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Being Acquitted of a "Disorderly Person" Charge in 1826

Author(s): Gordon A. Madsen
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Editor(s): Gordon A. Madsen, Jeffrey N. Walker, and John W. Welch
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Chapter Four

Being Acquitted of a "Disorderly Person" Charge in 1826

Gordon A. Madsen

Was Joseph Smith Jr. ever convicted of a crime? With one exception, historians agree that the Prophet was cleared or never convicted in all cases in which criminal charges were laid against him. That one exception, a "disorderly person" charge made when Joseph was twenty years old, has been shrouded by partial and unclear historical documentation. Since the 1826 trial of Joseph Smith has been extensively commented upon, one might wonder what else is to be said about this blip in Mormon history. However, little has been done to put that trial into the legal context of that day and to examine the applicable statutory, procedural, and case law in force in New York in 1826. This chapter will attempt to do that and then reexamine the conclusions drawn by earlier writers.

In March 1826, upon the sworn complaint of one Peter Bridgeman, Joseph Smith was brought before Justice of the Peace Albert Neely in South Bainbridge, New York, on the charge of being a "disorderly person." The earliest-known reference to the trial appeared in an article written five years later in 1831 by A. W. Benton.[1] Forty-one years later, William D. Purple claimed to have generated his version from his memory and notes; he had been asked by Judge Neely to act as scribe for the trial.[2] Other accounts written

1. A. W. Benton, "Mormonites," *Evangelical Magazine and Gospel Advocate* 2 (April 9, 1831). Benton wrote from his purported memory, implying he was a witness to the proceedings.

2. W. D. Purple, "Joseph Smith, the Originator of Mormonism Historical Reminiscences of the Town of Afton," *The Chenango Union*, May 3, 1877, as quoted in Francis W. Kirkham, *A New Witness for Christ in America: The Book of Mormon,* 2 vols. (Independence,

by Charles Marshall and Daniel S. Tuttle were derived from some pages purportedly severed from Judge Neely's docket book by his niece, Miss Emily Pearsall.[3] Neither the "docket book" or the Purple or Pearsall notes have survived. The disparities and inconsistencies among these accounts were later analyzed by Fawn Brodie, Francis Kirkham, and Hugh Nibley, the latter two expressing skepticism about their authenticity.[4]

Then in 1971, the Reverend Wesley P. Walters discovered two bills in the basement of the Chenango County Sheriff's building in Norwich, New York.[5] These bills were among a cache of some 8,000 "Audits" or bills paid by Chenango County during the 1820–30 decades. The first was submitted by Justice Neely to Chenango County for his services for a series of trials he conducted in 1826. There are seven trials listed on Neely's bill, running from some time prior to March 20 through November 9. The page is age-worn and illegible in part.[6] Figure 1 is a partial reproduction with some names approximated. Figure 2 is the text of the bill submitted by the constable in the case, Philip De Zeng, which lists more than thirty lines of billed services, presumably rendered during 1826. Before considering the meaning of these two bills and what Wesley Walters (their discoverer) claims they tell us, let us first consider the relevant New York laws in 1826 and the charge alleged against Jospeh Smith in this matter.

The Charge

With what exactly was Joseph Smith charged? Judge Neely's bill simply indicates "misdemeanor," but Oliver Cowdery wrote that Joseph Smith was charged more specifically on this occasion with being a "disorderly person."[7]

Mo.: Zion's Printing and Publishing Co., 1959), 2:364. Purple appears as a party or witness in other Bainbridge cases: Benton does not.

3. C[harles] M[arshall], "The Original Prophet," *Fraser's Magazine* 7 (February 1873): 225–35 (published in London); republished in New York in *Eclectic Magazine* 17 (April 1873): 479–88, and again in the *Utah Christian Advocate,* January 1886. See Kirkham, *New Witness,* 2:474. The Tuttle account was first published in 1883 in *Schaaf-Herzog Encyclopedia of Religious Knowledge,* 2:1576–77.

4. Kirkham, *New Witness,* 1:475–92; 2:354–68, 370–500; Hugh Nibley, *The Myth Makers* (Salt Lake City: Bookcraft, 1961), 139–58.

5. W[esley] P. Walters, "Joseph Smith's Bainbridge, N.Y., Court Trials," *The Westminster Theological Journal* 36 (Winter 1974): 123; Marvin S. Hill, "Joseph Smith and the 1826 Trial: New Evidence and New Difficulties," *BYU Studies* 12 (Winter 1972): 224.

6. Copies of the originals are in the possession of the author.

7. Oliver Cowdery, "Letter VIII to W. W. Phelps," *Messenger and Advocate* 2 (October 1835): 201.

Figure 1: From Chenango County to Albert Neely, Jr.

People — Assault & Battery
vs.

—— Brazee
Trial at G. A. Leadbetter's

Same — Justices
vs. — James Humphrey
Peter Brazee — Zechariah Tarbil [Tarbel]
Albert Neely

Same
vs. — To my fees in trial
John Sherman — of above cause 3.68

Same — Misdemeanor
vs.
Joseph Smith
The Glass Looker — To my fees in examination
March 20, 1826 — of the above cause 2.68

. . .

Figure 2: Bill for Services by Constable Philip De Zeng

. . .
Serving Warrant on Joseph Smith & travel . . 1.25
Subpoenaing 12 Witnesses & travel 2.50
Attendance with Prisoner two days &
1 night 1.75
Notifying two Justices . . . . . 1.—
10 miles travel with Mittimus to take him . . . 1.—
. . .

