

## New Jersey Court of Errors and Appeals.

Between

JOHN R. PARSELL and others,  
plaintiffs in error,

and

JOHN M. MANN, JOSHUA DOUGH-  
TY, and WM. G. STEELE,  
defendants in error.

Writ of error to Su-  
preme Court.

Ret'ble March T. 1862.

J. N. VOORHEES, *Attorney for plaintiffs in error.*

*HN Gaston*, *Attorney for defendants in error.*

New Jersey, to wit.—The State of New Jersey to the Judges of the Inferior Court of Common Pleas in and for the [L. s.] county of Somerset, greeting: We being willing, for certain reasons, to be certified of the appointment of surveyors of the said county of Somerset, made by you in the term of April last, in the application of John R. Parsell and others, to lay out a certain public road, in the township of Bridgewater, in said county, to begin at a stake standing on the north side of the New Jersey turnpike road, twenty-five feet south from a large ash tree, which stands on the northerly line of the said turnpike road, east of and near the Middlebrook bridge thence, in an easterly direction, over lands of James McNabb (property formerly owned by C. Morton), so as to leave the door-yard of the house on said lands on the northerly side of the proposed road; thence, in an easterly direction, over lands of Daniel Talmage, Joseph Ross, Isaac J. Fisher, the Central Railroad Company of New Jersey, and John Devlin, to or near a cherry-tree standing on the western line of the Presbyterian parsonage lot (now occupied by R. K. Rodgers); thence, in a southeasterly direction over said parsonage lot, to a stake

standing in the New Jersey turnpike road, twenty-five feet south from the easterly post of the wagon-way which leads into said parsonage lot, and of the return and assessments of damages made by the surveyors by you appointed, and of your order for the recording of the said return, do hereby command you, that the said appointment of surveyors and application, and the said return, and the assessments of damages, and the said order, together with all things touching and concerning the same, as fully and entirely as they remain before  
 10 you, before our justices of our Supreme Court of Judicature, at Trenton, on the first Tuesday of June next, you certify and send, that we may cause to be done what, according to the laws of the state, ought to be done.

Witness Henry W. Green, Chief Justice of our said Supreme Court of Judicature, at Trenton, the twenty-eighth day of February, in the year of our Lord eighteen hundred and sixty.

CHAS. P. SMITH, *Clerk.*

H. M. GASTON, *Attorney.*

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At a Court of Common Pleas, held at Bridgewater, in and  
 20 for the county of Somerset, on the eighth day of April, in the year of our Lord eighteen hundred and fifty-nine, in the April term of said court.

<p>In the matter of the application of          John R. Parsell and others for a          public road in the township of          Bridgewater.</p>	}	<p><i>Appointment of          Surveyors.</i></p>
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Application being made to the court by John R. Parsell and others, ten freeholders and residents of the county of Somerset, that they think a public road to be necessary in the town-  
 30 ship of Bridgewater, in said county, beginning at a stake standing on the north side of the New Jersey turnpike road, twenty-five feet south from a large ash tree, which stands on the northerly line of said turnpike road, east of and near the

Middlebrook bridge; thence, in an easterly direction, over lands of James McNabb (property formerly owned by C. Morton), so as to leave the door-yard of the house on said lands on the northerly side of said proposed road; thence, in an easterly direction, over lands of Daniel Talmage, Joseph Ross, Isaac J. Fisher, the Central Railroad Company of New Jersey, and John Devlin, to or near a cherry tree standing on the westerly line of the Presbyterian parsonage lot (now occupied by R. K. Rodgers); thence, in a southeasterly direction, over said parsonage lot, to a stake standing in the New Jersey turnpike road, twenty-five feet south from the easterly gate-post of the wagon-way which leads into said parsonage lot, "and do hereby apply to the court to appoint six surveyors of the highways of the said county to meet, at such time and place as the court shall direct, for the purpose of laying out said road," and due proof being made to us that at least ten days' previous notice was given of such intended application, and of the day on which said application was intended to be made, by advertisements, under the hands of said applicants, set up at three of the most public places in the township of Bridgewater, in which the said road is proposed to be laid out; and at said day, the court did postpone the hearing of said application to the twentieth day of April, inst.—Now, on this twentieth day of April, A. D. 1859, it is ordered that John P. Voorhees and Cyreneus T. Stryker, of the township of Branchburgh, Israel H. Hill and John B. Brokaw, of the township of Hillsborough, and John N. Hoagland and Peter L. Snyder, of the township of Franklin, six surveyors of the highways of said county, be and they are appointed accordingly, regard having been had to the appointment of the surveyors of the said townships where the said road is applied for to be laid, whom the court, for sufficient cause, refused to appoint; which surveyors shall meet at the house of Isaac J. Fisher, in the township of Bridgewater, in said county of Somerset, on the first day of June next (A. D. 1859), at the hour of ten in the forenoon.

A true copy from the minutes.

