn, testifies—I was brought up in Broadway, and am son of Helmagh Van Houten. I recollect, as long as thirteen to fifteen years ago, what are the reputed landmarks; I have always heard that they were the south Wallace house next the Dr. Ellison house, and the house opposite to it, and farther east a well on the Van Winkle property next east of Judge
30 Dickerson's. I have seen Jacob Geotschius survey it. He started at the south Wallace street, took sixty-six feet for the width of the street; he measured it at James W. King's corner, and made his house nine inches on the street. When my father was overseer of roads, he and I were working Straight street at the corner of Broadway, and in ploughing we struck against a stump, which was in the south line of Broadway, as surveyed by Geotschius; that was a little south of the corner of Graham's present fence, and on a line with our fence west of Straight street. Jacob Geotschius surveyed
40 it twelve to fifteen years ago, and before that time I heard the points mentioned spoken of as the landmarks of Broadway.

Being cross-examined, saith—I have heard my father and grandfather say that the points I speak of were the landmarks of old York road.

Cornelius G. Garrison, being sworn, testifies—I am a carpenter, and built one of Brant Van Blarcom's stores on the north of Broadway, opposite the defendant's. The new stores were built about fourteen to eighteen feet farther south than the old store and house on the same property, and about on range with the front of the market house, east, which had been built by Brant Van Blarcom. There was always a platform stoop along Van Geison's old store 10 in Broadway. Helmagh Van Houten, while overseer of the roads, removed the market people from the sidewalk, and they went upon that stoop, where they were not disturbed.

Being cross-examined, saith—I have known Paterson for twenty-eight years, have never known a fence in front of the old store on south side of Broadway. I helped to build James W. King's former house on his corner; there was a store there before, and we built the house about five feet farther north than the store; I think we built it twenty-four years ago.

Lemuel Griffin, being sworn, testifies—I formerly had a lease of 20 the most northerly lot of the John Parke property. When Van Wagoner surveyed that property, I showed him the post at the northwest corner of the lot; a stake had been driven at that post for the corner by Mr. Freeman, who surveyed it before 1828, and, as I think, in 1827; that stake was always the reputed corner of that lot.

Henry Whitly, recalled for defendant—I have always heard the south Wallace house, the Godwin house, the Ellison house, and the hickory stump opposite Dickerson's, spoken of as being on the lines of Broadway; I have frequently seen it surveyed, but did not learn 30 what the surveyors said about it. There have always been stoops along the houses on south side of Broadway near Main street.

Being cross-examined, saith—I never heard of any disputation about the lines of Broadway. Before the suit with James W. King, I would have thought myself safe to build in a line with the Godwin and Mitchell houses.

Albert Van Buskirk, sworn, testifies—I am a mason by trade; I

have lived here twenty-seven years; I worked at the old mill on the Passaic, above the old bridge; I think the end of the mill fronted Broadway. I did the mason work for Brant Van Blarcom's present stores opposite the defendant's corner; we began the work October 21st, 1830. When we had squared the grounds for the foundation, a number of persons gathered around, and complained that he was building over the line of Broadway, and upon the street. Van Blarcom told us to go on as we had laid it out; which we did, and built the stores accordingly.

10 *John R. Van Houten*, sworn, testifies—I have heard about the reputed landmarks of Broadway for twenty to twenty-five years past; always heard the weather boards of the Ellison house, the front of the south Wallace house, four feet in front of the Godwin house, and the hickory stump, to be the reputed landmarks. I have seen Broadway surveyed by Jacob Geotschius according to those points. I recollect the piazza in front of the Godwin house; it had seats on it, and its roof was a continuation of the roof of the house.

Being cross-examined, saith—I am forty-two years old. When Geotschius surveyed Broadway, he run the line across widow Van 20 Winkle's well. I heard of the old hickory stump twenty to twenty-five years ago, and of the other points of Broadway, mentioned in my chief examination, as long ago as that. I have always understood that Edo Van Winkle was on the street. I have heard my father, now dead, speak of the line of Broadway at the time of Geotschius' survey, and before.

