

New Jersey Court of Errors and Appeals.

Between

JONAS LIVERMORE and others, trading, &c.,

v.

THE BOARD OF CHOSEN FREEHOLDERS OF
THE COUNTY OF CAMDEN.

*In error to
the Supreme
Court, &c.*

WRIT OF ERROR.

[Filed June 28, 1861.]

As yet of the thirty-first day of January, A. D. eighteen hundred and sixty.—Witness E. B. DAYTON OGDEN, esquire, associate justice.

CHARLES P. SMITH, *Clerk.*

Camden, to wit.—Jones Livermore, John L. Cooper, John H. Stokes, and Woodward Warrick, trading in the name, style, and firm of Livermore, Cooper & Co., complain of the Board of Chosen Freeholders of the County of Camden, being summoned, &c., of a plea of trespass on the case; for that whereas heretofore, to wit, on the tenth day of March, in the 10 year of our Lord one thousand eight hundred and forty-six, at the township of Washington, in the said county of Camden, a certain dam for the use of a certain grist mill, to wit, the Good Intent Grist Mill, had been erected, and was then and there standing and being across a certain stream of water, called the South Branch of Timber creek, in and upon which dam there had been erected, and was then and there standing and being, a certain bridge over the race and floodgates, in, through, and appertaining to said dam; and that afterwards, to wit, on the day and year aforesaid, at the township afore- 20 said, in the county aforesaid, a certain public road was duly laid out over the said dam, and across the said race and floodgates then and there being, which said public road over the

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said dam, and across the said race and floodgates, hath ever since continued so laid out, without having been in any wise vacated; whereby, and by force of the statute in such case made and provided, it became and was, and continually from thence hitherto hath been the duty of the said defendants to rebuild, repair, and keep up the said bridge, to wit, at Camden, in the county of Camden aforesaid. And whereas, also, the said plaintiffs afterwards, to wit, on the first day of April, in the year of our Lord one thousand eight hundred and fifty-

10 nine, became and then were the owners and possessors of the said grist mill and dam, with all and singular the appurtenances, and continually from thence hitherto have been the owners and possessors of the said grist mill and dam, with all and singular the appurtenances, to wit, at Camden, in the county aforesaid. And the said plaintiffs further say, that after the laying out of the said public road over the said dam, and across the said race and floodgates as aforesaid, and since the fourth day of July last past, and while the said plaintiffs were the owners and possessors of the said grist mill and dam,

20 with all and singular the appurtenances, to wit, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and fifty-nine, the said bridge became and was, and for a long space of time before had been greatly out of repair, requiring to be rebuilt, repaired, and kept up, and the same, to wit, on the day and year last aforesaid, fell down, and was carried away by the water of said stream, lying and being and ponded against the said dam and bridge, for the use of said grist mill, creating and being a water power for propelling the machinery of said grist mill, of all which the

30 said defendants then and there had notice, to wit, at Camden, in the county aforesaid: yet the said defendants, not regarding their said duty in that behalf, nor the statute in such case made and provided, but contriving and unjustly intending to injure, aggrieve, and oppress the said plaintiffs in that behalf, then and there unlawfully, wrongfully, and injuriously neglected and refused to rebuild, repair, and keep up said bridge; and then and there unlawfully, wrongfully, injuriously, and negligently suffered and allowed the same to fall down and be carried away by the water of the said stream, then and

40 there lying, being, and ponded against the said dam and bridge,

as and for a water power for propelling the machinery of said grist mill as aforesaid ; and then and there unlawfully, wrongfully, and injuriously neglected and refused to rebuild and repair the said bridge, after it had so fallen down and been carried away as aforesaid, to wit, at Camden, in the county aforesaid ; by means of which said premises the said dam was broken and injured, and the water of the said stream, so lying, being, and ponded against the said dam and bridge, as and for a water power as aforesaid, ran away and was wasted and lost, and the said water power destroyed ; and the said plaintiffs, for a 10 long space of time, to wit, for the space of two months, lost and were deprived of the use of their said grist mill and of the profits of their business in and about said grist mill, which would have accrued to them during that period of time, to a large amount, to wit, to the amount of one thousand dollars, and were obliged to lay out and expend, and did necessarily lay out and expend, divers large sums of money, to wit, to the amount of one thousand dollars, in rebuilding and repairing the said dam and bridge, so as to renew the said water power, and were otherwise very much prejudiced, injured, and op- 20 pressed, to wit, on the day and year last aforesaid, at Camden, in the county aforesaid.