SAM'L S. HARTWELL, *Clerk.*

We, the subscribers, six of the surveyors of the highways county of Somerset, by the Inferior Court of Common Pleas of the county of Somerset, appointed on the application of John R. Parsell and others, ten of the residents and freeholders of the of said county, in the term of April last, to lay out a public road in the township of Bridgewater, in said county, as by the order and appointment of said court, on the minutes of said court, a certified copy whereof is hereto annexed, more fully appears, do hereby certify and return, that having met, agree-

10 ably to the order of said court, on the first day of June, A. D. eighteen hundred and fifty-nine, at the house of Isaac J. Fisher, in the township of Bridgewater, in said county, and due proof being made to us that advertisements of our said meeting have been set up according to law, on which we decided, and a majority of the applicants attending having consented, we adjourned to Monday, the sixth day of June, instant, then to meet at the place aforesaid, at the hour of ten and a half o'clock in the forenoon, and gave all the parties then present verbal notice thereof; and on the day last aforesaid, in pursu-

20 ance of said adjournment, we, John P. Voorhees and Cyreneus T. Stryker, Israel H. Hill, John B. Brokaw, John N. Hoagland, and Peter L. Suydam, the said surveyors in said order named, met at the place aforesaid, on the day of our said adjournment (all being present), and having viewed the premises, and heard what could be said for and against the said road on the day of our first adjournment, do now, on this sixth day of June aforesaid, think and adjudge the said public road to be necessary, and do lay the same as appears to us to be most

30 for the public and private convenience, having a regard for the best ground for a road and the shortest distance, in such manner as to do the least injury to private property, that is to say: we do lay out a public road of fifty feet wide, beginning at a stake standing on the north side of the New Jersey turnpike road, twenty-five feet south from a large ash tree which stands on the northerly line of said turnpike road, east of and near the Middlebrook bridge, in a course south, sixty-five degrees and forty minutes east, one hundred and forty-seven feet from the northwest corner of the east abutment wall of said bridge, and running thence, from said stake, over lands of James Mc-

Nabb, south, seventy-eight and a quarter degrees east, nine chains and eighty-four links, to a stake standing *twenty-five feet thirty-four and a half feet* south from the southwest corner of the door-yard of said James McNabb; thence, still over lands of said McNabb, north, eighty-seven degrees and forty minutes east, six chains and forty-two links, to a stake standing in the line of his lands and lands of Daniel Talmage; thence, over lands of said Talmage, on the same course, four chains and sixty-five links, to a stake in line of lands of said Talmage and Joseph Ross; thence, still on same course, over 10 lands of said Ross, seven chains and twenty links, to a stake standing in the line of his lands and lands of Isaac J. Fisher; thence, over lands of said Fisher, on the same course, five chains and sixty-four links, to a stake standing in the middle of the public road leading from the New Jersey turnpike, at Fisher's tavern, to the mountain, and in a line of lands of said Fisher and lands of the Central Railroad Company of New Jersey; thence, still on the same course, over lands of the said company, seven chains and eighty-four links, to a stake standing in line of lands of said company and lands of John Devlin; 20 thence north, seventy-five degrees and thirty-seven minutes east, over lands of said Devlin, three chains and fourteen links, to a stake standing in line of his lands and lands of the Presbyterian church at Boundbrook, in the counties of Somerset and Middlesex; thence, on the same course as the last, over lands of said church, twenty-two links, to a stake standing on said lands of said church near a cherry tree; thence, over lands of said Presbyterian church, south fifty-three and a half degrees east, six chains and twenty-two links, to a stake standing in the New Jersey turnpike road, twenty-five feet south 30 from the easterly gate-post of the wagon road which leads into said parsonage lot, which said lines of course are in the middle of the public road laid out; that is to say, the said public road is now by us laid out at twenty-five feet wide on each side of said lines of course herein before expressed, which said road, so by us laid out, we have caused to be marked at proper distances in the line of the same; and we do hereby make return thereof, with a map or draft of the said road so laid out, with the course and distances and reference to the most remarkable places and the improvements through which 40

the said road passes, herein before mentioned and described, which map or draft is hereunto annexed; and we do hereby fix the fourth day of October next as the time when the overseers of the highways of the said township of Bridgewater shall open the same for public use. And we do further return, that we have also made an assessment of the damages which the owners of the land and real estate taken for the purpose of said road will sustain by the laying out of the same (said owners not being applicants for said road), which assessment  
 10 we made immediately after the laying out of said road, and we have hereto annexed the same, and return it with this our return.

Dated, at the house of Isaac J. Fisher aforesaid, this sixth day of June, A. D. eighteen hundred and fifty-nine.

John N. Hoagland,	John P. Voorhees,
John B. Brokaw,	Cyreneus T. Stryker,
Israel H. Hill,	Peter L. Suydam.

We, the subscribers, six of the surveyors of the highways of the county of Somerset, above named, appointed on the  
 20 application of John R. Parsell and others, more than ten of freeholders and residents of the said county of Somerset, by the order of the Inferior Court of Common Pleas of said county, to lay out a public road in the township of Bridgewater, in said county, having met according to said order, as in the foregoing return is specified, and having laid out the said road pursuant to the order of said court, as by our return thereof, hereto annexed, will more fully appear, do hereby make an assessment of the damages the owners of the land and real estate taken for the said road will sustain by laying out the  
 30 same, as follows (said owners not being applicants therefor):

And we do hereby assess in favor of James McNabb, of the township of Bridgewater, the sum of three hundred and sixty-three dollars and sixty-six cents, for the damages he will sustain by the laying out of the said road.

And in favor of Daniel Talmage, of the township of Bridgewater, the sum of fifty-five dollars, for the damages he will sustain by the laying out of said road.

And in favor of Joseph Ross, of the township of Bridgewater, the sum of one hundred and forty-nine dollars, as the damages he will sustain by the laying out of said road.

And to Isaac J. Fisher, of the township of Bridgewater, and in his favor, the sum of one hundred and twenty dollars, as the damages he will sustain by the laying out of said road.