John G. Bates, sworn, testifies—I am seventy-five years old; came to Paterson in 1793; the south Wallace house was then being built. The old York road did not run there then, but down by Hartley's stone houses; there was then a post and rail fence up to 30 Esquire Van Saun's corner. When the street was opened along south Wallace house, Adams kept a store on the corner there; Adams built the north Wallace house, and moved away. The Ellison house and Godwin house were then where they are now; the Godwin house had the piazza to it when I came here. A slat fence extended along Abraham Van Houten's garden, now King's corner. I left Paterson in 1793, and came back twenty-six or twenty-seven years afterwards. I always understood the garden fence of Abraham Van Houten, where King afterwards bought and built, was the north line of Broadway. When I came back I found it all there, 40 except where the street was through.

Richard Van Houten, being sworn, testifies—I am forty-five years old. I have heard different persons speak of the points of Broadway as long as I can remember, my grandfather, father, and several other persons; they were the south Wallace house, the hickory tree, and a well in front of Mrs. Van Winkle's; and, twelve or fifteen years ago, I heard of the Ellison house as a point. My grandfather told me that the north line of Broadway struck the piazza of Mrs. Abraham Van Houten's house, which is east of Church street; her fence is outside of that piazza. Jacob Geotschius surveyed it by those marks. 10

Being cross-examined, saith—Jacob Geotschius' line corresponds with the marks that my grandfather had before told me were the points. I can remember when Abraham Van Houten lived in the old stone house west of James W. King's lot; Van Houten had a garden to the corner, and a paling or board fence along it. I never heard that the houses on the south side of Broadway, from Main to Church street, were on the line of the street; my father said that James W. King's house crowded somewhat on the street. By Geotschius' survey, my house, east of Church street, and south side of Broadway, is seven feet from the line of the street; he showed me 20 where the line came by my lot. I have seen Van Wagoner survey Broadway, and have measured 66 feet south from the mark on Dickerson's fence; and taking a range from that point, as near as I could see, that line would bring my house a foot to sixteen inches on the street.

Adrian Van Houten, being sworn, testifies—I am about seventy-four years of age, and have been here since 1814. I knew and was acquainted with the town of Paterson before that time. The Godwin house, on south side of Broadway, then had a piazza to it, and a fence ran easterly, if I remember right, from the outside of the piazza 30 along the road; I often stopped there when it was kept as a tavern, and tied my horse to that fence; the Ellison house stood opposite to it.

Being cross-examined, saith—Abraham Van Houten then lived in the stone house west of King's corner, and a fence ran easterly from it pretty near straight; his wagon house was west of his dwelling, standing where the old York road turned from the corner from the river. I remember when the old York road was the only road opened.

In chief, saith—They called the wagon house the south side of the road.

William D. Quinn, sworn, testifies—I am son-in-law of James W. King. His new house, at the corner of Main street and Broadway, stands one and a quarter inches more south along Broadway than his former house stood, which was burnt down in 1848.

Defendant offers in evidence his deed from A. S. P. and Dr. Marsh, &c., to Joseph Smith, dated, duly acknowledged, and recorded *(pro ut* the same); also abstract of deed from Silas Condit, late sheriff of Essex county, to the Paterson Bank, for the John Parke lot, dated 9th September, 1817, which abstract is agreed to
10 be admitted the same as if the original deed were produced *(pro ut* the same).

Cornelius S. Van Wagoner, being recalled, testifies—A map being shown to witness, purporting to be made by Thomas Wells, dated September 6th, 1817, he says—That is a map of the John Parke lot, and corresponds with the description of the deed from sheriff Condit to the Paterson Bank.

Which map is offered in evidence on the part of the defendant, and admitted *(pro ut* the same).

