# *CASES DETERMINED

IN THE

# SUPREME COURT OF JUDICATURE

OF THE

# STATE OF NEW JERSEY.

SEPTEMBER TERM, 1818.

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## THE STATE v. THE MORRIS TURNPIKE COMPANY.

1. Indictment for not repairing bridge. (a)
2. Company not liable.

**On indictment.**

The Morris Turnpike Company was indicted at the sessions, in Morris county, for not repairing a bridge upon the line of the road in the township of Morris, called the log bridge, which had fallen into great decay, so as to impede the traveling. The indictment was removed by *certiorari*, and a state of facts in the following words was agreed upon, and presented to the court:

"The company was incorporated by statute passed the 9th day of March, 1801, entitled 'An act for facilitating the communication from Elizabethtown, in the county of Essex, through Morristown, in the county of Morris, and from thence into the county of Sussex;' *pro ut* the same.

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(a) See *State* v. *Morris and Essex R. R.*, 3 *Zab.* 360; *State* v. *Morris and Essex R. R.*, 1 *Dutch.* 437; *State* v. *Morris Canal*, 2 *Zab.* 537; *Ward* v. *Newark &c. Turnpike Co.*, *Spen.* 323. County is not liable, *State* v. *Inhabitants of Hudson*, 1 *Vr.* 137; *Freeholders &c.* v. *Red Bank*, 3 *C. E. Gr.* 91; *Freeholders* v. *Strader*, 3 *Harr.* 108; *Cooley* v. *Freeholders*, 3 *Dutch.* 415; *Livermore* v. *Freeholders*, 2 *Vr.* 507; *Pray* v. *Jersey City*, 3 *Vr.* 394.

"On the 26th of February, 1802, the company, under their common seal, laid out a road across the state. It began at Elizabethtown Point, and extended through the counties of Essex, Morris and Sussex to the river Delaware, opposite the town of Milford, in Pennsylvania. The whole distance was sixty-two miles, seventy-one chains and fifty-seven links.

*"The efforts of the company failed in trying to procure subscriptions to a policy for the whole distance at once. They therefore opened and got a policy filled for only one district, embracing part thereof. When, after years, this was completed, they got a policy filled for a second district; and, this being done, they opened another subscription, under which they formed their third and last district, over the Blue Mountain in Sussex.

"These districts, taking their aggregate distances, amounted to only forty-eight miles, seventy-seven chains and seventy-one links. Commissioners appointed by the governor inspected and certified them to be completed according to law. Whereupon the governor, by license under the great seal, bearing date the 3d day of January, 1810, permitted and granted to the company a license 'to erect across the said road, the whole distance whereof is forty-eight miles, seventy-seven chains and seventy-one links,' eight gates, and to take toll for said distance. The company have never taken, nor pretended a right to take toll for any greater distance. There still remained thirteen miles, seventy-three chains and eighty-six links of the route undone, the power of the company to do which had expired at the date of their said license by a limitation in the fourteenth section of the statute. To do this remaining part would require a capital of between $20,000 and $30,000, which the company has no right to raise by subscription, and their funds otherwise are totally inadequate, their dividends having never amounted to two per cent. on the capital expended.

"When the company foresaw their inability to complete the whole distance, and that part of it must necessarily be left undone, they formed their turnpiking districts so as to include those parts generally which were the most expensive, rough and mountainous, which heavily-loaded carriages had ever found im-

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passable, and so as to leave unexecuted generally only such parts as being public highways under the care of township officers were naturally level, firm and good, or in such a state as not to impede loaded carriages greatly at any time.

"Hence, the fourteen unfinished miles were not continuous, a distance of from ten to twelve miles of turnpike road parting them from each other. Thus, a part of the free public highway, thirty-six chains and seventy-five links in length, extending from the Presbyterian church on Morristown green, across said green or common, and so along Bridge street, and the plain ground beyond it, *was omitted, being naturally a dry, level and good piece of road at all seasons, passing over a small stream of water, under very high banks, over which (at the time the company formed their districts) there was a good county bridge. Within about one year this bridge having fallen down (which is the bridge mentioned in the indictment) the company is indicted for not repairing it. No part of this thirty-six chains (including the said bridge) was ever turnpiked or repaired by the company. They never took toll, nor were licensed by the governor to demand toll for any part of it. It has always been a free public highway, repaired by the township officers, as such, during the whole existence of the company, almost seventeen years last past, until the falling down of the bridge, about a year ago.

"If the court should be of opinion that the company are bound by law to build the said bridge, it is agreed that the attorney for the company shall retract their plea, and plead guilty; but if the court shall be of the contrary opinion, it is agreed that a *nolle prosequi* shall be entered on the indictment."

*Attorney-General*, for the state.

*G. H. Ford*, for defendant.

Kirkpatrick, C. J.