And in favor of the Central Railroad Company of New Jersey the sum of three dollars, as the damages which it will sustain by the laying out of said road.

And in favor of the Presbyterian church at Boundbrook, in 10  
the counties of Somerset and Middlesex, the sum of two hundred and twenty-eight dollars, as the damages which said church will sustain by the laying out of said road.

And in favor of John Devlin, of the township of Bridgewater, the sum of one hundred and nine dollars and fifty cents, as the damages he will sustain by the laying out of said road.

All of said assessments to be paid by the inhabitants of the township of Bridgewater, in the county of Somerset.

Witness our hands this sixth day of June, A. D. eighteen hundred and fifty-nine, at the house of Isaac J. Fisher afore- 20  
said.

John N. Hoagland,	John P. Voorhees,
John B. Brokaw,	Cyreneus T. Stryker,
Israel H. Hill,	Peter L. Suydam.

Surveyor's return.—Filed June 18th, 1859.

SAM'L S. HARTWELL, *Clerk.*

Notice of application—public road.—Notice is hereby given, that the subscribers, freeholders and residents in the county of Somerset, state of New Jersey, intend to make application to the Court of Common Pleas of said county, on Friday, April 30  
8th, 1859, for the appointment of six surveyors of the highways of said county, to meet at such time and place as the court shall direct, for the purpose of laying out a public road, fifty feet wide, in the township of Bridgewater, in said county.

Beginning at a stake standing on the New Jersey Turnpike road, twenty-five feet south from a large ash tree, which stands

on the northerly line of said turnpike road, east of and near the Middlebrook bridge; thence, in an easterly direction, over lands of James McNabb (property formerly owned by C. Morton), so as to leave the door-yard of the house on said lands on the northerly side of said proposed road; thence, in an easterly direction, over lands of Daniel Talmage, Joseph Ross, Isaac J. Fisher, Central Railroad Company of New Jersey, and John Devlin, to or near a cherry tree standing on the westerly line of the Presbyterian parsonage lot (now occupied  
 10 by R. K. Rodgers); thence, in a southeasterly direction over said parsonage lot, to a stake standing in the New Jersey turnpike road, twenty-five feet south from the easterly gate-post of the wagon-way which leads to said parsonage lot.

Dated this twenty-eighth day of March, 1859.

	John R. Parsell,	Anthony Powelson,
	Elias C. Milliken,	William Van Nostrand,
	Israel Whitlock,	I. W. Winsor,
	John King,	James Cain,
	Israel C. Mundy,	Peter S. Tiger,
20	Samuel Hall,	Sam'l A. Deare,
	Israel A. Codington,	W. N. Adair,
	J. A. Staats,	K. G. Schenck.
	David Mack,	

To the Judges of the Inferior Court of Common Pleas of the county of Somerset:

The subscribers, freeholders and residents in said county, think a public road to be necessary in the township of Bridge-water, in said county—beginning at a stake standing on the New Jersey turnpike road, twenty-five feet south from a large  
 30 ash tree, which stands on the northerly line of said turnpike road, east of and near the Middlebrook bridge; thence, in an easterly direction, over lands of James McNabb (property formerly owned by C. Morton), so as to leave the door-yard of the house on said lands on the northerly side of said proposed road; thence, in an easterly direction, over lands of Daniel Talmage, Joseph Ross, Isaac J. Fisher, Central Railroad Company of New Jersey and John Devlin, to or near a cherry tree standing on the westerly line of the Presbyterian parsonage lot (now occupied by R. K. Rodgers); thence, in a southeast-

erly direction over said parsonage lot, to a stake standing in the New Jersey turnpike road, twenty-five feet south from the easterly gate-post of the wagon-way which leads into said parsonage lot.

And do hereby apply to the court to appoint six surveyors of the highways of the said county, to meet at such time and place as the court shall direct, for the purpose of laying out said road.

Dated this twenty-eighth day of March, 1859.

John R. Parsell,	Anthony Powelson,	10
Elias C. Milliken,	William Van Nostrand,	
Israel Whitlock,	I. W. Winsor,	
John King,	James Cain,	
Israel C. Mundy,	Peter S. Tiger,	
Samuel Hall,	Sam'l A. Deare,	
Israel A. Codington,	W. N. Adair,	
John A. Staats,	H. G. Schenck.	
David Slack,		

(Endorsed.)

*Somerset Pleas.* 20

In the matter of application for }  
public road in Boundbrook. } *Application.*

The court allow the petition, and appoint the surveyors of Branchburgh, Hillsborough, and Franklin to meet at the house of Isaac J. Fisher, in Middlebrook, on the 1st of June, at ten o'clock, A. M.

Filed April 5th, 1859.

SAM'L S. HARTWELL, *Clerk.*

Somerset county, ss.—We, the judges of the Inferior Court of Common Pleas of said county, by virtue of the within writ to us directed, do certify and send to the Supreme Court of Judicature of the state of New Jersey the appointment of surveyors, the return of said road, and assessment of damages made by them—no order for the recording of said return having been by us made.

Given under the seal of our said court, this 30th,  
[ L. s. ] May, A. D. 1860.

SAM'L S. HARTWELL, *Clerk.*

New Jersey Supreme Court,  
June term, 1860.

The State (John M. Mann, Joshua Doughty, and William G. Steele, prosecutors),	}	<i>On certiorari.</i>
<i>vs.</i>		
John R. Parsell and others.	}	

It appearing to the court that the *certiorari* in the above cause, together with the return and proceedings thereon, required to be certified and sent to this court, is returned at this  
10 term.—It is ordered that the parties have leave to take affidavits, to be used on the argument of the same.