Witness continues—I made the survey of the Parke lot from that
20 description as in the deed to the Paterson Bank, and found the middle of old York road, called for in that deed, at the same place as the centre line of Broadway, by my survey of the street. By my survey and map of Broadway, the north line of the street runs eighteen inches upon the north Wallace house. If the north Wallace house is taken as the line of Broadway, it makes the defendant's house three inches over the line of Broadway at his east corner, and a trifle more at the corner of Main street. The variation of the needle, from 1761 to the present time, is 57′ allowing the variation to be 3′ a year. A line beginning on Main street five feet south
30 from the corner of the defendant's house, running straight to a point four feet and four inches south, stood, which was burnt down in 1848.

Defendant offers in evidence his deed from A. S. P. and Dr. Marsh, &c., to Joseph Smith, dated, duly acknowledged, and recorded *(pro ut* the same); also abstract of deed from Silas Conduit, late sheriff of Essex county, to the Paterson Bank for the John Parke lot, dated 9th September, 1817, which abstract is agreed to be admitted the same as if the original deed were produced (*pro ut* the same).

Cornelius S. Van Wagoner, being recalled, testifies—A map being shown to witness, purporting to be made by Thomas Wells, dated September 6th, 1817, he says—That is a map of the John Parke lot, and corresponds with the description of the deed from sheriff Condit to the Paterson Bank.

Which map is offered in evidence on the part of the defendant, and admitted *(pro ut* the same).

Witness continues—I made the survey of the Parke lot from that description as in the deed to the Paterson Bank, and found the middle of old York road, called for in that deed, at the same 10 place as the centre line of Broadway by my survey of the street. By my survey and map of Broadway, the north line of the street runs eighteen inches upon the north Wallace house. If the north Wallace house is taken as the line of Broadway, it makes the defendant's house three inches over the line of Broadway at his east corner, and a trifle more at the corner of Main street. The variation of the needle, from 1761 to the present time, is 57′ allowing the variation to be 3′ a year. A line beginning on Main street five feet south from the corner of the defendant's house, running straight to a point four feet and four inches south from the northeast corner 20 of the house, would, if continued east, strike about forty feet in Broadway at Edo Van Winkle's.

Being cross-examined, saith—The distance from the south Wallace house to Edo Van Winkle's is 3540 feet.

Defendant rests.

Edo Van Winkle, recalled on behalf of the state, testifies—The Ellison house was built in 1793 or 1794; my father owned the land where it was built; he sold the lot, which was forty feet front, to Messrs. Doty, and had a fence on Broadway. The house was built three feet inside of the fence; the fence on each side was set 30 back aslant to the house; five or six houses were afterwards built near it, back from the street. It was always mentioned, until lately, that the Ellison house was back from the street. The Godwin house, opposite, was built before I was born; there was a stable at the west side of it, and the kitchen at the east; and the fence came up to the kitchen at the inside of the piazza. I recollect of there being trouble about the line of Broadway as long ago as the James W. King suit. Abraham Van Houten lived in the old stone house west of King's property, and had his garden in front; and before Main street was opened his fence ran eastward, as straight as they gene- 40

rally made them then. That fence stood there when he sold to James W. King; that fence was continued all along straight east of where Main street now is; I never knew that fence to be shifted. I then lived on the Brant Van Blarcom lot. When I was a boy, the house standing where I now live was called the Black Horse tavern; it stood back from the road; my present house was built in 1794 or 1795; no fence was kept in front until I put the present one there. That fence is farther out in Broadway than my fences, running east and west from the house, which fences stand about
10 four feet south of the front line of my house. The lots of Broadway, east of Main street, were not laid out by Abraham Van Houten in any regular way.

Being cross-examined, says—Five or six houses were built east of Doty's in 1794 or 1795. I heard my father say that the old fence of the present Brant Van Blarcom lots was the true line of Broadway. I never took any particular notice, so as to see whether the fence running east of Abraham Van Houten's old house and garden was straight or crooked. Abraham Van Houten's garden was enclosed when he sold to James W. King; I am sure that he never
20 changed the position of his garden fence.