There was a *certiorari* directed to the court of quarter sessions of the peace of the county of Morris, to remove the above indictment into this court, and the justices have sent up the

indictment itself, probably taken from their files (though it is not marked filed), together with the original recognizance upon the allowance of the writ, and a copy of their order, directing the said writ to be returned; all which are certified by the clerk under the seal of the court, and which, in the said certificate, are said to be all things touching the said indictment in the said court remaining.

There is no record returned, nor materials of which this court can make a record; there is no caption; it does not appear when the indictments were found, nor by whom they were found, nor by what authority, nor to whom presented.

The mere endorsement of the time of finding on the back of the indictment, or the placing of it at the head or at the foot of the same, by the attorney-general or by the clerk, is not sufficient. It makes no part of the record. It must always appear, and it can lawfully appear only in what is called the caption, that *is, that part of the record which recites all the circumstances introductory of the indictment itself.

The legitimate office of the *certiorari* in these cases is to bring up the record, and not the papers, from the files, unless such papers be specially called for; and this record, when brought up, must contain distinctly in itself all the matters above specified; for otherwise it contains no lawful charge upon which the citizen can be put to plead or brought to trial.

But inasmuch as the attorney-general and the turnpike company, for the sake of saving trouble and expense, have submitted the question as to the liability of the said company to keep up and maintain the said bridge, in the said first indictment mentioned upon a case by them stated; and inasmuch as the court are willing to meet their wishes in this respect, and to put an end to the controversy, especially as it affects the public traveling and general convenience of the country, therefore they have thought proper to look into it.

Having the liability of the company only in view, it is not necessary to examine the form of the indictment, to which objection might be raised. It is sufficient to say that it charges, in substance, that a certain bridge, commonly called the log bridge, in

the county of Morris, which the said company were bound to keep up and maintain, was, from the 1st of October, 1815, until the finding of the said indictment, suffered to be in great decay, broken, ruinous &c. And—

The case raised upon this indictment and submitted to the consideration of the court, is in these words, to wit. (See case).

Upon looking into this act, we find it enacted, among other things, in section 10, "that as soon as the said company shall have completed twelve miles of the said road, they may apply to the governor, who shall appoint commissioners to view the same, and if they shall report that the same is finished according to the true intent and meaning of the said act, he shall, by license under his hand, permit them to erect two gates or turnpikes thereon and to receive and take toll &c., and in like manner for every six miles thereafter so made, approved &c., to erect one gate, take toll" &c.

We find it further enacted in section 14 "that if the said company shall not commence their operations within two years after the passing of the said act, or shall not within seven years after*wards complete the said road, then all their powers shall cease, be void and of no effect, *so far as may relate to the parts unfinished*."

In the making of the road the act prescribes no particular place of beginning, no particular portion which shall constitute the said first twelve miles, nor does it direct that the reaches of six miles, afterwards to be made and licensed, shall be contiguous to or in continuation of the said first twelve miles or of one another. All this was left to the discretion of the company, and it was so left, no doubt, because it was obvious that the private interest of the company was so blended with the public convenience that the one could not be promoted without promoting the other also. The company, in the exercise of this discretion, have thought proper to leave certain intermediate spaces unmade, and so far as relates to these, their power, by the provisions of the act, has long since ceased. Instead, therefore, of being obliged to go on and finish these intermediate spaces, of which the space on which this bridge stands is one, they are expressly prohibited

from so doing. The law cannot impose a penalty for not doing that which it prohibits to be done.

According to the agreement of the attorney-general, therefore, let a *nolle prosequi* be entered.

SOUTHARD, J.

The case submitted leaves but little doubt for the court to resolve.

The company is indicted for not repairing a bridge on the line of the road. The defence is that it is not a part of the road, and that they have now neither power over it nor authority to build or repair it. And this defence seems to be admitted by the facts stated. It is probable that the legislature did not anticipate such a case as has occurred. It no doubt intended that the parts of the road which were made should lie adjoining each other and not that a short space should be permitted to intervene, throwing upon the public so expensive a burthen as this bridge.

But we must construe the grant to the company according to the manifest meaning of the words, and these seem to justify the following remarks: 1. The parts made must be on the line of the road and contain six miles, but need not adjoin each other. 2. The power to compel the company to make the road *continuous, if it existed at all, ought to have been exercised before the governor granted a license. 3. After seven years from the passing of the law the power of the company ceased over all parts of the line of the road which was not then completed. Nothing short of a legislative act could revive their power. If these remarks be correct all doubt is at an end. The state of the case affirms that the road as it is now used was regularly licensed; that the distance of thirty-six chains, including this bridge, never was turnpiked or licensed, and that the seven years have long since passed away. It necessarily follows that the company cannot make this bridge, and, therefore, cannot be convicted under this indictment.

*Nolle prosequi* entered.

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