On motion of

H. M. GASTON,  
*Attorney of plaintiff.*

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Supreme Court of New Jersey.

The State (John M. Mann, Joshua Doughty, and William G. Steele, prosecutors),	}	<i>On certiorari to Judges of Somerset Pleas.</i>
<i>vs.</i>		
John R. Parsell and others.	}	

20 Reasons for setting aside the appointment of surveyors, and the return and assessments of damages by them made, of the laying out a certain road in Bridgewater, in the county of Somerset, on application of John R. Parsell and others.

The plaintiff in *certiorari*, by Hugh M. Gaston, its attorney, prays that the order appointing surveyors in the above case, and the return and assessments of damages by the said surveyors made, may be set aside, for the reasons following :

1st. Because the Court of Common Pleas of the county of Somerset, in the appointment of said surveyors, acted upon an  
30 erroneous principle, in excluding, as interested against said road, the surveyors of the township in which the road was proposed to be laid, merely because of their residence in said township, and in appointing the surveyors of other townships, who were interested in laying the road, as sharers, in whatever

benefits the road would yield, while they contributed nothing to the burthens it imposed.

2d. Because real applicants for said road, including the persons in whose handwriting the application for the appointment of the surveyors is written, and who employed counsel, paid the fees of the surveyors, and who advocated the road in speeches before the surveyors, have had damages assessed to them, they not having signed the written application for the appointment of surveyors, in contravention of the spirit of the road act. 10

3d. Because the originators and real parties in said application paid certain of the surveyors who laid said road sums of money, as fees, that are not only more than the law allows, but unusual, unprecedented, and illegal.

4th. Because the surveyors, in laying out said road, acted upon an erroneous principle in laying the same, *viz.* that it is the duty of the public to render railroad crossings safe, whereas, by the charter of the Somerville and Easton Railroad Company, the crossing of whose road the road was laid to avoid, are bound to so cross the common roads by passages and 20 bridges over and under the same, as not to impede the use of the common roads.

5th. Because the said return is, in divers other respects, uncertain, defective, and illegal.

H. M. GASTON,  
*Attorney of plaintiff in certiorari.*

Filed June 28th, 1860.

CHAS. P. SMITH, *Clerk.*

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Examination of witnesses, &c., taken before me, Isaiah N. Dilts, one of the masters of the Court of Chancery of New 30 Jersey, at my office, in Somerville, on the twenty-fifth day of October, 1860, in a matter of *certiorari*, pending in the Supreme Court of New Jersey, between the State, John M. Mann and others, relators, and John R. Parsell and others, respondents, in the presence of Hugh M. Gaston, attorney for the plaintiff in certiorari, and John V. Voorhees, attorney for the defendants, on due notice admitted by defendants' attorney.

*Cyreneus T. Stryker*, of Branchburgh, in the county of Somerset, a witness produced by the relators, being duly sworn, on his oath saith—I was one of the surveyors who laid out the road at Middlebrook, in Somerset county, on the 6th day of June, 1859, on application of John R. Parsell and others; we first met to view the road on the 1st day of June; couldn't get through, and adjourned to the 6th; it was about dark when we adjourned. I know Daniel Talmage, of this township; I think he was present at the meetings of the surveyors  
 10 pretty much all the time; he was rather in favor of the road, of course. After the lawyers got through he got up, and spoke in favor of the road; I could not tell how long he spoke, but he made quite a little speech. Last winter, when surveyors were called to vacate the road, I was present; I went to hear what they had to say<sup>o</sup> out of curiosity. Daniel Talmage, William Ross, Joseph Ross, Isaac J. Fisher, and Mr. Parsell advocated the road. Mr. Talmage paid me my fees; he paid me the second day; he gave me \$4 for two days' work; he also paid my expenses, both days I suppose; I had no bill to  
 20 pay at the public house; I had no invitation to come there last winter when the surveyors came to vacate the road; I then paid my expenses myself; I reside in Branchburgh; we had our dinners, second day, before we went home. The beginning and ending points of this road are on the turnpike road. The reason and main object in laying this road was to shun the crossing of the railroad; I heard no reason in particular beside that. The turnpike is rather a level road where it would be avoided by this new road; it is rather a good road in winter; I have rode it a good deal—it is rather a solid road.  
 30 There was an assessment of damages in favor of Daniel Talmage, Isaac J. Fisher, and Joseph Ross, above named; we didn't give much to Talmage.

And being cross-examined, witness says—there was a good deal of excitement about the laying of this road—a good many people there; the people opposed to the road offered to pay our expenses, provided we didn't lay the road. Talmage was not more active in getting the road laid than others—there were other people there who seemed as much interested in getting the road laid as he did. A great many people, from all around the country, were there last winter when the sur-

veyors met to vacate the road ; there was good deal said about the road, in favor and against it, outside the lawyers who were there.

Re-examined, he says—I voted for the road when it was laid ; I was a friend to the road last winter, when it was proposed to vacate it—I always was a friend to it. There was a majority of surveyors in favor of the road the first day of meeting ; Mr. John P. Voorhees, the first day, was opposed to the road, I think ; there were four for the road the first day, and four for it the second day—Mr. Voorhees, who opposed 10 it the first day, favoring it the second day, and Mr. Suydam, who favored it the first day, opposing it the second day. There were six surveyors present both days. John N. Hoagland also opposed the road both days. I meant, by people opposed to the road offering to pay our expenses if we didn't lay it ; only one man talked to me about it.—Mr. McNabb.