Benton agreed but characterized the basis for the charge as "sponging his living from [the public's] earnings."[8] Purple claimed that Joseph was charged with being a "vagrant, without visible means of livelihood."[9] Marshall and Tuttle called him a "disorderly person and an imposter."[10]

The statute that would seem to apply, enacted in 1813 by the New York State Legislature, reads as follows:

> That [1] all persons who threaten to run away and leave their wives or children to the city or town, and [2] all persons who shall unlawfully return to the city or town from whence they shall respectively have been legally removed by order of two justices of the peace, without bringing a certificate from the city or town whereto they respectively belong; and also [3] all persons who not having wherewith to maintain themselves, live idle without employment, and also [4] all persons who go about from door to door, or place themselves in the streets, highways or passages, to beg in the cities or towns where they respectively dwell, and [5] all jugglers [those who cheat or deceive by sleight of hand or tricks of extraordinary dexterity], and [6] all persons pretending to have skill in physiognomy, palmistry, or like crafty science, or pretending to tell fortunes, or to discover where lost goods may be found; … and [7] all persons who run away and leave their wives and children whereby they respectively become chargeable to any city or town; and [8] all persons wandering abroad and lodging in taverns, beer-houses, out-houses, market-places, or barns, or in the open air, and not giving a good account of themselves, and [9] all persons wandering abroad and begging, and … [10] all common prostitutes, shall be deemed and adjudged disorderly persons.[11]

Several of these ten provisions came from the classic definitions of a vagrant; however, in this statute vagrants are not classed separately, but are rather included with all the other people who are considered "adjudged disorderly persons." So there is no reason to conclude that the twenty-year-old Joseph was accused of being a vagrant. He had not made himself a financial burden to the community, wandered homelessly, begged, deceived by sleight

8. Kirkham, *New Witness,* 2:467.
9. Kirkham, *New Witness,* 2:364.
10. Kirkham, *New Witness,* 2:360.
11. *Revised Laws of New York* (1813), 1:114, sec. I.

of hand, or refused to work. By all accounts, he was employed by Josiah Stowell, which largely precludes a charge of vagrancy.

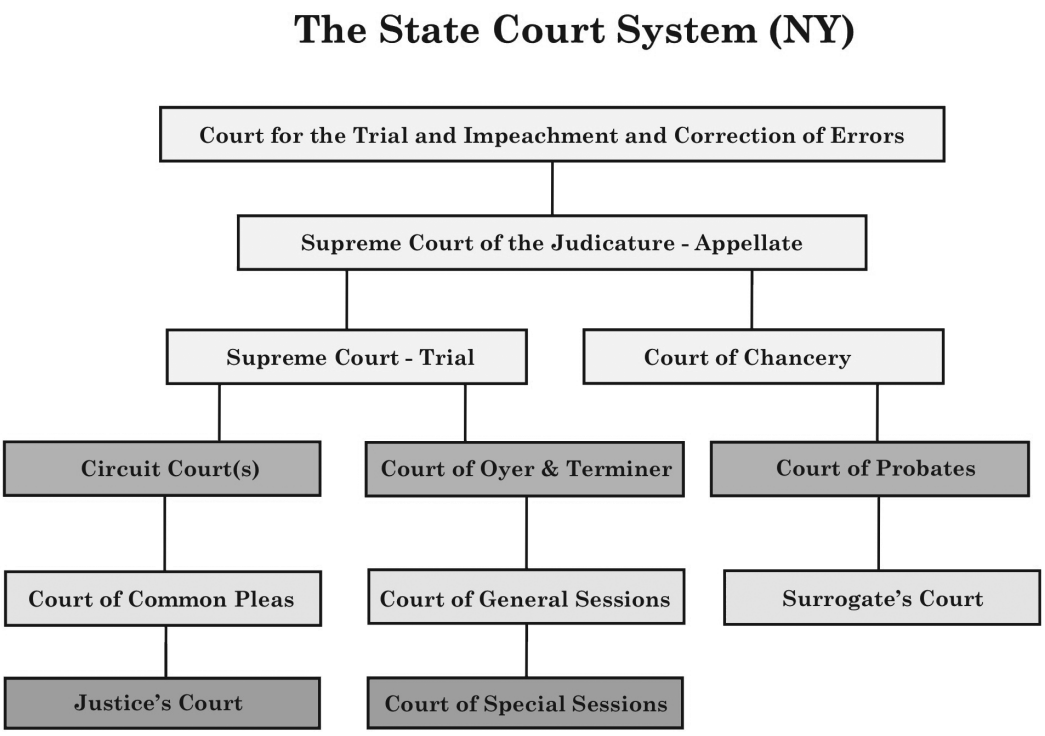
The two bills, however, provide little help in determining the nature of the charge brought against Joseph, beyond specifying that the offense was a misdemeanor. It is true that the judge, on the first bill, identifies Joseph as "the Glass Looker," but that entry is below Joseph's name rather than opposite where "Misdemeanor" appears, and in each of the other cases itemized, the offense is always listed opposite the accused's name rather than below it. Since this bill was a summary of fees for seven trials, the last of which is dated November 9, 1826, it was undoubtedly written some time after Joseph Smith's trial, and so this identifier may reflect perceptions outside of the trial itself. Indeed, there was no statutory or common law crime of "glass looking" then on the books, unless, of course, the wording in item 6 in the statute—"pretending to tell fortunes, or to discover where lost goods may be found"—was understood to include "glass looking." But even at that, being a "glass" looker might not have included the use of a seer "stone." Moreover, such practices were common enough that these activities would not, in and of themselves, have been considered criminal; only "pretending" or deceptively using such practices could give rise, under the statute, to a charge of disorderly conduct. Thus, "Glass Looker" is more likely a phrase of identification than the statement of a criminal charge in Judge Neely's bill. Similarly, the word "imposter" was not used in the statute to describe any criminal offense. So we are left with the charge of somehow being a disorderly person.