And whereas also heretofore, to wit, on the tenth day of March, in the year of our Lord one thousand eight hundred and forty-six, at the township of Gloucester, in the county of Camden as aforesaid, a certain other dam for the use of the said grist mill, to wit, the Good Intent Grist Mill, had been erected, and was then and there standing and being across the said stream of water, called the South Branch of Timber creek, in and upon which last said dam there had been erected, 30 and was then and there standing and being, a certain other bridge over the race and floodgates in, through, and appertaining to the last said dam ; and that afterwards, to wit, on the day and year last aforesaid, in the township last aforesaid, in the county aforesaid, a certain other public road was duly laid out over the last said dam, and across the last said race and floodgates, then and there being, which last said public road over the last said dam, and across the last said race and floodgates, hath ever since continued so laid out without hav- 40 ing been in any wise vacated, whereby and by force of the

statute in such case made and provided, it became and was, and continually from thence hitherto hath been the duty of the said defendants to rebuild, repair, and keep up the last said bridge, to wit, at Camden, in the county of Camden aforesaid. And whereas also the said plaintiffs afterwards, to wit, on the first day of April, in the year of our Lord one thousand eight hundred and fifty-nine, became, and then and there were the owners and possessors of the said grist mill and last said dam, with all and singular the appurtenances, and continually from
10 thence hitherto have been the owners and possessors of the said grist mill and last said dam, with all and singular the appurtenances, to wit, at Camden, in the county aforesaid. And the said plaintiffs further say, that after the laying out of the last said public road over the last said dam and across the last said race and floodgates, as aforesaid, and since the fourth day of July last past, and while the said plaintiffs were the owners and possessors of the said grist mill and last said dam, with all and singular the appurtenances, to wit, on the twenty-
20 third day of September, in the year of our Lord one thousand eight hundred and fifty-nine, the last said bridge became and was, and for a long space of time before had been greatly out of repair, requiring to be rebuilt, repaired, and kept up, and the same, to wit, on the day and year last aforesaid, fell down, and was carried away by the water of said stream, lying and being and ponded against the last said dam and bridge, for the use of said grist mill, creating and being a water power for propelling the machinery of said grist mill, of all which the said defendants then and there had notice, to wit, at Cam-
30 den, in the county aforesaid: yet the said defendants, not regarding their said duty in that behalf, nor the statute in such case made and provided, but contriving and unjustly intending to injure, aggrieve, and oppress the said plaintiffs in that behalf, then and there unlawfully, wrongfully, and injuriously neglected and refused to rebuild, repair, and keep up the last said bridge; and then and there unlawfully, wrongfully, injuriously, and negligently suffered and allowed the same to fall down and be carried away by the water of the said stream, then and there lying, being, and ponded against the last said dam and bridge, as and for a water power for pro-
40 pelling the machinery of said grist mill as aforesaid; and then

and there unlawfully, wrongfully, and injuriously neglected and refused to rebuild and repair the last said bridge, after it had so fallen down and been carried away as aforesaid, to wit, at Camden, in the county aforesaid; by means of which said premises in this count mentioned, the last said dam was broken and injured, and the water of said stream, so lying, being, and ponded against the last said dam and bridge, as and for a water power as aforesaid, ran away and was lost, and the said water power destroyed; and the said plaintiffs, for a long space of time, to wit, for the space of two months, lost and 10 were deprived of the use of their said grist mill, and of the profits of their business in and about said grist mill, which would have accrued to them during that period of time to a large amount, to wit, to the amount of one thousand dollars, and were obliged to lay out and expend, and did necessarily lay out and expend, divers large sums of money, to wit, to the amount of one thousand dollars, in rebuilding and repairing the last said dam and bridge, so as to renew the said water power, and were otherwise very much prejudiced, injured, and oppressed, to wit, on the day and year last aforesaid, at 20 Camden, in the county aforesaid.