And being cross-examined, witness says—

*Quest.* What did McNabb tell you about paying your expenses ? [Question objected to as irrelevant.]

*Ans.* McNabb was opposed to the road, and he came to me 20 and said, if you don't lay the road, we have the money, and are willing to pay your expenses.

C. T. STRYKER.

Sworn and subscribed before me, October 25th, 1860.

I. N. DILTS, *M. C.*

*Peter L. Suydam*, of Franklin, in the county of Somerset, a witness produced on part of the relators, being duly sworn, on his oath saith—I was one of the surveyors by whom the road in question was laid ; I believe the reason for laying this road was to shun the railroad crossings. Mr. Talmage, I think, 30 was the chief advocate for this road outside of the lawyers ; he paid me—gave me \$4 for the two days ; I paid no expenses—I don't know who paid them—I suppose Mr. Talmage, as he paid us for our services. Joseph Ross was there ; I think he was in favor of the road ; Isaac J. Fisher, I believe, was in favor of the road.

Cross-examined, he says—I was in favor of the road the first day. So far as my experience goes, it is customary to

pay the surveyors \$2 per day and expenses. The reason why I changed my views as to this road was, I considered it was the railroad company's duty to give them a road to clear the township of expense. Several people, besides Talmage advocated the road, when it was laid.

To counsel for relators.—I never have received \$4 for laying out a road before this, because I never was two days on one. This turnpike is an ancient road—has been there more than thirty years—it was there long before the railroad was  
10 laid.

PETER L. SUYDAM.

Sworn and subscribed before me, October 25th, A. D. 1860.

I. N. DILTS, *M. C.*

*John N. Hoagland*, of Hillsborough, a witness produced for the relators, being duly sworn, on his oath saith—I was one of the surveyors at the laying out of the road in question. The reason which induced the surveyors to lay the road was to avoid the two railroad crossings. We crossed the branch track of the railroad in laying this road; this branch track  
20 runs to a gravel pit. From the beginning of the road to Isaac J. Fisher's there is nothing to obstruct the view of the railroad from the new road. I was never in favor of this road; I didn't know, until I came on the ground, whether I should be in favor of or against it; I don't consider this road as overcoming the difficulty they proposed to avoid.

And being cross-examined, witness says—I supposed the track we crossed running to the gravel pit was used simply for removing gravel.

JOHN N. HOAGLAND.

Sworn and subscribed before me, October 25th, 1860.

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I. N. DILTS, *M. C.*

*John B. Brokaw*, of Hillsborough, a witness produced by the relators, being duly sworn, on his oath saith—I was one of the surveyors who laid this road. The reason that operated on the minds of the surveyors was to clear the railroad crossings. Daniel Talmage and Joseph Ross were in favor of the road—whether I. J. Fisher was, or not, I am not able to

say. Talmage and Ross talked in favor of the road. I was paid for my services, two days, \$4—I was never, at any other time, or for any other purpose, paid any money with reference to that road. I was there last winter when the road was proposed to be vacated—I came there about ten o'clock in the morning—I left about eight P. M.—I think, about that time; no one spoke to me about coming that day; I felt interested in the road, and went down to hear what they had to say; I think I saw the day in the paper—I saw a notice of it somewhere.

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Cross-examined, he says—There is a great deal of travel on these railroad crossings. [This answer objected to.] Several accidents have occurred there on the one crossing, as I have understood. [Objected to.] Talmage and Ross were not the only persons who advocated the road—others, also, urged its being laid—quite a number.

Re-examined, he says—I don't know how long the railroad has been laid—about eighteen years last January—I suppose about that. I have heard of accidents happening on the railroad, and persons being killed at other places, in that time. 20 There are other dangerous railroad crossings in this township, and in or about Somerville. I regarded Daniel Talmage as the chief mover in and advocate of the new road. I did not pay my expenses at the tavern last winter, when they met to vacate the road; I don't know who paid—Talmage asked me to go and take dinner with him.

To counsel for respondents.—I know these crossings at Middlebrook—I know them to be dangerous.

JOHN B. BROKAW.

Sworn and subscribed before me, October 25th, A. D. 1860. 30

I. N. DILTS, M. C.

*Israel H. Hill*, of Hillsborough, a witness produced by the relators, being sworn, says—I was one of the surveyors who laid this road; the ground and reason which operated on my mind, in laying this road, was to avoid the crossing of the railroad.

Cross-examined, he says—I consider the Middlebrook crossing to be dangerous; I have read and heard of accidents happening there.

Re-examined, he says—I have read and heard of accidents happening at other places along the railroad. The idea of the surveyors was not that the old road should be closed; I suppose the road must remain open for the accommodation of the people of Middlebrook and of such others as choose to travel it.

ISRAEL H. HILL.

Sworn and subscribed before me, October 25th, 1860.

I. N. DILTS, *M. C.*

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*Dr. Robert S. Smith*, of Boundbrook, in the county of Somerset, being sworn, on his oath saith—I reside in Boundbrook—have resided there 40 years nearly. I am familiar with this Talmage road application, I believe; I have been present at different meetings, with reference to this road, of surveyors and others; I always considered Daniel Talmage as being the originator and chief mover in the matter; he has advocated the road to the surveyors in speeches. Joseph Ross, also, has always advocated the road; I remember his rising, and  
20 making remarks to the surveyors in favor of the road, and using all his influence in favor of it; he has always, except when the assessors of damages were there, advocated the road, spoke of the advantage it would be to him in raising the value of his lots; that they'd have the railroad depot there, and that Talmage would build a great grain store there. Talmage is a brother of Ross's wife.