Cornelius H. Post, recalled for state, testifies—Abraham Van Houten's garden fence was made of upright boards, and I always took it to be on a line with the fence on the east side of Main street. I assisted as an apprentice in the building of James W. King's first store on his lot, in 1819 or 1820; it was built on Broadway, right where the fence was. The front of Rutan's wagon maker's shop stands two feet six inches farther back from Broadway than King's house. This stoop is next west of King's. We have this morning taken with the eye the range of the old barns west of Rutan's shop
30 on Broadway, and this range strikes King's building about two or three feet south of its northwest corner.

Being cross-examined, saith—I cannot tell the course of that range, nor where, if extended, it would strike Main street. I do not know when those old barns were put there.

The state offers in evidence a deed from Benjamin Youmans and wife to Edward Mitchell, dated January 8th, 1807, being for the lot. Also, a mortgage from Moses and David Decamp to Abraham Van Houten, upon the lot, dated May 26th, 1796.

The testimony being closed, and the cause summed up by the
40 respective counsel, the court thereupon charged the jury as follows:

The grand jury of the county of Passaic have presented, that on the 1st of July, 1849, and for a long time before, there was, and still of right there ought to be, a common and public highway (leading from Main street, easterly, to Straight street, in the town of Paterson,) for the inhabitants of this state, on foot and with their horses and carriages, to pass and repass at their free will and pleasure; and that, on the said day, Joseph Smith, the defendant, unlawfully dug up a part of said street, and erected upon it the walls of a building; and the walls so erected the defendant still maintains and continues, whereby the said street is obstructed and narrowed, 10 so that the citizens of the state cannot pass and repass, as they ought, and were accustomed to do. To this charge the defendant has pleaded not guilty, and by that plea has taken issue with the state upon the truth of the matter with which he stands charged.

That issue, which you are sworn to try, involves two questions, *viz:*

1. Is there a common public highway, as charged in the indictment?

2. Has the defendant by his building, which it is admitted that he erected, narrowed or obstructed that highway? 20

The indictment does not charge the defendant with knowingly obstructing the street, or with obstructing it with intent to injure or defraud either the public or individuals. An indictment for forgery charges that the crime was committed with intent to defraud, and the state must prove the criminal intent. An indictment for passing counterfeit money charges that the money was passed knowing it to be counterfeit, and the state must prove the guilty knowledge. In these cases, as in many others involving moral delinquencies, the guilty purpose is of the essence of the crime. But in this case the defendant is not charged with knowledge of the wrong done, 30 nor with any improper intent. It is not necessary to prove either. It is immaterial whether the defendant acted knowingly or ignorantly, with good or with bad intent, in the erection of his building; the simple inquiry is, does the building of the defendant encroach upon the street. The injury complained of is not merely a private wrong; it is an injury to a public common right, the remedy for which is not by a civil suit, but by indictment.

A public highway in New Jersey may be established (as the counsel of both parties agree) either—1. By the act of surveyors of the highways in laying out the road according to the statute. 2. By 40 the uninterrupted use and enjoyment of the road, as a highway by

the public, for a period not less than twenty years. 3. By the dedication of the land by the owner to the use of the public as a highway. In the present case, the state relies upon dedication by the owner, and a long uninterrupted use by the public, as proof of the existence of a highway at the place in question.

Have the public acquired a right to the use of the place where the defendant's house is erected, as a public street or highway, by an uninterrupted possession for twenty years or by dedication? Has the ground where the house now stands been open and used
10 by the public, as a part of the highway, for a period of twenty years?

The oldest witnesses speak of a post and rail fence on the south side of Broadway, which formerly crossed where Main street now is, before that street was opened. This was followed by a paling or picket fence, which extended from the corner of Main street, and joined up to the Berry house. There was another fence, which extended from the Berry house, farther east, to the Mitchell house, at a later period. Garrabrant Van Houten moved a barn on to the corner of Main street and Broadway, and converted it into a store.
20 The building was placed, as the witnesses testify, on a line with where the paling fence formerly stood, the porch or steps projecting beyond the line into the street. In 1821, Parsons bought the corner, and from that time it is undenied, and very clearly proved, that the fences and lines have remained unchanged until the defendant erected his building. I do not particularize the evidence, but, so far as I recollect, all the witnesses agree that there has been no material change in the south side of Broadway, from St. John's Hall to the corner of Main street, within the memory of the oldest witness. Within this line the defendant's building is erected.