And whereas also heretofore, to wit, on the tenth day of March, in the year of our Lord one thousand eight hundred and forty-six, a certain other dam, for the use of the said grist mill, to wit, the Good Intent Grist Mill, had been erected, partly in the township of Washington, and partly in the township of Gloucester, in said county, and was then and there standing and being across the said stream, called the South Branch of Timber creek, in and upon which last said dam there had been erected, and was then and there 30 standing and being, a certain other bridge over the race and floodgates, in, through, and appertaining to the last said dam; and that afterwards, to wit, on the day and year last aforesaid, in the township last aforesaid, in the county aforesaid, a certain other public road was duly laid out over the last said dam, and across the last said race and floodgates then and there being, which last said public road over the last said dam, and across the last said race and floodgates, hath ever since continued so laid out without having been in any wise vacated, whereby and by force of the statute in such case made and 40 provided, it became and was, and continually from thence

hitherto hath been, the duty of the said defendants to rebuild, repair, and keep up the last said bridge, to wit, at Camden, in the county of Camden aforesaid; and whereas, also, the said plaintiffs afterwards, to wit, on the first day of April, in the year of our Lord one thousand eight hundred and fifty-nine, became and then and there were the owners and possessors of the said grist mill and last said dam, with all and singular the appurtenances, and continually from thence hitherto have been the owners and possessors of the said grist mill and last

10 said dam, with all and singular the appurtenances, to wit, at Camden, in the county aforesaid. And the said plaintiffs further say, that after the laying out of the last said public road over the last said dam and across the last said race and flood-gates as aforesaid, and since the fourth day of July last past, and while the said plaintiffs were the owners and possessors of the said grist mill and last said dam, with all and singular the appurtenances, to wit, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and

20 fifty-nine, the last said bridge became and was, and for a long space of time before had been greatly out of repair, requiring to be rebuilt, repaired, and kept up, and the same, to wit, on the day and year last aforesaid, fell down, and was carried away by the water of said stream, lying and being ponded against the last said dam and bridge for the use of said grist mill, making and being a water power for propelling the machinery of said grist mill, of all which the said defendants then and there had notice, to wit, at Camden, in the county aforesaid: yet the said defendants, not regarding their said duty in that behalf, nor the statute in such case made and pro-

30 vided, but contriving and unjustly intending to injure, aggrieve, and oppress the said plaintiffs in that behalf, then and there unlawfully, wrongfully, and injuriously neglected and refused to rebuild, repair, and keep up the last said bridge, and then and there unlawfully, wrongfully, injuriously, and negligently suffered and allowed the same to fall down, and be carried away by the water of the said stream, then and there lying, being, and ponded against the last said dam and bridge, as and for water power for propelling the machinery of said grist mill as aforesaid, and then and there unlawfully, wrongfully,

40 and injuriously neglected and refused to rebuild and repair

the last said bridge, after it had so fallen down and been carried away as aforesaid, to wit, at Camden, in the county aforesaid ; by means of which said premises, in this count mentioned, the last said dam was broken and injured, and the water of the stream, so lying, being, and ponded against the last said dam and bridge, as and for a water power as aforesaid, ran away and was lost, and the said water power destroyed, and the said plaintiffs, for a long space of time, to wit, for the space of two months, lost and were deprived of the use of their said grist mill, and of the profits of their business in and about 10 said grist mill, which would have accrued to them during that period of time, to a large amount, to wit, to the amount of one thousand dollars, and were obliged to lay out and expend, and did necessarily lay out and expend, divers large sums of money, to wit, to the amount of one thousand dollars, in rebuilding and repairing the last said dam and bridge, so as to renew the said water power, and were otherwise very much prejudiced, injured, and oppressed, to wit, on the day and year last aforesaid, at Camden, in the county aforesaid, to the damage of the said plaintiffs of two thousand dollars, and 20 therefore they bring their suit, &c.