The Court

Was this trial conducted by a single justice of the peace or by a three-judge court of special sessions? If it was the latter, it is reasonable to assume this was a felony charge. Walters infers from the item in Constable De Zeng's bill, which lists "notifying two justices," that the trial was conducted before a Court of Special Sessions.[12] This brings us to an examination of the court system that existed in New York in the 1820s, and ample evidence suggests that this was a misdemeanor charge presided over by a single justice of the peace. Three courts are relevant to our purposes: justice courts, courts of special sessions, and courts of general sessions.

Four Justices of the Peace operated in Bainbridge in 1826: Albert Neely, James H. Humphrey, Zechariah Tarbel (sometimes Tarbell or Tarble) and Levi Bigelow. The first case shown on the Neely bill names three defendants

12. Walters, "Joseph Smith's Bainbridge Trials," 133.



charged with Assault and Battery and also names the two additional Justices (Humphrey and Tarbel) who tried the case with him. The Joseph Smith case shows no co-Justices sitting in on his trial. All the other cases on the bill likewise name no fellow Justices joining in the trials. That Joseph Smith's name appears *only* on the Neely bill, which is prima facie evidence that his case was not heard before a three justice Court of Special Sessions.

Justice courts, or courts presided over by a single justice of the peace, were then (as such courts generally are today) the bottom rung on the legal ladder. A widely used treatise titled *The Justice's Manual,* first published in 1825, described the role of a justice of the peace.[13] Justices of the peace were not generally trained in law, but were appointed or elected from the more affluent gentlemen of a community and had limited original jurisdiction in criminal matters to literally "keep the peace"—to hear cases regarding trespass against persons and property, breaches of the peace, and misdemeanors (including vagrancy and disorderly persons). In criminal matters, justices of the peace could sentence offenders to "the bridewell, or house of correction, there to be kept at hard labour, . . . for a term not exceeding sixty days, or until

13. Thomas Gladsby Waterman, *The Justice's Manual, or, A Summary of the Powers and Duties of Justices of Peace in the State of New York* (Binghamton, N.Y.: Morgan & Canoll, 1825).

the next general sessions [of the peace],"[14] with the provisos that a "common gaol [jail]" could be used in a county that had no bridewell or work house, and that any two justices (one being the committing justice) could discharge any offender if "they see cause."[15] They were also empowered to conduct bail hearings or in some instances preliminary examinations or preliminary hearings in certain felony cases. Where appropriate, the justice court could *bind over* such accused felons to the court of general sessions to stand trial.

On the rung above justice courts were the courts of special sessions, which were comprised of three justices of the peace sitting as one court. The statutes of 1813 redefined the jurisdiction of these courts and granted them power to try criminal offenses "under the degree of grand larceny," except where the accused posted bail within forty-eight hours of being charged and elected to be tried at the next session of the court of general sessions in the county, and special sessions courts could impose fines not exceeding twenty-five dollars and jail terms not exceeding six months.[16] These notions of limited jurisdiction are corroborated in the *Justice's Manual*. It says regarding courts of special sessions:

> This court is composed of three Justices, associated for the particular purpose of trying some person accused of an offense under the degree of grand larceny.
>
> The jurisdiction of this court is limited, by the statute, to cases of "petty larceny, misdemeanor, breach of the peace, or other criminal offence under the degree of grand larceny." The only point of difficulty, relative to jurisdiction, is, in determining what offences are under the degree of grand larceny. And I know of no rule by which the different degrees of criminality may be determined, except by the punishments directed. I therefore conclude that this court has not jurisdiction of any offence the punishment whereof *may be* imprisonment in the state prison; nor, where the term of imprisonment in the common gaol is fixed to exceed six months; nor where a fine is fixed to exceed $25.... If this rule be correct, the jurisdiction of a court of special sessions may be readily determined, in any supposable case, by reference to the punishment prescribed for the offence in question.[17]

14. Waterman, *Justice's Manual,* 116.

15. *Revised Laws of New York* (1813), 1:114–15, secs. I and II.

16. *Revised Laws of New York* (1813), 2:507–8, sec. IV.

17. Waterman, *Justice's Manual,* 200–1; italics in original.

The third and top-tier trial court was the court of general sessions and with the language of the *Justice's Manual* in mind, sometimes called county court. These courts were the general professional courts of the state, presided over by trained, full-time judges. They tried felony cases and reviewed and retried those cases appealed from either justice-of-the-peace courts or courts of special sessions.

Now, understanding the New York court system in 1826 and with the language of the *Justice's Manual* in mind, we return to Justice Neely's bill, where we see that the first item listed concerned a court of special sessions and the other two justices were James Humphry and Zechariah Tarbil. It was an "Assault & Battery" case, involving three defendants, two named Brazee, and a Sherman. Special-session court jurisdiction was probably invoked because the case involved multiple defendants and was a misdemeanor "under the degree of grand larceny."[18]

The provision in the disorderly persons statute states: "It shall and may be lawful for any justice of the peace to commit such disorderly persons (being thereof convicted before him by his own view, or by the confession of such offenders, respectively, or by the oath of one or more credible witness or witnesses) to the bridewell or house of correction."[19] Here, the *Justice's Manual* rightly speaks in the singular—"*a* justice of the peace *is* authorized to commit to the bridewell"—and the forms to be used that follow are all couched in first person singular and provide for a single signature. Conversely the forms suggested by the *Manual* to be used by courts of special sessions speak in the plural and require three signatures.[20] Since the statute limits the sentence to sixty days and speaks of the matter being tried before "him," and since the Neely bill shows no additional justices listed under "Misdemeanor" similar to their listing in the first case itemized on the bill, it follows that Joseph Smith's case was tried by Neely alone.