ROBERT S. SMITH.

Sworn and subscribed before me, October 25th, 1860.

I. N. DILTS, *M. C.*

30 *Hugh M. Gaston*, of Somerville, being sworn, says—I am acquainted with the handwriting of Daniel Talmage; the notice of application and the application for the appointment of surveyors are both in the handwriting of Daniel Talmage, in my opinion. This application and notice I speak of are now attached to the writ of *certiorari*, and returned with it, I believe; I examined them before they were sent in; the application is dated March 28th, 1859.

H. M. GASTON.

Sworn to before me, October 25th, 1860.

I. N. DILTS, *M. C.*

The reassessments of damages in the case of Isaac J. Fisher and Joseph Ross were here also offered in evidence, marked, Filed September 13th, 1859, by Sam'l S. Hartwell, clerk, marked by me *Exhibits A* and *B*, respectively.

*Leonard Bunn*, of the county of Somerset, a witness produced by the relators, being duly sworn, on his oath saith—I am, and for number of years have been, one of the judges of the Court of Common Pleas of the county of Somerset. We excluded the surveyors of Bridgewater from appointment in the laying out of the road in question upon the ground, that as the road was applied for to be laid out in said township of Bridgewater, the surveyors of said township were interested in the matter, they being residents and taxpayers in said township, and for no other reason. We have excluded the surveyors of the township in which a road was proposed to be laid in all instances, since we understand the Supreme Court had intimated an opinion that such was the correct practice.

LEONARD BUNN.

Sworn and subscribed before me, October 26th, 1860.

I. N. DILTS, *M. C.* 20

Master's fees, taking testimony :

Examinations in chief, 16 fol., 14 cts.,	- - -	\$2 24
Exhibits,	- - -	20
		<hr/>
		\$2 44

Cross-examination, 8 fol., 14 cts., 1 12

CHARLES P. SMITH, *Clk.*

Filed November 8th, 1860.

A further examination of witnesses, &c., taken before me, Isaiah N. Dilts, one of the masters of the Court of Chancery of New Jersey, at my office in Somerville, in a case pending 30 in the Supreme Court of New Jersey between John M. Mann and others, plaintiffs in *certiorari*, and John R. Parsell and others, defendants therein, in the presence of Hugh M. Gaston, esquire, attorney for the plaintiffs, and John V. Voorhees, esquire, attorney for the said defendants in *certiorari*, said

examination being taken by consent, and an acknowledgment of notice, on the nineteenth and twentieth days of February, in the year of our Lord one thousand eight hundred and sixty-one.

*Peter A. Dumont*, of Hillsborough, in the county of Somerset, a witness produced by defendant in *certiorari*, being duly sworn, on his oath saith [Evidence taken subject to objections for irrelevancy].—I was one of the chosen freeholders of the county of Somerset in 1859. I was called to view  
10 and certify in reference to the road in question; the meeting must have been in the early part of December, 1859; the freeholders did not certify to the court at that time; they left the road undisturbed. We were told it was unnecessary to make a certificate, as we hadn't taken up the road. There was pleading, both sides, for and against the road.

PETER A. DUMONT.

Sworn and subscribed before me, February 19th, 1861.

I. N. DILTS, *M. C.*

*Ephraim Giles*, of Warren, in the county of Somerset, a  
20 witness produced by the defendants in *certiorari*, being duly sworn, on his oath saith—I was one of the surveyors of the highways of the county of Somerset from April, 1859, to April, 1860; I was on the road in question, near Boundbrook, in February, 1860; we met at Holcombe's hotel; we were called for the purpose of vacating the road; we did not vacate it. The matter was pretty fully discussed by those both in favor of and those opposed to the road; there were petitions for and against it; there was a long list, on one side, against vacating, the other was not so large; so far as I understood  
30 it, the signers of the list for vacating were confined to the township of Bridgewater. [All this evidence objected to as irrelevant.]

And being cross-examined, he says—I can't tell how many petitions were presented for vacating the road.

EPHRAIM GILES.

Sworn and subscribed before me, February 20th, 1860.

I. N. DILTS, *M. C.*

Filed Feb. 21, 1861.

CHAS. P. SMITH, *Clk.*

New Jersey Supreme Court,  
June term, 1861.

The State—John M. Mann, *et al.*

*vs.*

John R. Parsell *et al.*

} *Certiorari.*

The court having heard the argument of counsel, and inspected the proceedings in this cause, and advised thereon— It is ordered, that the appointment of surveyors, the return by them made, and all proceedings by them had or taken, be and they are hereby set aside, made void, and for nothing holden. 10

On motion of

HUGH M. GASTON,  
*Attorney for prosecutor.*

I, Charles P. Smith, clerk of the Supreme Court of the State of New Jersey, hereby certify the foregoing to be a true copy of the proceedings in the foregoing case, as fully as the same remain of record and affiled in my office.

In testimony whereof, I have hereto affixed my  
[ L. s. ] hand and the seal of said court at Trenton, this eleventh day of March, A. D. eighteen hundred and sixty-two, (1862). 20

CHAS. P. SMITH, *Clerk.*

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ASSIGNMENT OF ERRORS.