And the said defendant, by Thomas W. Dudley, his attorney, comes and defends the wrong and injury, when, &c., and says, that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendant, and it, the said defendant, is not bound by law to answer the same, and this it is ready to verify : wherefore, by reason of the insufficiency of the said declaration in this behalf, the said defendant prays judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against it. 30

And the said plaintiffs say, that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for them, the said plaintiffs, to have and maintain their aforesaid action thereof against the said defendants, and the said plaintiffs are ready to verify and prove the same, as the court here shall direct and award : wherefore, inasmuch as the said defendants have not answered the said declaration, nor hitherto in 40

any manner denied the same, the said plaintiffs pray judgment and their damages, by reason of the grievances in the said declaration mentioned, to be adjudged to them, &c.

But because it is unknown to our said court here what judgment to give in the premises, a day is therefore given, to wit, until, &c., to hear judgment thereon.

And now at this day, to wit, the eighteenth day of June, A. D. eighteen hundred and sixty-one, before the justices of the Supreme Court of the State of New Jersey, at Trenton, 10 come the parties aforesaid, by their respective attorneys aforesaid, whereupon all and singular the premises being seen, and by our said court here fully understood, and mature deliberation being thereupon had, it appears to the said court here that the said declaration, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendants—

Therefore it is considered, that the said Jonas Livermore, John L. Cooper, John H. Stokes, and Woodward Warrick take 20 nothing by their said writ, and that the said the Board of Chosen Freeholders of the County of Camden do go thereof without day, &c.

And it is further considered by our said court now here, that the said the Board of Chosen Freeholders of the County of Camden do recover against the said Jonas Livermore, John L. Cooper, John H. Stokes, and Woodward Warrick the sum of twenty-eight dollars and fifty cents, for their costs and charges by them about their suit in this behalf expended, by the court now here adjudged to said the Board of Chosen Free- 30 holders of the County of Camden, and with their assent, according to the form of the statute in such case made and provided, and that they have execution thereof, &c.

Judgment signed this eighteenth day of June, A. D. eighteen hundred and sixty-one.

E. W. WHELPLEY.

New Jersey, to wit.—The state of New Jersey to our Justices of our Supreme Court of Judicature, greeting :

Forasmuch as in the record and proceedings, and also in the giving of judgment, of a plea which was in our said Su-

preme Court between Jonas Livermore, John L. Cooper, and John H. Stokes, trading in the name, style, and firm of "Livermore, Cooper & Co.," plaintiffs, and "the Board of Chosen Freeholders of the County of Camden," defendants, manifest error intervened, as is said, to the great damage of the said plaintiffs; and being willing that the said error, if any there be, should be duly amended, and full and speedy justice done to the parties aforesaid, we do command you, that if judgment be given thereon, then you send distinctly and plainly, under your seals, or the seal of any one of you, the record and proceedings aforesaid, with all things touching and concerning the same, and this writ, to our Court of Errors and Appeals in the last resort, at Trenton, on the eighteenth day of June, instant, in order that the said Court of Errors and Appeals may inspect the record and proceedings aforesaid, and may further cause to be done thereupon for amending the said error, as of right and according to the constitution and laws of this state shall be meet to be done. 10

Witness the Honorable Henry W. Green, Chancellor, at Trenton, the fourteenth day of June, in the year of our Lord one thousand eight hundred and sixty-one. 20

W. S. JOHNSON, *Clerk.*

A. BROWNING, *Attorney.*

The answer of the Justices of the Supreme Court of the State of New Jersey to the within writ.

The record and proceedings therein, of which mention is within made, with all things appertaining to and concerning the same, we do certify and send to the Court of Errors and Appeals, as within we are commanded in a certain schedule hereto annexed. 30

E. W. WHELPLEY, *C. J.*

OPINIONS OF SUPREME COURT.