In light of all this information, what is the meaning of the De Zeng entry "Notifying two Justices"? I frankly do not know. Walters infers from this that the trial was conducted before a court of special sessions.[21] However, it is possible that De Zeng confused this case with the earlier three-justice court of special sessions. Or perhaps Neely first thought the Joseph Smith case needed to be heard by three justices and later changed his mind. In any event, the record is clear that no other justices are mentioned in Joseph's trial, either

18. Waterman, *Justice's Manual,* 200.

19. *Revised Laws of New York* (1813), 1:114, sec. 1.

20. Waterman, *Justice's Manual,* 116–20, 203–8; italics added.

21. Walters, "Joseph Smith's Bainbridge Trials," 133.

in the Neely bill, or the Pearsall notes, or the Purple account. Moreover, several other of Constable de Zeng's bills to Chenango County for both prior and subsequent years, shows the same "notifying Justices" or "notifying two Justices" wording when the cases to which the "notifying" language applied were in fact tried by a single Justice of the Peace. Whether de Zeng in those instances summoned several Justices before one agreed to take the case, or whether he assumed those cases were to be three justice hearings, when in fact they proved to be handled by a single Justice, as in the Joseph Smith case, who can say? All that can be said with certainty is that de Zeng charged the County for notifying two Justices, but none of the other Justices billed Chenango County for trying Joseph Smith. And finally, there is no indication that a jury trial was requested or waived, or any fee billed for summoning or swearing a jury. It thus appears safe to conclude that Joseph was tried by Neely in a simple justice court—indicating the charge was a mere misdemeanor, as the Neely bill on its face indicates.

The Meaning of the Term *Recognizance*

What is meant by the term *recognizances* found at the end of the Marshall rendering of the Pearsall notes? The full Neely bill of $2.68 in the Joseph Smith case is itemized as follows: "Costs: Warrant, 19c. Complaint upon oath, 25½c. Seven witnesses, 87½c. Recognisances [*sic*], 25c. Mittimus, 19c. Recognisances of witnesses, 75c. Subpoena, 18c.—$2.68."[22]

Recognizance or *recognize* was used interchangeably with *examination* or *examine* in the early 1800s, in much the same synonymous fashion as were the words *warrant* and *mittimus*. *To recognize* meant then (and sometimes even today) "to try; to *examine* in order to determine the truth of a matter."[23] On the other hand, the plural *recognizances* referred to types of bonds or undertakings. Sometimes it referred to bail used by nineteenth-century courts to guarantee attendance at court at a later time or more frequently used by justices of the peace to bond or "recognize" someone to keep the peace or to maintain good behavior. Walters, in his analysis of the trial, relies upon this meaning of the word. But *recognizance* or *recognize* meant "to examine." Indeed, other justice-of-the-peace bills scrutinized by Walters refer

22. C[harles] M[arshall], "The Original Prophet," 230.

23. John Bouvier, *Bouvier's Law Dictionary and Concise Encyclopedia,* 8th ed, by Francis Rawle, 3 vols. (St. Paul, Minn.: West Publishing, 1914), 3:2842; italics added.

to "recognizing two witnesses 0.50" (meaning a fifty-cent fee for examining two witnesses) or "recognizing three witnesses 0.75."[24]

Walters assumes that "Recognizance 25" on the Neely itemization refers to the fee for an appearance bond by Joseph Smith guaranteeing his coming to court and that "Recognisances of witnesses, 75c." refers to the fee for putting three witnesses under similar bond or recognizance to also appear at the future trial. Since by Walter's own reckoning the trial supposedly took place the very next day (the De Zeng entry states, "Attendance with Prisoner two days & 1 night"), there would be little need to bond witnesses for twenty-four hours and no opportunity for the prisoner to be "recognized" in the bail sense of the word.

It seems more reasonable to assume, therefore, that *recognizance* in Neely's bill refers to the fees for the examination of the defendant and witnesses. This is further corroborated by *The Justice's Manual*, which specifies the forms of such recognizances and requires that the accused and two sureties sign the same, that a transcript or summary of the testimony be reduced to writing, and that additional orders of transmittal to the next session of the court of general session be executed.[25] No such bonds or recognizances with additional signatures, or at least the naming of co-signing sureties, appear in the record.

None of the reports hints that the proceeding against Joseph Smith was a preliminary examination for a felony or other offense beyond Justice Neely's jurisdiction (as has been advanced by Dan Vogel as an alternative analysis[26]), and Neely's bill fits a fact situation suggesting he tried the matter himself. Therefore, "recognizance" as used in the bill must mean "examining" the witnesses and defendant, rather than binding them over for a trial to be conducted in a court of general sessions at a later time.

The Trial

Wesley Walters reconstructed the trial in these terms:

> When Joseph was arrested on the warrant issued by Albert Neely, he would have been brought before Neely for a preliminary examination to determine whether he should be released as innocent of the charges or, if the evidence seemed sufficient, brought to trial. During the examination Joseph's statement would be taken (probably not under oath), and witnesses for and against the

24. Walters, "Joseph Smith's Bainbridge Trials," 138 n. 28.

25. Waterman, *Justice's Manual,* 190–95.

26. Dan Vogel, "Rethinking the 1826 Judicial Decision," Mormon Scripture Studies, http://mormonscripturestudies.com/ch/dv/1826.asp (accessed December 5, 2013).