30 It is said, by the defendant's counsel, that it is charged in the indictment that this is a highway for all the citizens of this state to pass on foot and with their carriages and horses; that the proof in this case shows only that the place where the house stands formed a part of the sidewalk; that the public travelled only on foot over this spot, and that carriages and horses could not travel there, and, therefore, that the jury cannot convict the defendant, even if they believe the witnesses on the part of the state, because the proof does not correspond with the charge in the declaration. My charge to you upon this point is, that if there was any dedication to the
40 use of the public, it was as a public street; and if you find that the place where the house stands was dedicated to, and used by the

public as a part of the highway, it is immaterial whether it formed a part of the sidewalk or of the carriage way: the public authorities may apply it to either purpose, as they may see fit, but that will not alter its character as a highway.

It is further said, on behalf of the defendant, that the mere fact that the owner of land chooses to leave it unfenced, does not divest him of his property, or give a right of way to the public. It is certainly true that a landholder may leave his land adjoining a highway unenclosed and open to the public: he may permit the public to use it for the purpose of passing and repassing, and yet vest no 10 right in the public. It is said again, that the mere fact that a man opens the street up to his house, if he leaves his porch or cellar door extending into the street, it protects his right. This is undoubtly true, if there be in fact no dedication of the land to the use of the public. As a general rule, the right of the public, where it is a question of dedication, may not extend beyond their actual enjoyment; nor, on the other hand, will having a porch, or steps, or area, within the limits of the street, deprive the public of their right or restrict the limits of the highway. The use, by the public, of private property or the appropriation of a public street to indivi- 20 dual use, for the necessary purposes of steps or porches, may be permissive merely, without conferring any right.

This brings us to the question, whether, in fact, this land was used by the public with the assent of the owners, and with a recognition, on their part, of the right of the public to the use of the road in the place where the defendant's building is erected.

It appears in evidence, that on the 1st of May, 1807, Peter Wilson conveyed the corner lot, 100 feet on Main street, and 50 feet deep, bounding north on Broadway, and south on Van Houten's land, to Simeon Van Houten. On the 4th of May, 1820, Peter Van 30 Houten and wife conveyed to Garrabrant Van Houten, describing the lot as 100 feet on Main street, and 50 feet deep. Garrabrant Van Houten erected the storehouse on the corner where the picket fence formerly stood. This must have been done in the year 1820, as on the 5th of March, 1821, he conveyed to Parsons.

A strong confirmation of the fact, that the position of the south line of Broadway has not been changed, is found in the condition of the lots lying east of the defendant's lot, and extending 100 feet on Broadway to St. John's Hall, or the society's line. These lots are bounded on the north by Broadway, and extend back 100 feet 40 in depth. They were laid out, mapped, numbered, and sold, by

Abraham Van Houten. Those lots, on measurement, are now found to be 100 feet deep.

In 1821, Garrabrant Van Houten deeded to Isaac Parsons the corner lot, 100 feet on Main street, also the Simeon Van Houten lot, extending 55 feet on Main street.

In 1820, Parsons bought of Winans a lot of 40 feet front on Main street, beginning at 155 feet from the corner of Main street and Broadway. This lot adjoined the land he afterwards purchased of Van Houten on the south, and made his entire front on Main street, extending south from the corner of Broadway, 195 feet. Parsons held the entire lot, from 5th of March, 1821, till the 14th of December, 1835, a period of more than fourteen years. He bought his entire front for 195 feet. This is the measurement called for in his deeds. He held that quantity. That, according to his own testimony, was all he claimed or occupied. He measured it repeatedly. Beyond the 195 feet was the street. He never claimed where the street was open and used by the public.

