"The question is, whether the description in the patent of the land granted by it did or did not cover the ground on which the defendant has his fence, which is complained of as being upon a public highway. The trial of the former indictment against another defendant, bringing up precisely the same question in effect, took place before myself; and though I reserved the case for the opinion of the Court of Common Pleas, I had formed, I confess, a strong opinion of my own, that upon the evidence given at the trial the land in question formed a part of the land granted by this patent, and was not within the allowance for a street or public highway.

"The Court of Common Pleas have decided otherwise, but not without a difference of opinion.

"We have read the evidence given upon this trial, and see nothing in it to warrant us in holding that if a conviction was proper in the former case, the same verdict was not also proper upon the evidence that was given in the case now before us. Whether the evidence given upon the trial of this latter case does not better support a verdict in support of the prosecution than the evidence that was given on the former case, it is not necessary to determine, for we think our right course will be to defer to the judgment given in the Court of Common Pleas, rather than to decide in opposition so it; and in this case there can be no difficulty in the defendant obtaining the judgment of the Court of Appeal. We give judgment, therefore, discharging the rule *nisi* for a new trial, and we do so entirely on the authority of the judgment given in the Court of Common Pleas, and in the hope that the judgment may be reviewed on appeal, for the case is one of consequence, upon which I may say that there is among the judges a considerable difference of opinion, and the judgment of the higher court could not be obtained by our taking any other course than affirming the conviction."

From this decision the defendant appealed, assigning as a reason:

That upon the proper construction of the patent, taken in connexion with the evidence given, it should be held to embrace the land upon which the fence complained of in the indictment was erected; and that the learned judge should have so directed the jury.

J. Wilson, Q. C., and *C. Robinson*, for the appellant.

Robert A. Harrison, for the Crown.

The question involved in this appeal was simply whether the line as run by Mr. Carroll, the surveyor, or the fence enclosing the block on which the Episcopal Church stood should govern; the appellant contending that the line of fence should be the boundary, and that the learned judge should have so charged the jury; that not having so charged there had been such a misdirection as would entitle the appellant to a new trial.

Sir J. B. Robinson, Bart., C. J.—This appeal brings up the question whether the patent dated the 18th day of January, 1836, setting apart for the use of the Church of England the tract of land in the city of London, on which the church then stood, makes the fence which then enclosed the tract the southern boundary, which would leave 100 feet and no more for the breadth of North Street East, or whether in consequence of the government surveyor, Mr. Carroll, having before the issue of the patent run a line and marked it through the inclosed tract, intending it to shew the northern boundary of North Street East, the line so run must govern. In the latter case the fence which was put up before the making of the patent and which is still maintained encroaches upon the street to the extent of 32 feet in depth, and to that extent closes up and obstructs the highway.

This same point had been before discussed in a prosecution for nuisance against another defendant, which case is reported (8 U. C. C. P. 253.), and to which reference was made in the judgment given below in disposing of the case now before us. In that case, which was tried before myself, it was sworn by the surveyor who made the original survey of the new addition to the town plot of London on which the church referred to stands, that he had not run out and marked any line to define the northern limits of North Street East until some time in February, 1836, which was after the issuing of the patent.

If that were so, then the mention made in the patent of the "ground on which the church then stood" could not, I think, be held to have any reference to the line of the street which had not at that time been run out, and for that reason, and upon the other evidence given, I should have thought it clear that by the "ground on which the church stood" we ought to understand the tract as actually inclosed and held with the church at the time the grant was made. And I should have so held, if it had been left to me to determine the legal question, but both parties desired that the point should be reserved for the consideration of the court from which the record came, and I did accordingly reserve it.

It was afterwards discovered, as it seems, that the surveyor was mistaken in supposing that he had not run out and staked the north line of East North Street until after the completion of the patent; and upon the trial of the indictment, which is before us, against this defendant, Mountjoy, the surveyor, swore that he had posted North Street, on the 8th of January, 1836, which was ten days *before the patent is dated.*

This is a very material variation from his former testimony, occasioned, I suppose, from his having in the meantime referred to his field notes. And the question now is what, with the knowledge of this fact before us, we must take to be the southern limit of the land granted by the patent of the 18th of January, 1836, in other words, did the Crown grant, and could the Crown grant, by that patent the land that was inclosed with the church and upon which, in that sense, the church then stood; or was and is the tract granted, necessarily confined on the south to the northern limit of North Street as laid out in the original survey of the new town plot that had been made a few days before?

That survey it is proved had not been returned by the surveyor to the government till the 28th of March following the issuing of the patent, and it is not therefore reasonable to suppose that the government referred to any tract as laid out in that survey, when they used the words "all that parcel or tract of land being part of the town plot of London, on which the Episcopal Church of England now stands." If not then what were they referring to? Not surely to the small space on which literally the church stood, that is, not merely to the land covered by the building, because the tract is described in the patent as containing four acres and two-tenths or thereabouts.

I confess I have a strong conviction that as the government from the words used in the patent, evidently were aware that there was this church standing upon a certain tract in the town of London, which tract could be seen and was notoriously marked by the fence which inclosed it and had inclosed it for a year or more, they meant to grant the tract so inclosed on which the church stood, and not a tract as bounded by a line drawn by their surveyor, of which line they had then no knowledge, nor until more than two months afterwards. What I mean is that they most probably intended to make the grant to conform to the plan which had been made out and submitted by Mr. Askin, and which the rector and congregation had been given to understand had been acceded to.

This plan gave to North Street a width of 100 feet, which was 32 feet more than the width of the streets in the plot before laid out, and more I suppose than either the government or the inhabitants of London would have expected to be the width of the streets, if there had been no such special instruction as was given to the surveyor by Colonel Talbot.

If the church had happened to be placed upon the very southern limit of the tract as inclosed, on the understanding that the patent had reference to the tract which had been asked for, and which they had reason to believe they had obtained, it would have been difficult I think to contend that the land covered by the church was not conveyed by the patent under the words used. The only question then, I think, would have been whether the government could legally grant the land so covered by the church, notwithstanding it was within the street as it had, before the completion of the patent, been laid out in the original survey of the town plot.

That question under any view of the evidence we are under the necessity of considering, for I understand it to be an undisputed fact, that the street had been laid out on the ground two chains wide before the patent was made.

The law existing on that point at the time the patent issued in 1836, was the provision contained in the statute, 50 Geo. III, chapter 1, section 12, which enacted that all allowances for roads in any town or township laid out by the King's surveyors shall be