> accused were sworn and examined. Both before and during the examination Joseph remained under guard, with Constable De Zeng in "attendance with Prisoner two days & 1 night," referring to the day of examination and the day and night preceding. Since the evidence appeared sufficient to show that Smith was guilty as charged, he was ordered held for trial. In such situations, if the defendant could not post bail the justice at his discretion could either order the arresting officer to continue to keep the prisoner in his custody, or he could commit him to jail on a warrant of "commitment for want of bail," sometimes referred to as a "mittimus." The latter appears to have been the fate of young Joseph since De Zeng's bill records "10 miles travel with Mittimus to take him"—and the wording should probably be completed by adding "to gaol." Shortly after this Joseph's bail was posted as the entry "recognizance 25" cents would indicate. The material witnesses, three in this instance, were meanwhile also put under recognizances to appear at the forth-coming Court of Special Sessions (Neely's "recognizances of witnesses 75" cents). The Court was summoned to meet by Justice Neely through Constable De Zeng's "notifying two Justices." At this point the course of events becomes somewhat difficult to trace, mainly because we lack the other two justices' bills which might clarify the trial proceedings. Probably what happened was that the Court of Special Sessions found young Smith guilty, as Neely records, but instead of imposing sentence, since he was a minor "he was designedly allowed to escape," as the Benton article expresses it. Perhaps an off-the-record proposition was made giving Joseph the option of leaving the area shortly or face sentencing, and it would explain why no reference appears in the official record to the sentencing of the prisoner. Another possibility, of course, is that Joseph jumped bail and when the Court of Special Sessions met they may have decided not to pursue the matter further, hoping the youth had learned his lesson. Dr. Purple, in any event, carried away the impression that "the prisoner was discharged, and in a few weeks left the town."[27]

In this reconstruction, Walters assumes a number of unsupported or unwarranted facts and procedures. First, he posits a preliminary hearing *and* a trial occurred on two successive days, the first before Justice Neely and the

27. Walters, "Joseph Smith's Bainbridge Trials," 139–41.

second before Neely and two unnamed additional justices. There are at least five reasons to reject that possibility:

(1) The court of special sessions' jurisdictional prerogatives exceeded the sentence limit prescribed by the Disorderly Persons statute, suggesting that such cases were rather tried by single justices of the peace.

(2) As noted previously, the Disorderly Persons statute speaks of a trial in language of a single justice. This is corroborated by the language in *The Justice's Manual*, prescribing the forms to be used, for example from the warrant form: "command you to take the said John Stiles, and him bring before *me*."[28] That language left no room for a three-justice court.

(3) Both Dr. Purple and whoever made the notes ultimately delivered by Miss Pearsall to Marshall and Tuttle refer to one hearing only, and none of them suggests multiple justices sitting to hear the matter. Nor is there any purported transcript or notes of a second hearing.

(4) No additional justices of the peace are noted in the Neely bill opposite the Joseph Smith heading, as they were in the first assault-and-battery case.

(5) Courts of special session were to try those cases coming before them to a jury unless that right was waived by the accused. There is no hint in the bills, notes, or commentaries that a jury was either impaneled or waived.

Further, there is no basis for Walters's assumption that Neely found that "since the evidence appeared sufficient to show that Smith was guilty as charged, he was ordered held for trial," or for his assumption that "Recognizance 25" meant bail, posted after Joseph was first jailed. In a footnote, Walters himself appears to abandon that jail-and-bail notion by noting that the fee for constables to take prisoners to court was nineteen cents and to take them to jail was twenty-five cents. Constable De Zeng in this instance billed nineteen cents.[29] It should here be observed that the phrase *to take* meant "to arrest" or "to capture"; hence, "to take prisoner" could more probably mean the act of arresting rather than transporting him somewhere, especially since no place is mentioned.

28. Waterman, *Justice's Manual,* 117–18; italics added.

29. Walters, "Joseph Smith's Bainbridge Trials," 140 n. 36.

Walters assumes that the three witnesses were first examined and then put under "recognizance" to appear later at the supposed second hearing. But if that theory were to be reflected in Justice Neely's bill, there would be a charge for examining the witnesses *and* a charge for taking their bond to appear at a future time for trial. Only one such charge of twenty-five cents for the defendant and seventy-five cents for the three witnesses is listed. Also missing is any reference to the minimal bonds or recognizance forms signed either by the witnesses or by witnesses and their sureties. The far safer conclusion, as I maintain, is that "recognizance" as used in Neely's bill means "examining" defendant and witnesses.

From this point on, Walters's "reconstruction" is all admittedly supposition. He admits the "course of events becomes somewhat difficult to trace," largely, he speculates, because the "other two justices' bills" are missing—missing, as we have shown above, because there were no other justices.

Notwithstanding Walters's claim that the Pearsall notes were originally written by Purple and his acknowledgment that Purple's published account states that Smith was "discharged," Walters nonetheless declares that Smith was "probably" found guilty "as Neely records." Thereafter, Walters continues, Smith was either "designedly" allowed to escape because of his youth or given an "off-the-record" invitation to leave the county, or he jumped bail. And when the three justices convened a special session court, they forgot the whole matter, recognizance bonds and all, hoping the boy had "learned his lesson." This chain of unsupported hypotheses stretches credulity further at every link.[30]

Moreover, it cannot be maintained having abandoned the three justice court theory, argued instead that the trial was in reality a "Court of Inquiry," or what would be called today a "Preliminary Hearing" and that Joseph was "bound over" or ordered to appear in the Court of General Sessions (the Court of Common Pleas, when it is sitting on a criminal matter), but that he never appeared before that court. The threshold problem with that suggestion is that the New York Statute[31] together with the instructions in the

30. For example, it would make no sense whatever that Joseph appeared in Bainbridge within a matter of months after this trial to have Squire Tarbill marry him to Emma Hale on January 18, 1827, if, as Walters posits, Tarbill was one of the judges who supposedly gave Joseph "the option of leaving the area shortly or face sentencing." It makes even less sense if, as alternately suggested, Joseph had "jumped bail." Walters, "Joseph Smith's Bainbridge Trials," 139–41.