THE CHIEF JUSTICE. This case is before the court upon a demurrer to the plaintiffs' declaration. The question presented for decision is, whether the defendants are liable for the con-

sequential injury sustained by the plaintiffs' milldam and sluice over the south branch of Timber creek, in the county of Camden, by reason of the fall of a county bridge upon the dam and sluice gates, *per quod* the dam and gates were broken down and the water let out of plaintiffs' pond, who was thus deprived of the use of the water as motive power for his grist mill, situate below the dam and gates. The declaration alleges that the falling of the bridge was occasioned by the neglect of the defendants to repair it, as they were bound to do.

- 10 This court held, in *The Freeholders of Sussex v. Strader*, 3 *Harr.* 108, that an action lies at the suit of an individual against the board of chosen freeholders of a county for injuries sustained in consequence of their not completing or keeping in repair a county bridge or its abutments; that the only remedy was by indictment. This principle was reaffirmed by this court in *Cooley v. The Chosen Freeholders of Essex*, 3 *Dutcher* 415. See, also, *The State v. The Chosen Freeholders of Essex*, 3 *Zab.* 214, in which it was held that it rested in the discretion of the board whether to rebuild a bridge or
20 not, that the location might be changed.

The ground upon which these decisions first cited rest is, that the duty is owed to the public, and not to each individual who may have occasion to use the bridge, and that the adoption of any other rule would be highly inexpedient and destructive of the public interests, by subjecting these public corporations to numberless suits for every petty neglect occasioning inconvenience to any one.

- The counsel for the plaintiff attempted to distinguish this case from the cases cited, in this that in this the duty was owing to the mill owner, and not to the public, as in the other.
30 But I am unable to perceive the soundness of the distinction. The whole suit rests upon the obligation to repair the bridge, because it is a part of a public highway. The duty counted upon is a public duty. The plaintiff alleges a private injury, sustained by reason of the neglect of this public duty. It may be that this private injury is of a peculiar character, occasioned by the falling of the bridge upon the dam, instead of that sustained by one in the use of the bridge; but that cannot alter the fact, that the obligation or duty neglected was
40 public, instead of private. It cannot be pretended that the

plaintiffs had any right to enforce the building the bridge in in this place—it was not especially for their use.

The case falls within the rule in *The Freeholders of Sussex v. Strades*.

But it was insisted that this suit might be maintained in virtue of the 21st section of the supplement to an act concerning roads, *Laws of 1859, chap. 219*, which provides, that if any damage shall happen to any person or persons, his, her, or their team, carriage, or other property, by means of the insufficiency or want of repair of any bridge upon any public road in any township in this state, which such township, or the county in which the same shall be situate, is or shall be liable to make or repair, the person or persons so sustaining such damage shall have the right to recover the same, with costs, in an action on the case in any court of competent jurisdiction in this state, to be instituted by such person or persons, his, her, or their executors or administrators, against the board of chosen freeholders of such county. 10

This act does not reach the case. It will be perceived that its object was not to deprive the board of freeholders of their immunity from suits of private individuals in all cases, but only those coming fairly within its scope. Its main, if not its only design was to secure the repair of roads and bridges for the benefit of travellers using them. It is a supplement to the act concerning roads, not to the act defining the powers and duties of the boards of freeholders of the several counties. The words, other property, used in the act, obviously meaning property of the same kind, that is personal and moveable, as that particularly mentioned. It was intended to include what might be carried in the carriages, as well as the vehicles themselves. It would be an unwarrantable extension of the term, used in that connection, to make it include real estate. 20 30

Where an act specifies a number of things all of a particular character, and then closes with the general expression, other property, it means other property *ejus dem generis*.

The damage meant by the act was direct injury to persons or property while in the use of the bridge, not consequential damages growing out of the loss of that destroyed by the fall of the bridge.

This act gives an action to the executor or administrator as well as the testator or intestate. It could not have been the 40

intention of the legislature to make such a cause of action as that disclosed in the declaration survive to the executor or administrator when the land injured went to the devisee or heir.

I cannot bring my mind to the conclusion that damage to real estate was intended to be provided for in this act.

There must be judgment for the defendant on this demurrer.