On the 14th of December, 1835, Parsons conveyed, by deed, to Aaron S. Pennington and four others, for $25,500. This deed describes the land thus: "Beginning on the easterly side of the Paterson and Hamburg turnpike, at the southeast corner of its intersection with Broadway or the old York road, then running south, along the turnpike 195 feet, to the line of Van Blarcom."

Parsons sold for a high price every foot of the land on Main street, being of high value. The description, in his deed to Pennington and others, manifestly calls for the corner of the street, as it actually was at that time. He testifies that he held and sold only to that corner. It is obvious, moreover, that the whole plot will be deranged by shifting that corner to the point where the defendant now seeks to fix it. From the 14th of December, 1835, Pennington and his associates held it until the 5th of May, 1849, when a part of the lot, including the spot where the defendant's building now stands, was conveyed to the defendant. Mr. Pennington testifies that while he and his associates held, a period of more than thirteen years, they never changed the lines of the lot or enlarged the possession, as they received it from Parsons.

The ownership and possession of Parsons and Pennington, the previous owners of this land, from whom the defendant derives his title, extends from 1821 to 1849, a period of more than twenty-eight years. Mr. Pennington testifies that he had the entire length of line upon Main street called for in his deed, and a foot over,

within the bounds of the lot, as he held it, at the rate that Pennington and his associates sold to the defendant (20 feet 8 inches for $4450, or about $215 per foot); the 4 feet 4 inches now occupied by the defendant's building, beyond the line as conveyed to him, would amount to the value of over $930. This lot, before it was conveyed to the defendant, was owned for many years by intelligent business men, who knew Paterson well; and it is remarkable that, notwithstanding the high price at which they sold the land, they did not attempt to sell or convey to the defendant beyond the line they actually occupied. This fact shows unequivocally that 10 they did not claim more. It shows, moreover, that the street beyond the line to which they occupied was used by the public with their knowledge and assent.

If there were no evidence in the cause previous to the year 1821, when Parsons acquired title, it is nevertheless shown that the public have used the land where the defendant's building is erected, with the assent of the owners, for more than twenty-five years. If you believe the witnesses, this evidence establishes the public right. If this be so, it is not material where the road was originally laid out, or whether the lines of the street, as occupied, correspond with 20 the lines of the original survey, or whether the road was ever laid out by surveyors of the highways. The public have acquired by use a right to the road, as good as if the street had been originally laid out where it now is according to law. This view of the case renders it unnecessary to advert particularly to the evidence adduced before you to show where the true lines of the street would be, if laid out strictly in accordance with the original survey.

The act of the township officers, in not working the road, and of the surveyor of the highways and the counsel of the township, in not correcting the error (if it actually exists), cannot relieve the 30 defendant from liability where a public common right is involved. The right of the people to a public highway cannot be lost by a mistake of their agents or servants, or by their misapprehension of the right of the public. On this account, I have felt it my duty to state my views of the laws clearly and unequivocally, that there may be no misapprehension on this point by the jury. If I am in error, there is a mode of redress, of which the defendant may avail himself. I have been the more explicit, because it has been stated, in your hearing by counsel, that the defendant acted under an impression, prevalent in Paterson, that if he built on the line of the 40 street, as originally laid out, he was safe in so doing. This impres-

sion, if it really exists, is, in my judgment, a dangerous error: no man is justified in depriving the people of a common right of stopping or obstructing an ancient highway, though never laid out agreeably to law. If he built within the line of the street, as it actually exists, he acts at his peril; and if he thereby creates a nuisance, it may, and ought to be abated, either by the act of the parties specially aggrieved or by force of law.

If you find, upon the evidence in this cause, that the defendant's house is located within the bounds of a public street actually opened
10 and used by the people as a highway for more than twenty years, and especially if you find that the street has been so used with the knowledge and assent of the owners of the land now occupied by the defendant, and under whom the defendant claims, the building erected by the defendant is a nuisance, and your verdict should be guilty.