31. *Laws of New York,* vol. 2 (1813), 507, sec. II spells out the preliminary examination procedure for felonies or crimes, and sec. III explains the direct trial procedure for misdemeanors..

Justice's Manual[32] (a widely used instructional manual for New York Justices of the Peace) expressly provided that such hearings are available only in felony or "crimes" prosecutions—not misdemeanors.

The Pearsall and Purple Notes

So, what really happened? What can we draw from the statutory and case law, the bills, the admittedly incomplete and inconsistent "reports" of the note-takers, and the even more inconsistent conclusions of the commentators? Let us first resort to *The Justice's Manual* as a basis for judging the reliability of the Pearsall and Purple notes and their pretensions at being official. Purple claimed that Justice Neely was his friend and asked him to make notes of the trial. He also admitted telling the story repeatedly over the more than forty years before he submitted his article to the *Chenango Union* in May 1877.[33] Miss Pearsall, according to Tuttle, had torn her notes from her Uncle Albert Neely's docket book.[34]

How close does either come to meeting the requirements of a transcript of testimony required of a justice of the peace at that time? The statute provides that

> in all cases where any conviction shall be had before any court of special sessions, in pursuance of the act hereby amended, it shall be the duty of the justices holding such court of special sessions, to make a certificate of such conviction, *under their hands and seals,* in which shall be briefly stated the offence, conviction and judgment thereon; and the said justices shall within forty days after such conviction had, cause such certificate to be filed in the office of the clerk of the county in which the offender shall be convicted, and such certificate, *under the hands and seals of such justices,* or any two of them, and so filed, or the exemplification thereof by such clerk, under his seal of office, shall be good and legal evidence in any court in this state, to prove the facts contained in such certificate or exemplification.[35]

32. Waterman, *Justice's Manual,* 192–95.

33. Quoted in Kirkham, *New Witness,* 2:362–64.

34. Quoted in Walters, "Joseph Smith's Bainbridge Trials," 134.

35. *Laws of New York, Forty-third Session* (1820), 235–36, sec. II; italics added.

The Justice's Manual states that in implementing this statute

> upon this judgment, the court are [*sic*] required to make a certificate of the conviction, under their hands and seals, "in which shall be briefly stated the offence, conviction and judgment thereon"; and within 40 days thereafter cause this certificate to be filed in the office of the clerk of the county.

The *Manual* then goes on to add this significant language:

> Before the passing of this act, the record of conviction, before a court of special sessions, was required to be drawn with much particularity and precision; to show not only the jurisdiction of the court, but also the regularity of their proceedings.[36]

So if Walters is correct, and a court of special sessions convened, and the Pearsall notes were "The Official Trial Record" (as he maintains), where is the certification "under their hands and seals" wherein is "briefly stated the offence, conviction and judgment thereon"? The Purple notes are equally lacking such certification. On the other hand, if (as I maintain) Justice Neely alone tried the matter, and if a conviction resulted, far more particularity would have been needed in such notes demonstrating jurisdiction, the regularity of the proceedings, the conviction, and the sentence. In either event, the record of conviction would have needed to be filed with the county clerk within forty days. No such record has to date been unearthed in the office of the Clerk of Chenango County.

But what can be learned from the two accounts? Both suggest that some sort of proceeding took place. The Pearsall account lists Peter Bridgeman as complainant; the Purple notes say the complainants were Josiah Stowell's "sons." Both accounts begin with Joseph Smith being examined. Purple's account is a first-person narrative with observations interspersed. The Pearsall notes purport to be summaries of testimony. Two witnesses, Josiah Stowell and Jonathan Thompson, together with the accused, are common to both accounts. Purple adds Joseph Smith Sr., and Pearsall adds Horace Stowell, Arad Stowell, and a Mr. McMaster as witnesses. Since the Neely itemization at the end of the Pearsall account notes the presence of the defendant and "three witnesses," modern readers are left to conjecture as to who testified besides Joseph Smith, Josiah Stowell, and Jonathan Thompson.[37]

36. Waterman, *Justice's Manual,* 204–5.

37. Kirkham, *New Witness,* 2:361, 365.

Clearly, then, the Purple and Pearsall accounts do not pass muster as reproductions of court transcripts of testimony. Moreover, there are several inconsistencies and discrepancies between them. Is there anything in them that might help to clarify the charge of disorderly person?

The Elements of the Crime

What were the elements of proof that Justice Neely would have to find in order to rule Joseph Smith guilty of being a disorderly person? From the common law, or accumulated "case law" as it sometimes is called, there are some fundamental elements required in any criminal prosecution. Case law is comprised of opinions of appellate courts, but one would not expect to find a large number of disorderly person convictions reaching the Court of Appeals of New York, or other appellate courts, for that matter, for the simple reason that the class of people charged with this offense are unlikely to be able to pay for appeals. Even so, a few cases of a related nature do appear in the early New York casebooks, called *Reports,* that do shed some light on the subject.

