

Court of Errors and Appeals.

PIERSON A. FREEMAN

ads.

THE BOARD OF CHOSEN FREE-

HOLDERS OF MORRIS COUNTY.

} On Error.

This action is brought by the Board of Freeholders to recover the sum of \$595.06 from Pierson A. Freeman, late Sheriff of Morris county, for alleged errors in his accounts rendered to the Board during his term of office.

The Sheriff admits the amount claimed in the bill of particulars attached to the declaration, except the item of \$64.50, which sum was paid out to foreign witnesses under the direction of the then Prosecutor (De Mott), now deceased, for their legal fees and mileage in the case of the *State v. Nixon*, who was convicted and sentenced to the State Prison.

Judge Dalrimple, in approving the taxed bill of costs in that case, as required by the statute (*Rev., 1219, pl. 43*), disallowed these fees. Sheriff Freeman then presented a bill to the Board for this disbursement made by him under the direction of the statute, and it was allowed. When he was subsequently investigated this item was exhumed and made one of the items of the county's claim.

The sheriff pleaded the general issue and a special plea of payment, and gave notice of an off-set for the balance, consisting of two items; one amounting to \$178, for various sums not charged for in his previous accounts; and the other item, amounting to \$386.09, for "jail fees" for prisoners committed and discharged from the common jail during his term of office, against whom no indictment had been found.

The record presents but two questions for the adjudication of this court.

First. Whether the plaintiff in error is entitled to an allowance for the item of \$64.50, disbursed by him under the circumstances narrated.

Second. Whether the plaintiff in error is entitled to be paid out of the county stock "jail fees," amounting to \$386.09 for committing and discharging persons from the county jail other than those against whom indictments were found.

POINT I.

The county is liable to pay all reasonable expenses incurred in good faith by a public officer in the arrest and prosecution of public offenders, when the exigencies of the case and the ends of justice require the expenditure, though they may not be taxable in any bill of costs.

Lewis v. B'd of Freeholders, 8 Vr., 254 ;

Hull v. Wash. Co., 2 Gr., (Iowa) 473 ;

Carpenter v. Sprague, 13 Ind., 585 ;

Webb v. Baird, 6 Ind., 13 ;

Lan. Co. v. Brinthall, 29 Penn. St., 38 ;

Post. Co. v. Wan. Co., 15 Wis., 361 ;

North. Co. v. West, 28 Penn. St., 173 ;

Ribble v. Mercer Co., May Term, 1875 ;

Revision, 285, sec 95 and 109.

POINT II.

It has been the usage and practice of the board of freeholders of the respective counties to allow the sheriff "jail fees," in his accounts presented to the board for settlement, for all persons committed and discharged from the county jail, whether bills of indictment have been found against them or not.

Crown Circuit Companion, 432 ;

2 Burns' Justice, 366, 363 ;

- Chitty's Cr. Law, Vol. I., 650, 832 ;*
Jacob Law Dict., Vol. III., 22 ;
1 Burns' Justice, 432 ;
Leaming & Spicer, 300-1 ;
N. J. Laws and Ord., Vol. I., 329 ;
Neville, 343 ;
Pat., 424 ;
Revision, 405, 1108 ;
State v. Boff ;
State v. Crampton ;
State v. Seman ;
State v. Yorks ;
State v. Baker ;
Co. Lit., 368 ;
Prec. in Ch., 551 ;
Chitty Cr. Law, Vol. I., 833 ;
Fleetwood v. Finch, 2 H. Bla., 220 ;
2 Inst., 210 ;
Bac. Ab. Fees, A ;
Gilbert v. Brazier, 1 Caines, 13 ;
Irwin v. Commrs., 18 R., 505 ;
King v. Meyers, 6 Durnf. & Est., 237 ;
Schuyllkill v. Reifsnyder, 46 Penn. St., 446 ;
Flaacke v. Jersey City, 6 Stew. Ch., 57.

New Jersey Court of Errors and Appeals.

PIERSON A. FREEMAN,

Plaintiff in Error,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF MORRIS.

Defendants in Error.

*Brief on behalf of
Defendants in
Error.*

ALBRIDGE C. SMITH, Att'y.

This action was begun in the Circuit Court of the County of Morris by the defendants in error against the plaintiff in error, to recover certain moneys alleged to have been received by the plaintiff in error of the Board 10 of Chosen Freeholders of Morris County contrary to law while the plaintiff in error was Sheriff of that County.

By the state of the case it appears that there are really only *two items* in dispute between the parties, to-wit :

One charge, amounting to \$64.50, made by the defendant in error against the plaintiff in error as appears by bill of particulars annexed to declaration.

One charge, amounting to \$386.09, made by the plain- 20

tiff in error against the defendant, and filed as a set off in the Court below.