And the defendant, by his counsel, excepts to the aforesaid charge of the court—

1st. Because the jury were therein expressly told, and a large part of said charge assumed it as an established fact, that the land
20 in controversy had been dedicated by the owners to public use, and used by the public as a public highway for a sufficient length of time to establish the same as such in law; whereas the questions of such dedication and uses are properly questions for the jury, and should have been left open for their decision.

2d. Because, by said charge, the court instructed the jury, that the description in Parsons' "deed to Pennington and others manifestly calls for the corner of the street, as it actually was at that time"; whereas, in point of fact, there is nothing in said deed or in the evidence indicating that such was the fact, nor that any other
30 corner was called for than the corner formed by the intersection of Broadway and Main street, as laid out by the surveyors; and that the corner intended by said deed was a point that should have been left open for the decision of the jury.

3d. Because by said charge, the jury were instructed that it was "not material where the road was originally laid out, or whether the lines of the street, as occupied, correspond with the lines of the original survey, or whether the road was ever laid out by surveyors of the highways"; whereas each and all the said matters were material and important.

40 4th. Because the court, by their said charge, instructed the jury that the act of the township officers, in not working the road, and

of the overseers of the highways and the counsel of the township, in not correcting the error (if any actually existed), cannot relieve the defendant from liability; whereas the said matters were material and binding on the public, and ought to have been left to the jury, for their consideration.

For the foregoing reasons, the defendant, by his counsel, prays a bill of exceptions to the said charge, which is allowed and sealed accordingly.

COURT OF ERRORS AND APPEALS.

JOSEPH SMITH *ads.* THE STATE,	*In error to the Supreme Court.*

And the said Joseph Smith, by his attorney, John Hopper, comes 10 before the said Court of Errors and Appeals, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, in this, that, by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid, was given against the said Joseph Smith; whereas, by the law of the land, the said judgment ought to have been given for the said Joseph Smith.

There is also error in this, *to wit*, that it appears, by the said record and proceedings, that the indictment in this case was against the said Joseph Smith, for obstructing and narrowing a common 20 and public highway in the township of Paterson, in the county of Passaic; and upon the trial thereof, a question of dedication by the owners, and of user by the public, of the land alleged to have been dug up and built upon by the said Joseph Smith arose, and the evidence produced failing to establish the fact of an actual dedication in law of the said land to the public, and a user thereof by the public as a public highway, for a sufficient length of time to establish the same as such; yet the court, in their charge to the jury, assumed it as an establshed fact, and so charged the jury, that the land in controversy had been dedicated by the owners thereof to 30 public use, and had been used by the public as a public highway

for a sufficient length of time to establish the same as such in law; and did not, as they ought in law to have done, leave those matters as questions of fact, to be decided by the jury from the evidence.

There is also error in this, *to wit*, that, upon the said trial, a deed from Andrew Parsons and wife to Aaron S. Pennington and others, was read in evidence on the part of the state, calling for the corner of Main street and Broadway, and it became a question of fact for the jury to determine the actual location of that corner, as referred to in that deed, and also in other deeds; and for that purpose evi-
10 dence was introduced and received, on the part of the said Joseph Smith, showing that said street, called Broadway, was a public highway laid out by surveyors of the highways, and also tending to show the true lines of said highway at said corner, as laid out; yet the said court charged the jury that the said deed manifestly called for said corner as the enclosure actually was when the deed was given; and also, that it was not material where the said highway or road was originally laid out, or whether the lines of the street, as occupied, correspond with the lines of the original survey, or whether the said road was ever laid out by surveyors of the highways.

20 There is also error in this, *to wit*, that evidence was produced to the jury, on the part of the said Joseph Smith, that the public, by the acts of their officers and of their legally constituted authorities, had not accepted the land in controversy, nor recognised or used the same as a part of the public highway; yet the court, in their charge, instructed the jury that such acts did not in law release the said Joseph Smith from liability on said indictment.

And the said Joseph Smith prays that the judgment aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether holden
30 for nought, and that he may be restored in all things which he has lost by occasion of the said judgment.

JOHN HOPPER,
Attorney of plaintiff in error.