For example, the 1810 case of *People v. Babcock* has some relevance, establishing that private frauds were not criminal. In that case, the accused obtained by false pretenses from one Rufus Brown a release of an eighteen-dollar judgment on the representation that he would pay ten dollars cash and give his promissory note for the remaining eight dollars. Having received the release, he absconded without paying the cash or giving his note. The trial court convicted him of the crime of "Cheat." The Court of Appeals of New York, reversing the conviction, said:

> The case of the *King v. Wheatley* (2 Burr. 1125) established the true boundary between frauds that were, and those that were not indictable at common law. That case required such a fraud as would affect the *public;* such a deception that common prudence and care were not sufficient to guard against it as the using of false weights and measures, or false tokens, or where there was a conspiracy to cheat.[38]

This case was repeatedly cited in later New York rulings and stood for the proposition that private frauds were not criminally indictable. This rule was expressly repeated in *The Justice's Manual.* For example, "*Fraud* is an offence at common law. To constitute this offence, however, the act done must effect

38. 7 *Johnson's Reports,* 201–5 (1810), 204; italics added.

the public—and be such an act as common prudence would not be sufficient to guard against; as the using of false weights and measures, or false tokens, or where there has been a conspiracy to cheat."[39]

An earlier and equally often cited case, *People v. C. & L. Sands,* establishes another principle—that in order to be actionable the crime must be "mischief already done."[40] In this case, the accuseds were charged with the offense of being a nuisance for keeping fifty barrels of gunpowder in a certain building near the dwelling houses of "diverse good citizens, and near a certain public street," and also of "transporting 10 casks of gunpowder through the streets of Brooklyn in a cart." After conviction in the court below, the defendants appealed. The Court of Appeals reversed the decision and adopted the holding of an English case that ruled "a powder magazine was not itself a nuisance, but that to render it such, there must be 'apparent danger or mischief already done.'"[41]

Another relevant principle is familiar to most judges and attorneys under the Latin phrase *mens rea,* meaning "criminal state of mind." This principle is succinctly stated in *The Justice's Manual* also: "To constitute a crime against human laws, there must be, first, a vicious [*sic*] will; and, secondly, *an unlawful act* consequent upon such vicious will."[42]

Applying the principles of these three cases just cited, then, Justice Neely was obliged to find that some public rather than private fraud or harm had taken place; that implicit in Joseph Smith's activities there was either some apparent danger or mischief already done; and that the acts complained of were willful or done with a "vicious" or criminal state of mind.

The Evidence

With that measure, what did the evidence show? Joseph Smith was reputed to be able to look into a stone and discover lost treasure. Let us assume, for argument's sake, that this is close enough to come within the statute's reference to "where lost or stolen goods may be found." The Pearsall notes state that

> at Palmyra he had frequently ascertained in that way where lost property was, of various kinds; that he has occasionally been in the habit of looking through this stone to find lost property for three years, but of late had pretty much given it up on account

39. See, for example, People v. Miller, 14 *Johnson's Reports,* 371 (1817).

40. 1 *Johnson's Reports,* 78 (1806).

41. 1 *Johnson's Reports,* 85 (1806).

42. Waterman, *Justice's Manual,* 167; italics in original.

> [of] its injuring his health, especially his eyes—made them sore; that he did not solicit business of this kind, and had always rather declined having anything to do with this business.[43]

Purple quotes no testimony directly but rather gives a lengthy recital of how Joseph obtained his stone. He claims Joseph exhibited the stone to the court. Earlier in his narrative, he alludes to Joseph's use of the stone as a means of bilking Stowell and others, but it is far from clear that those remarks pretend to be a summary of Joseph Smith's testimony and makes them a sort of preamble.[44]

The pivotal testimony, in my view, was that of Josiah Stowell. Both accounts agree on the critical facts. The Pearsall account states: "[Joseph Smith] had been employed by him [Stowell] to work on [the] farm part of [the] time; . . . that he positively knew that the prisoner could tell, and professed the art of seeing those valuable treasures through the medium of said stone."[45] The Purple account states:

> Justice Neely soberly looked at the witness and in a solemn, dignified voice, said, "Deacon Stowell, do I understand you as swearing before God, under the solemn oath you have taken, that you *believe* the prisoner can see by the aid of the stone fifty feet below the surface of the earth, as plainly as you can see what is on my table?" "Do I *believe* it?" says Deacon Stowell, "do I believe it? No, it is not a matter of belief. I positively know it to be true."[46]

From the array of the other witnesses there was no testimony that any of them parted with any money or other thing of value to Joseph Smith. Only Josiah Stowell did so, and then for part-time work on his farm in addition to services rendered in pursuit of treasure. More to the point, he emphatically denied that he had been deceived or defrauded. On the contrary, he "positively" knew the accused could discern the whereabouts of subterranean objects. In short, only Josiah Stowell had any legal basis to complain, *and he was not complaining.* Hence Purple's concluding comment, "It is hardly necessary to say that, as the testimony of Deacon Stowell could not be impeached, the prisoner was discharged, and in a few weeks he left the town."[47] Indeed, following the law, Justice Neely had no other choice.

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43. Kirkham, *New Witness,* 2:360.
44. Kirkham, *New Witness,* 2:364–65.
45. Kirkham, *New Witness,* 2:360.
46. Kirkham, *New Witness,* 2:366.
47. Kirkham, *New Witness,* 2:368.

The Outcome

It could be argued that Justice Neely may have had no training in law and therefore that the precedents and principles I have advanced were not part of his training or experience. Even if that were so, and that all he had as a minimum were the statutes under which the charge was tried together with *The Justice's Manual,* the same result of acquittal would have been mandated.

As confirmation that this was in fact the outcome, and as noted previously, the statute required the justice upon conviction to commit the defendant "to the bridewell, or house of correction, of such city or town, there to be kept at hard labour, for any time not exceeding sixty days, or until the next general sessions of the peace to be holden in and for the city or county in which such offence shall happen."[48] And, as also noted, such a sentencing would have needed to be certified by Judge Neely and filed in the county clerk's office within forty days. Moreover, Neely's bill requesting payment would have had an additional item under a heading of "Warrant for commitment—$1.00," which is not there, and Constable De Zeng's bill for taking Joseph Smith to jail would have been increased by twenty-five cents. The "bridewell" or poor house was located in MacDonough, a town some 17 miles north and west of Bainbridge, and thus the trip there would have added $3.50 to his bill. All those additions are missing from the bills. Moreover, the database of the names of all the people who were sentenced to the poor house in the 1820s mentions eight so sentenced in 1826. The twenty-year-old Joseph Smith was not among that number. There is additional statutory language following that last quote that places a continuing duty on the justice to discharge convicted disorderly persons from the house of corrections earlier than the maximum sixty days. So unless Judge Neely did, in fact, discharge the prisoner, Neely had a continuing responsibility regarding Smith, about which the record is silent. Indeed, an argument could be advanced that the absence of these many formalities shows that Justice Neely, knowing that he acquitted the prisoner, also knew that there was no need to formalize a record.