Afterwards, to wit, on the eleventh day of March, in the year of our Lord eighteen hundred and sixty-two, before the Court of Errors and Appeals in the last resort, at the city of Trenton, comes the said John R. Parsell, Elias C. Milliken, John King, Israel C. Mundy, Samuel Hall, Israel A. Codington, John A. Staats, David Mack, Anthony Powelson, William Van Nostrand, John W. Winsor, James Cain, Peter S. Tiger, Samuel A. Deare, William N. Adair, and Kortenius G. Schenck, by John V. Voorhees, their attorney, and say, that 30

in the record and proceedings aforesaid there is manifest error in this, to wit :

1st. Because the court, in and by their said judgment, did determine that the return of the surveyors laying out said road was defective, null, and void, because the Court of Common Pleas of the county of Somerset, in appointing said surveyors to lay out said road, refused to appoint the surveyors of the township of Bridgewater, where the said road was proposed to be laid out.

10 2d. Because the said court, in and by their said judgment, in setting aside said return, did determine that it was proper and right that the surveyors of the township where the road was applied for to be laid were not interested in the laying out, or otherwise, of such road by reason of their being taxpayers, to such an extent as to exclude them from acting as such surveyors.

3d. Because the said court, in deciding said case and setting aside said return, did so on the ground that the surveyors of Bridgewater had been unlawfully excluded by the Court of  
20 Common Pleas from acting as surveyors in laying out the said road.

4th. Because there is error in the entry of the judgment by the Supreme Court.

5th. There is error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid given was given in favor of the prosecutors in *certiorari*, whereas, by the laws of the land, the said judgment ought to have been given for the applicants of said road, defendants in *certiorari*; and the said John R. Parsell and the other plaintiffs in error, before named, pray that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid,  
30 may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by reason of the said judgment.

J. V. VOORHEES,

*Attorney of plaintiffs in error.*

## OPINION OF JUDGE VAN DYKE.

The *certiorari* in this case is brought to reverse the proceedings of the Court of Common Pleas, and also of surveyors of the highways appointed by them to lay out a public road in the county of Somerset, in the township of Bridgewater.

The first objection to the proceedings is, that the Court of Common Pleas refused to appoint the surveyors of the highways of the township in which it was proposed to lay the road, simply and only because they were residents of that township, on the supposition it is supposed, that they were interested in the assessments, if any, that should be made of the damages to the land taken. The order of the court states that regard was had to the appointment of those surveyors, but that they refused their appointment for sufficient reasons. But that the court did exclude them expressly, and only on the ground of their being residents of the township, is not only clearly proved, but it is not denied or controverted in any way. The question, then, is fairly presented for our consideration, whether it is lawful or otherwise for the court, in all cases, to exclude the surveyors of the township through which it is proposed to lay the road merely because they are residents of the township. 10

It is insisted, however, that this is a discretionary power lodged with the Court of Common Pleas, to appoint the surveyors of the township, and that they are the exclusive judges of the sufficiency of the reasons on which they act, and that their determination in the matter is not subject to reversal or review. It is true that court is authorized to determine what reasons should exclude the surveyors of such particular township, or of any other township; and if we have no knowledge of the reasons or principles on which they act, we cannot properly interfere with their determination. But if the law requires the Court of Common Pleas to appoint particular surveyors, unless there be some sufficient reason to the contrary, and the court reject such surveyors, and furnish to us clearly the reason or principle on which they thus rejected them, and if that principle be clearly wrong and contrary to the clear meaning of the act, this court is not only authorized, but 20 30

bound to reverse such decision. The discretion with which that court is clothed must be exercised according to law, and not contrary thereto. If they should reject the surveyors of a township from which they were required to take them, except for a sufficient reason, and they should reject them alone on the ground of religious belief, this court should not sustain such determination as legal, nor permit it to be practised, but should set such determination aside. So in the case upon us. If the reason or principle on which the Court of Common Pleas rejected the surveyors of the township of Bridgewater be illegal, such as this court should not sanction, and which should not be tolerated in practice, this court is bound to reverse the proceedings, not only for the correcting of the mischief in this particular case, but for the government of the courts in all other similar cases. The question then is, whether the Court of Common Pleas was right or wrong in rejecting the surveyors of the township through which the road was to run simply because they were residents of that township. This was not the exercise of a discretion, but the adoption of an inflexible rule to be applied to all cases.

This question received some consideration in the case of *The State v. Atkinson*, 3 *Dutcher* 420, and so far as that case goes, it seems to sustain the decision of the Court of Common Pleas. That decision, so far as it is supposed to sanction that view of the case, we are asked to review, as not being correct in principle. If the question was distinctly presented in that case, and was carefully considered and decided, and especially if we consider it correctly decided, we should adhere to it, and again assert the principle. If, on the other hand, the case did not fully present the question—if it was only incidentally considered by a part of the court, and possibly not concurred in by the remainder of it, although there may have been a concurrence in a result, and especially if its correctness be questionable, I can see no reason why we should not so far reverse it, as to declare explicitly what the law is on the subject now, when we have it directly before us. In the case of the *State v. Atkinson*, the question now under consideration was not before the court, so far as we can learn, at all. There was no complaint made there that the court either had or had not in fact appointed the surveyors of the town-

ship in which the road was to be laid. It does not appear from the case whether such surveyors have been appointed or not, and the question raised was not, and could not have been in that case, that the court had improperly rejected or improperly appointed the surveyors of that township, but the only question was on the order of the court itself, that it did not show on its face that the court had considered the question at all; in other words, the objection was, "It does not appear *by the order* that regard was had to the appointment of the surveyors of the highways of those townships where the said 10 road was applied for to be laid out." The court held that that matter need not be set out on the face of the order. This is all that was decided, so far as this feature of the case is concerned. The question is one of some importance, and as it has never before been presented for decision, although somewhat discussed, it is proper that it should be examined and settled.

