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Since the subject of the 1826 trial of Joseph Smith has been extensively reported and commented upon, one quite rightly wonders what else is new or old to be said about that blip in Mormon history. However, none of the reports and few of the commentaries have tried to put the trial in the legal context of that day and examined the applicable statutory, procedural, and case law in force in New York in 1826. This essay will attempt to do just 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." No account of the trial was published at or near the time it occurred. The earliest known reference to the trial appeared in an article written in 1831 by A. W. Benton.[1] Forty-one years later, William D. Purple claimed to have generated his version from notes and memory, having been asked to act as scribe by Judge Neely.[2] The accounts 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] The disparities and inconsistencies among these accounts were later commented upon by Brodie, Kirkham, and Nibley, the latter two expressing skepticism about their authenticity.[4] Then the Reverend Wesley P. Walters discovered two bills in the basement of the Chenango County Jail in Norwich, New York, sometime in the summer of 1971.[5] The first was the bill of Justice Neely to Chenango County for his services for a series of trials he conducted in 1826. There are seven trials listed, running from some time prior to 20 March through 9 November 1826. The page is age-worn and illegible in part, but the following is a reproduction with some names approximated:

Gordon A. Madsen is an attorney practicing in Salt Lake City.

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 [Tarble?]
	Albert Neely
Same	
vs.	To my fees in trial
John Sherman [?]	of above cause 3.68

People	Assault & Battery
vs.	To my fees in the cause 1.99
Samuel May	
March 22, 1826	

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

Same	
vs.	Champerty
Newel Evans [?]	To examination of above cause 2.18
Sept. 2, 1826	

Same	
vs.	Assault & Battery
Josiah Evans	To my fees in above cause —1.46

Same	
vs.	Petit Larceny
Robert Darnell [?]	To fees in above cause —— 1.85
October 3, 1826	

Same	Assault & Battery
vs.	
Ira Church	to fees in above cause ——2.53

Nov 9, 1826 Albert Neely, Just. of Peace $16.37[6]

The other bill was that of the constable in the case, Philip De Zeng, which states only the year 1826 and lists thirty plus lines of billed services, presumably rendered during that year. The relevant passage states as follows:

> 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.—[7]

Before considering these bills and what Reverend Walters (their discoverer) claims they tell us vis-à-vis the accounts of the trial previously published, let us first consider the law in force in New York in 1826.

THE CHARGE

With what exactly was Joseph Smith charged? Oliver Cowdery wrote that Joseph Smith was charged with being a "disorderly person."[8] Benton agreed but characterized the basis for the charge as "sponging his living from their [the public's] earnings."[9] Purple claimed that Joseph was charged with being a "vagrant, without visible means of livelihood."[10] Marshall and Tuttle called him a "disorderly person and an imposter."[11]

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

> That all persons who threaten to run away and leave their wives or children to the city or town, and 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 all persons who not having wherewith to maintain themselves, live idle without employment,* and also 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 all jugglers, and 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 all persons who run away and leave their wives and children whereby they respectively become chargeable to any city or town; and 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 all persons wandering abroad and begging, and all idle persons not having visible means of livelihood, and all common prostitutes, *shall be deemed and adjudged disorderly persons.*[12]

The first italicized passage is the classic definition of a *vagrant;* however, in this statute vagrants are not classed separately, but are rather included with all the other collection of people to be "adjudged disorderly persons."

The two bills, however, provide no help beyond specifying that the offense was a *misdemeanor*. The judge, on his bill, identifies Joseph as "the Glass Looker." That entry is below Joseph's name rather than opposite where "Misdemeanor" appears, and in each of the other cases itemized, the offense is also 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 9 November 1826, it was undoubtedly written some time after Joseph Smith's trial. Moreover, there was no statutory or common law crime of "glass looking" then on the books. Therefore, "Glass Looker" is likely a phrase of identification rather than the statement of a criminal charge. Similarly, "Imposter" did not describe any criminal offense. So we are left with the charges disorderly person and vagrant.