Against these strong indications that Joseph Smith must have been acquitted, there remains only the concluding statement of the Pearsall record, "And thereupon the Court finds the defendant guilty."[49] I believe this statement is an afterthought supplied by whoever subsequently handled the notes and is not a reflection of what occurred at the trial. This view is buttressed by the curious fact that all through the Pearsall notes, Joseph Smith is referred

48. Waterman, *Justice's Manual,* 116.

49. Kirkham, *New Witness,* 2:360–62.

to only as the "prisoner." Then for the first time, in this final sentence, he is called the "defendant."

Conclusion

What can be inferred about this experience? The foregoing considerations lead me to conclude that in 1826 Joseph Smith was indeed charged and tried for being a disorderly person and that he was acquitted. Whatever the gist of that charge, he was found guilty of no crime. Indeed, perhaps Oliver Cowdery, who either served as a justice of the peace or practiced as a lawyer from 1837 until his death in 1848, had it just about right. He wrote in 1835, "While in that country, some very officious person complained of him as a disorderly person, and brought him before the authorities of the county; but there being no cause of action he was honorably acquitted."[50]

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50. *Messenger and Advocate* 2 (October 1835): 201.

Postscript: Joseph Acquitted Again in 1830

In June/July 1830, Joseph was again charged with being a disorderly person in two cases, the first in South Bainbridge, Chenango County, and the second in Colesville, Broome County, on successive days.

The first case is described by Richard Bushman as follows:

> Doctor A. W. Benton of Chenango County, whom Joseph Knight called a "catspaw" of a group of vagabonds, brought charges against Joseph as a disorderly person. On June 28, he was carried off to court in South Bainbridge by constable Ebenezer Hatch, trailed by a mob that Hatch thought planned to waylay them en route. When a wheel came off the constable's wagon, the mob nearly caught up, but, working fast, the two men replaced it in time and drove on. . . .
>
> The nature of the charges brought against Joseph in the court of Justice Joseph Chamberlain of Chenango County is not entirely clear. Joseph Smith said it was for "setting the country in an uproar by preaching the Book of Mormon," . . . but Joseph Knight Sr. said Benton swore out the warrant for Joseph's "pretending to see under ground," going back to the old money-digging charges of the 1826 trial. . . .
>
> Joseph Knight hired James Davidson to defend the Prophet, but Davidson . . . advised engaging John Reed as well, a local farmer noted for his speaking ability. Reed later said that Joseph "was well known for truth and uprightness; that he moved in the first circles of community, and he was often spoken of as a young man of intelligence, and good morals." . . . The hearing dragged on until night, when Justice Chamberlain, whom Reed considered a man of "discernment," acquitted Joseph.[51]

The bills of Justice of the Peace Joseph P. Chamberlain and Constable Ebenezer Hatch were among the Audits of Chenango County noted in footnote 6 above. Chamberlain's bill shows no reference to a commitment to the bridewell nor an item showing he required a Peace Bond of

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51. Richard Lyman Bushman, with Jed Woodward, *Joseph Smith: Rough Stone Rolling* (New York: Alfred A. Knopf, 2005), 116–17.

the Defendant. Hatch's bill shows no mileage to transport Joseph to the bridewell at MacDonough. There is considerable other reminiscence and corroborating material to reconstruct those trials, which again supports the conclusion that Joseph was acquitted.

The second case was tried before a three justice of the Peace court—a Court of Special Sessions. Bushman continues his description of this second proceeding with these words:

> Joseph had no sooner heard the verdict than a constable from neighboring Broome County served a warrant for the same crimes. The constable hurried Joseph off on a fifteen-mile journey without a pause for a meal. . . .
>
> At ten the next morning, Joseph was in court again, this time before three justices who formed a court of special sessions with the power to expel him from the county. . . . Reed said witnesses were examined until 2 a.m., and the case argued for another two hours.[52]

One of the judges in that court was Joel K. Noble, who wrote his memory of that trial on several occasions. The first known publication was in 1832, quoting from a letter from a "gentleman in Windsor, Broome Co., N. Y.," dated August 30, 1832.[53] Here, the warrant was for "breach of the peace against the state of New York, by looking through a certain stone to find hid treasures." In the newspaper article, Noble reports some of the statements by witnesses and at other points summarizes or interprets their testimony. Because the lawyers began their case by trying to show that Joseph had taken money from widows and Church members, it appears that they understood that the crime of being a "disorderly person" needed to involve direct evidence of fraud on the public. Nevertheless, their argument still failed because there was testimony that Joseph had not looked "in the glass within the space of two years last past." Noble's conclusion thus reads: "Joseph Smith, jr. was discharged; he had not looked in the glass for two years to find money, &c.,—hence it was outlawed," or in other words, the cause of action was barred by the statue of limitations and was dismissed completely.

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52. Bushman, *Rough Stone Rolling,* 17.

53. "Mormonism," *New England (Boston) Christian Herald,* November 7, 1832, 22–23; and reprinted in *(Limerick, Maine) Morning Star,* December 16, 1832.