It seems impossible to doubt that the legislature, in the act concerning roads, imperatively required the Court of Common Pleas of the counties to appoint, on such applications, the sur- 20 veyors of the townships through which the road was to run, unless it was to run through the lands of such surveyors, or unless they were excluded by some other legal reason such as should exclude any surveyor. And it seems equally free from doubt, that if the courts refuse to obey this requirement of the statute, except for the reasons contemplated, such refusal would be ground of reversal. The Court of Common Pleas, from deference, it is supposed, to the case of the *State v. Atkinson*, did refuse to obey this injunction of the act, and did refuse to appoint the surveyors of the township through which the road 30 was to be laid, and so refused, for no one of the reasons contemplated by the act, but did so simply and only because they were surveyors of that township.

This provision of the law has never been repealed or disturbed since it was originally passed. It could only be repealed by the legislature doing so in express terms, or by the passage of a subsequent act so in conflict with it that both could not stand, in which case the latter would prevail. But there is no such act. It is supposed that the supplement, passed March 1st, 1850, providing for the assessment of dam- 40

ages in behalf of the persons whose lands should be taken for the purposes of the road, in some way annuls or renders inoperative this requirement of the original act; but that supplement does not in terms repeal the former act, nor is there anything in it which is inconsistent with that act in respect to the matter under consideration.

It is insisted that the power given by the supplement to assess and award damages to the landowners, which damages are to be paid by the taxpaying residents of such townships, renders the surveyors of such townships intended in the question, because they, as residents thereof, will be required to contribute to the payment of such assessment; but this in no way interferes or conflicts with the principle contained in the original act, for there never was a time since its passage that the surveyors of the townships were not interested as taxpayers in every road laid in their townships. No public road was ever laid out by public authority, constituted and kept in repair, including its bridges, &c., except at a yearly expense to the taxpayers of the township in which it is located; and the adding of the additional expense of paying for the land taken for the road does not change or introduce any new principle creating an interest in the surveyors, but only increases, to some extent, the burthens previously imposed upon them. The question was not first introduced by the supplement, that the inhabitants of a township should be taxed for the making and sustaining of each additional highway laid out in their township, but that the tax in a particular feature was liable to be increased. Instead of its being increased fifty cents a year by the laying out and maintaining a new highway, it is now liable to be increased, for the first year, to one dollar or over for each taxpayer, and after that the same as if no assessment of damages had been made. The idea, therefore, that the surveyors of each township are affected primarily by the laying out of roads in their respective townships is nothing new. It was always so. And all that can be said of the supplement is, that it may increase remotely their interest in the laying out of new roads, but introduces no new principle which did not exist before.

The legislature, then, passed the act requiring the surveyors of the townships in which the road was to run to be appointed,

when it was as well known as it can be now, that they were interested as taxpayers in the laying out of such roads, and this must have been for some good and sufficient reason. Perhaps it was because, being better acquainted with the locality than strangers, they were better qualified to judge of the necessity for the road, or it may have been because the laying of all roads imposed a burthen, in the way of tax, on the inhabitants of the townships through which they were made, and that it was unjust to impose such tax, unless the people of the townships were represented in the tribunal imposing such tax. 10

This latter reason is a very natural and important one, and if it be the one which governed the legislature, it is certainly a very strange construction of it to withhold the representation the moment the tax is to be increased; but whatever the reason may have been which caused the insertion of the provision, it is very certain that such reason still exists with all the force which it ever possessed, and the legislature never having repealed either the provision, or the reason for it, I certainly think we are not at liberty to disregard them, but, on the contrary, we are bound to see that they are enforced. I think, 20

therefore, the obligation to appoint the surveyors of the townships through which the road is to be laid is just as imperative as it ever was, and the construction of the courts always was, and the practice always was, that the surveyors of these particular townships were to be appointed of course and as a legal necessity, unless the reasons to the contrary were such as should exclude any surveyor. But if the doctrine contended for be the right one, the surveyors of the townships, instead of being preferred, are for ever excluded, and can never in any such case be appointed, although the law as 30

it stands requires that they should be. It never could have been intended that the mere fact of the surveyors being residents of the townships to be affected should exclude them from the survey, for that is the very reason why they are to be appointed.

The principle contended for would place every township entirely at the mercy of outsiders, for even the petitioners for the road need not reside in the township, who being strangers to their wants, and indifferent to their burthens, may inflict on them the most intolerable oppressions, not only against 40

their will and consent, but without even the privilege of a voice in the matter. The rule also, if it applies to the appointment of surveyors, must of necessity apply to the appointment of freeholders to review the proceedings of the surveyors. They, too, must be taken from foreign townships; and the case before us furnishes a pretty striking exemplification of the danger and mischief of which I speak, for, upon looking at the return, we find that, in addition to the ordinary expenses, there are assessments to an amount of over \$1000 in  
10 going a distance of little over half a mile.

I think, therefore, that the Court of Common Pleas, in rejecting the surveyors of the township of Bridgewater, for the reason by which they were governed, committed an error, which it is our duty as well as our province to reverse.

Other reasons were urged in favor of a reversal; but as I deem the one already considered sufficient for that purpose, it is unnecessary to examine the others.