As Marvin Hill has pointed out, all accounts agree that Joseph was employed by Josiah Stowell, which largely precludes a charge of vagrancy ("not having wherewith to maintain themselves, live without employment"). Hill continues:

> A "misdemeanor" might be many things, as the term simply designates a minor offense. Was the charge vagrancy, disorderliness, being an "imposter," or was it deliberately left vague because treasure hunting, as Joseph practiced it with Stowell, did not violate any specific New York law? It is generally known among historians that digging was common in western New York in this period. How many such persons were held accountable, and to what law? These are questions that need answering before any fair assessment of the trial can be made.[13]

The heading "Misdemeanor" and the disparate identifying of the charge also show that the would-be reporters/witnesses were not all that conversant with early New York jurisprudence or criminal law. That should not be taken as too heavy an indictment on either the court or the observers. The very problem Hill raises is addressed in a *practice commentary* appearing in the current New York Penal Code under the present-day statute titled "Disorderly Conduct":

> This section partially replaces the former Penal Law's "disorderly conduct" statue [provisions cited]. . . . For a thorough understanding of the revised section and others contained in this Article, some familiarity with the former statutory law of this general area is required.
>
> The former Penal Law and the Code of Criminal Procedure defined a host of minor offenses, most not amounting to "crimes,"

> penalizing miscellaneous types of conduct tending to create public disorder, offensive conditions and petty annoyances to individuals. Most of these appeared in three multisubdivisioned statutes bearing the labels of, or known as, "disorderly conduct" (Penal Law §722), vagrancy (Code Crim. Proc. §887) and disorderly persons (*id.* §899). Many of the Criminal Code provisions in particular, defining status offenses such as being a drunkard, a pauper and the like, were distinctly archaic and probably unconstitutional. One of the defects of the Penal Law's disorderly conduct statute was that much of the conduct proscribed, such as begging and loitering for immoral purposes, did not have the "breach of the peace" character essential to that offense (§722 [6]-[11]), thus rendering conviction in such cases extremely difficult and sometimes impossible [cases cited].[14]

THE COURT

Walters infers from the item in Constable De Zeng's bill listed as "'notifying two justices'" that the trial was conducted before a "'Court of Special Sessions.'"[15] This brings us to an examination of the court system that existed in New York in the 1820s. Without detailing the overlapping and appellate jurisdictions of courts of common pleas, chancery, and oyer and terminer; courts of appeal; supreme court; and city courts of New York, we will note the three courts relevant to our purposes: justice courts, courts of special sessions, and courts of general sessions.

Justice courts, or courts presided over by a single justice of the peace, were then (as they generally are today) the bottom rung on the legal ladder. 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 house of correction "until the next general sessions of the peace," or a maximum of six months, with the proviso that any two justices (one being the committing justice) could discharge any offender if "they see cause."[16] The phrase "general sessions of the peace" meant the next convening of the court of general sessions discussed hereafter. They were also empowered to conduct bail hearings or in some instances preliminary examinations or preliminary hearings in certain felony cases and, where appropriate cause justified, to *bind over* such accused felons to the court of general sessions to stand trial.

On the next rung up were the courts of special sessions comprising 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. Special sessions courts could impose fines not exceeding twenty-five dollars and jail terms not exceeding six months.[17]

These limited jurisdiction notions are corroborated by a widely used treatise titled *The Justice's Manual*, first published in 1825. As its title page advertises, it is "A Summary of the Powers and Duties of Justices of the Peace, in the State of New York Comprising a Variety of Practical Forms, Adapted to Cases Civil and Criminal."[18] *The Justice's Manual* 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 offence 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 [jail] 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.[19]

The third kind of court in issue here is the court of general sessions, 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, returning to Justice Neely's bill, 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."

The provision that follows after the definition of the offense (spelled offence in the statute and in the *Manual)* in the disorderly persons statute states:

> And 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, 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.[20]

The Justice's Manual, like the statute, in discussing disorderly persons prosecutions, speaks in the singular case as well — "*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.[21] Conversely the forms suggested by the *Manual* to be used by courts of special sessions speak in the plural and require three signatures.[22] 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 the Joseph Smith case was tried by Neely alone.

In light of the above, what is the meaning of the De Zeng entry "Notifying two Justices"? I frankly do not know. Perhaps 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 the Joseph Smith trial either in the Neely bill or in the Pearsall notes or the Purple account. Moreover, there is no indication that a jury trial was either requested or waived, nor any fee billed for summoning or swearing a jury.

At the end of the Marshall rendering of the Pearsall notes, the Neely bill of $2.68 in the Joseph Smith case is itemized as follows: "Costs: Warrant, 19c. Complaint upon oath, 25½ c. Seven witnesses, 87½c. Recognisances [*sic*], 25c. Mittimus, 19c. Recognisances of witnesses, 75c. Subpoena, 18c.—$2.68."[23] There is no hint in that itemization of a jury or additional justices.