VREDENBURGH, J. The complaint is, that on the 10th of March, 1846, a certain dam, for the use of the plaintiff's grist mill, was standing across the south branch of Timber creek, 10 in and upon which dam there had been erected, and was then standing, a certain bridge over the race and floodgates, and that afterwards a certain public road was laid over the said dam across the said race and floodgates, whereby it became the duty of the defendants to rebuild and repair the said bridge; and that, on the 23d of September, 1859, the said bridge became out of repair, fell down, and was carried away by the water, and that the defendants have neglected to rebuild the same, whereby the water in the dam ran away, and the plaintiffs' water power destroyed.

20 In the case of *Strader v. The Freeholders of Sussex*, 3 *Harr.* 108, this court decided that the freeholders were not liable *civiliter* for not repairing bridges, so that the act, *Nix. Dig.* 707, § 26, does not affect this question. That case is as applicable to the case now before the court as the one then decided.

It is, however, urged by the plaintiffs, that the act of 1859, *Pam. Laws* 633, § 20, 21, makes the freeholders liable in this case. This last act provides, that if any damage shall happen to any person, his team, or other property, by means of want 30 of repair, &c., of any bridge, he may recover his damages against the board of freeholders. But it is perfectly manifest that the damages here spoken of are those which accrue to those using the road and bridge for passage, and was not intended to apply to such damages as are claimed in the present action.

There is still another answer to this declaration—the damages claimed by the plaintiff arise not because the bridge was not repaired, but because his dam went out. His water is not kept in by the bridge, but by the dam. The plaintiff brings

suit because his water sweeps away the defendants' bridge. His remedy is to put up his dam, and let the bridge take care of itself.

The defendants have as good a right to sue the plaintiff because the water of the plaintiff carried away their bridge as the plaintiff has to sue the defendants because their bridge let out his water.

The declaration discloses no cause of action, and judgment must be entered in favor of the demurrer.

BROWN, J., concurred.

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ASSIGNMENT OF ERRORS.

[Filed March 4, 1863.]

IN THE COURT OF ERRORS AND APPEALS.

Between

JONAS LIVERMORE and others, trading, &c.,

v.

THE BOARD OF CHOSEN FREEHOLDERS OF
THE COUNTY OF CAMDEN.

} *In error to
the Supreme
Court, &c.*

Afterwards, that is to say, on the eighteenth day of June, eighteen hundred and sixty-one, before our said Court of Er- 20
rors and Appeals in the last resort in all causes, as heretofore, &c., at Trenton, come the said Jonas Livermore, John L. Cooper, and John H. Stokes, trading in the name, style, and firm of "Livermore, Cooper and Co.," by Abraham Browning, their attorney, and say, that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error, in this, that the declaration aforesaid and the matters therein contained are sufficient in law for the said Jonas Livermore, John L. Cooper, and John H. Stokes, trading as aforesaid, to maintain their aforesaid action thereof against 30
the said the Board of Chosen Freeholders of the County of Camden; and, also, there is error in this, that the judgment aforesaid, by the record aforesaid, appears to have been given

for the said the Board of Chosen Freeholders of the County of Camden, whereas, by the law of the land, the said judgment ought to have been given for the said Jonas Livermore, John L. Cooper, and John H. Stokes, trading as aforesaid, against the said the Board of Chosen Freeholders of the County of Camden. And the said Jonas Livermore, John L. Cooper, and John H. Stokes, trading as aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether holden for
 10 nought, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

A. BROWNING,
Attorney, &c., of plaintiffs in error.

JOINDER IN ERROR.

[Filed March 4, 1863.]

IN THE COURT OF ERRORS AND APPEALS.

Between

20	THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF CAMDEN <i>ads.</i> JONAS LIVERMORE AND OTHERS, trading, &c.	}	<i>In error, &c.</i>
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And hereupon the said the Board of Chosen Freeholders of the County of Camden, by Thomas H. Dudley, their attorney, come and say, that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid; and they pray that the Court of Errors and Appeals in the last resort, &c., here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid may in all
 30 things be affirmed, &c.

THOMAS H. DUDLEY,
Attorney of defendants.