THE MEANING OF THE TERM *RECOGNIZANCE*

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."[24] On the other hand, the plural *recognizances* referred to types of bonds or undertakings, or

sometimes bail used by the courts of the time 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 to "recognizing two witnesses 0.50" (meaning a fifty-cent fee for examining two witnesses) or "recognizing three witnesses 0.75."[25]

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 Walters'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.[26] 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, 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

Walters reconstructs 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 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 having taken place in two successive days, the first before Justice Neely and the second before Neely and two unnamed additional justices. We have already identified 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 above, 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*, to be dealt with in the premises"; from the record of proceedings form: "the John Stiles . . . is duly convicted, before *me,* the under-named Justice of the Peace"; from the commitment form: "Whereas John Stiles . . . has been duly convicted, *before me,* the under-named Justice of the Peace."[28] No room in that language 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 empaneled 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. We have already discussed Walters's dubious equation of the "recognizance" to a bail bond posted after delivery to jail ("to gaol" — the English spelling, which Walters tacks on to De Zeng's "to take prisoner"). 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* then as now 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 somewhere is mentioned.

Walters assumes that the three witnesses were first examined and then put under "recognizance" to appear later at the supposed second hearing. But as we have noted, 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," he nonetheless declares that Joseph Smith was "probably" found guilty "as Neely records." Thereafter, he continues, the "youth" (Joseph was at the time nine months from his twenty-first birthday) 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]

THE STATUS OF THE PEARSALL AND PURPLE NOTES

What really happened? What can we draw from the statutory and case law, the bills, the admittedly incomplete and inconsistent "reports" of the notetakers, 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.[31] Miss Pearsall, according to Tuttle, had torn her notes from her Uncle Albert Neely's docket book.[32] 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.[33]

The Justice's Manual states that in implementing this statute

> upon this judgment, the court are 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 adds 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."[34]

In the margin are noted two New York Supreme Court cases giving rise to the quoted paragraph. They are *Powers against The People* and *The People against Miller*.[35] Both cases involved three-justice courts, and because the record of the proceedings was not "with particularity and precision" drawn when transmitted to the appellate court, both were quashed or dismissed. The language of the *Powers* case, however, seems germane here because it is broad enough to apply to single-justice courts as well as to courts of special sessions:

> It ought, then, to have appeared, that she had not given bail after being apprehended, and that she had 48 hours to procure such bail; (Laws of N.Y. 24 sess. c. 70. s. 11.) but the complaint was made on the 10th March, and she was summoned to appear before the justices, and did appear, and was tried on the same day. . . . It is a salutory rule, with respect to *inferior courts,* that the cause of which *they* take cognizance, should appear to be within their jurisdiction. These objections are fatal, and the conviction must, therefore, be quashed.[36]

The reference to the right to bail is in the statute prescribing duties of individual justices of the peace as well as three-justice courts.

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 Bridgman 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," we are left to conjecture as to who testified besides Joseph Smith, Josiah Stowell, and Jonathan Thompson.[37]

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 clarify the charge of disorderly person? What were the elements of proof that Justice Neely would have to find in order to rule Joseph Smith guilty?

THE ELEMENTS OF THE CRIME

From the common law, or accumulated "case law," as it sometimes is called, there are some fundamental elements required in any criminal prosecution. The case law is comprised of opinions of appellate courts, and one would not expect to find a large number of disorderly person convictions reaching the Supreme Court 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, 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 against Babcock* has some relevance.[38] 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 Supreme Court of New York reversed the conviction.

The court said:

> Lord Kenyon said that 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.[39]

This case was repeatedly cited in later New York rulings and stood for the proposition that private frauds were not criminally indictable.[40] That rule, incidentally, was expressly repeated in *The Justice's Manual:*

> *Fraud* is an offence at common law. To constitute this offence, however, the act done must effect 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.[41]

An earlier and equally often cited case, *People v. C. & L. Sands,* establishes another principle.[42] In this case the accused were charged with 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 Supreme Court 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.'"[43]

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."[44]

Applying the principles of the 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.

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 [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.[45]

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. Indeed Purple separates them from his claimed summary of testimony and makes them a sort of preamble.[46]

The pivotal testimony, in my view, was that of Josiah Stowell. Both accounts agree on the critical facts. The Pearsall account states: "[Joseph] had been employed by him [Stowell] to work on farm part of 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."[47] 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."[48]

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."[49] Indeed Justice Neely had no other choice.

It could be argued that Justice Neely may well 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 all he had as a minimum were the statutes under which the charge was tried together with *The Justice's Manual*, the same result would have been mandated.

As noted above, 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." And, as also noted above, 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 to jail would have been increased by twenty-five cents. There is additional statutory language following that last quoted 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, he had a continuing responsibility regarding him, about which the record is silent. Indeed, an argument could be advanced that the absence of the 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 must have been acquitted, there remains only the concluding statement of the Pearsall record, "And thereupon the Court finds the defendant guilty." 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 to only as the "prisoner." Then for the first time in this final sentence he is called "defendant."[50]

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. Such a conclusion does nothing to "prove" or disprove the claim that he was reputed to be a "glass-looker." It simply means that he was found guilty of no crime.

While it is comparatively easy for any of us to be subjected to labels and name-calling — and in fulfillment of prophecy, Joseph Smith received a remarkable quota of both — it is quite another thing to be convicted in a court of law, even in the court of a justice of the peace. The evidence thus far available about the 1826 trial before Justice Neely leads to the inescapable conclusion that Joseph Smith was acquitted.

Indeed, perhaps Oliver Cowdery, who was trained in the law and practiced that profession 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."[51]

NOTES

[1]A. W. Benton, "Mormonites," *Evangelical Magazine and Gospel Advocate* 2 (9 April 1831).

[2]W. D. Purple, "Joseph Smith, The Originator of Mormonism Historical Reminiscences of the Town of Afton," *The Chenango Union,* 3 May 1877, as quoted in Francis W. Kirkham, *A New Witness for Christ in America: The Book of Mormon,* 2 vols. (Independence, Mo.: Zion's Printing and Publishing Co., 1959), 2:364.

[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]Photostat of original in possession of author.

[7]Photostat of original in possession of author.

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

[9]Kirkham, *New Witness* 2:467.

[10]Kirkham, *New Witness* 2:364.

[11]Kirkham, *New Witness* 2:360.

[12]*Revised Laws of New York* (1813), 1:114, sec. I; italics added.

[13]Hill, "Joseph Smith and the 1826 Trial," 228.

[14]*New York Penal Code,* Title N, sec. 240.20, Part 3, 262–63.

[15]Walters, "Joseph Smith's Bainbridge Trials," 133.

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

[17]*Revised Laws of New York* (1813), 2:507–08, sec. IV.

[18]Thomas Gladsby Waterman, *The Justice's Manual or, A Summary of the Powers and Duties of Justices of the Peace in the State of New-York* (Binghamton, N.Y.: Morgan and Cannoll, 1825), title page.

[19]*The Justice's Manual,* 200–01; italics in original.

[20]*Revised Laws of New York* (1813), 1:114, sec. I; italics added.

[21]*The Justice's Manual, 116–20; italics added.*

[22]*The Justice's Manual, 203–08.*

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

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

[25]Walters, "Joseph Smith's Bainbridge Trials," 138, n. 28.

[26]*The Justice's Manual,* 190–95.

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

[28]*The Justice's Manual,* 117–18; italics added.

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

[30]For example, it makes no sense whatever that Joseph would appear in Bainbridge within a matter of months of the trial to have Squire Tarbill marry him to Emma Hale on 18 January 1827 if, as Walters posits, Tarbill was one of the judges who gave Joseph "the option of leaving the area shortly or face sentencing." It makes even less sense if, as alternately suggested, Joseph "jumped bail."

[31]Quoted in Kirkham, *New Witness* 2:362–64.

[32]Quoted in Walters, "Joseph Smith's Bainbridge Trials," 134.

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

[34]*The Justice's Manual,* 204–05.

[35]4 *Johnson's Reports,* 292 (1809); 14 *Johnson's Reports* 371 (1817).

[36]4 *Johnson's Reports,* 292 (1809); *Revised Laws of New York* (1813), 2:507, sec. IV; italics added; *Laws of New York, Forty-third Session* (1820), 236, sec. II.

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

[38]7 *Johnson's Reports,* 201–05 (1810).

[39]7 *Johnson's Reports,* 204; italics added.

[40]See, for example, *People vs. Miller,* 14 *Johnson's Reports,* 371 (1817).

[41]*The Justice's Manual,* 175.

[42]1 *Johnson's Reports,* 78–90 (1806).

[43]1 *Johnson's Reports,* 85 (1806).

[44]*The Justice's Manual,* 167; italics in original.

[45]Kirkham, *New Witness* 2:360.

[46]Kirkham, *New Witness* 2:364–65.

[47]Kirkham, *New Witness* 2:360.

[48]Kirkham, *New Witness* 2:366.

[49]Kirkham, *New Witness* 2:368.

[50]Kirkham, *New Witness* 2:360–62.

[51]*Messenger and Advocate* 2 (October 1835): 201.