The Court below allowed the item of \$64.50 to the defendant in error, and disallowed the item of \$386.09 to the plaintiff in error.

The allowance and disallowance are both assigned for error in this Court and are the only errors assigned.

10 1st. There was no error in allowing the item \$64.50.

By the state of the case agreed on by counsel, it appears that the item of \$64.50 was money paid by the Board of Freeholders to Pierson A. Freeman for witness fees alleged to have been paid out by Sheriff Freeman in the case of the State vs. Nixon, who was indicted, convicted and committed to the State Prison.

In the taxing of the costs in that case his Honor, Judge Dalrimple, refused to allow these fees, and struck
20 them out of the taxed bill of costs.

Sheriff Freeman then made a bill, including the \$64.50, with other charges against the County and was paid the fees in question.

The plaintiffs in the Court below seek to recover the money so paid.

This could not be chargeable to or in anywise enforce-
able against the County, *because* by the express provision
of the statute where offenders are sentenced to the State
30 Prison, *the costs of conviction shall be paid by the State.*

See Crim. Proced. § 98 Revision page 286.

In any event the disallowance of these fees by Judge Dalrimple in taxing the costs was conclusive against the plaintiff in error, and he could not recover them from the State, much less from the County, had the latter been otherwise legally liable for them. The decision of the taxing officer was conclusive. The costs were taxed
by the Court.

40 Sec. 93, Rev. p. 285.

2d. As to the items amounting to \$386.09 disallowed plaintiff in error.

These items arise upon the claim of the plaintiff in error, to be paid by the County of Morris, the sums fixed by the fee bill for the commitment and discharge of persons from the common jail of the County of Morris during the plaintiff's term of office as Sheriff of said County. The fees claimed are fixed by the act entitled "An act to regulate fees," *revision p. 399* in the section "fees of Sheriffs," *rev. p. 405*, in these words: 10

Every person committed to prison, - - - 25 cts.
Discharging every person from prison, - - 12 "

AS TO COSTS IN CRIMINAL CASES.

1st. *Costs on conviction.*

20

If defendant is convicted in criminal case and *sentenced to State Prison*, all costs are taxed and *paid by the State*.

Rev. sec. 98, page 286.

If defendant *on conviction* is sent to *County Jail*, and is unable to pay the costs of prosecution, the *County pays them*.

Rev. sec. 99, p. 286.

2d. *Costs on acquittal.*

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When on any indictment there is an *acquittal*, the Sheriff shall pay the *witnesses and constables fees*; and these shall be refunded by the County Collector.

Rev. stat. April 16th, 1846, sec. 2.

As the law then was, no officer or party received any fees on an acquittal except *constables and witnesses*.

To the same effect is *revision pages 404 and 407* that no costs shall be allowed where the indictment is 40

quashed, judgment is arrested or the defendant acquitted.

By Sec. 3 of a supplement approved March 7th, 1866, laws of 1866, p. 257, (now Sec. 105, Rev. page 287.)

“In all criminal cases upon indictment on the acquittal of the defendant, the *fees* of the *Court, Clerk*, and “*Sheriff*” shall be paid by the County Collector upon the “taxed bill certified to be correct by the prosecutor.”

It will thus be seen that not until 1866 did the Sheriff
10 receive any fees on the acquittal of offenders, repealing to that extent the law of 1846.

It should be added on this head that his fees are collected through the “taxed bill of costs.” The whole policy of the law in relation to the public authorities paying fees and costs in criminal cases, requires that they first be taxed by Clerk or Court.

See section above cited.

Also Sec. 109, p. 288.

Also Sec. 27, p. 173.

20 The plaintiff in error admits in every instance where the prisoner has been indicted and either *acquitted* or *convicted* he has received his official fees. They were taxed in the bill of costs and collected of the County or State.

The disputed fees relate to prisoners who have never been indicted, including those committed on charge of crime and discharged for want of prosecution; on convictions before two justices; *under the tramp act*; or for
30 violations of town ordinances or other cause.

Attention is called to Revision page 404 and 407, wherein it is provided that no costs shall be allowed in Quarter Sessions or Oyers and Terminer where “defendant is discharged for want of prosecution.”

By the law of 1846 we have seen that no costs were allowed on acquittal. The law of 1866 remedied this serious injustice towards the numerous body of unselfish Clerks and Sheriffs in our State.

If it required legislative interference to give Clerks and
40 Sheriffs their fees on acquittal of offenders, is it not

needed in cases of the miscellaneous class, covered by the issue in this case?

By the Revised Statutes of New York where a defendant is discharged for want of indictment the Sheriff cannot exact any fees.

Crocker on Sheriff, p. 108, Sec. 233.

Was there error in holding that the County of Morris is not responsible for these fees?

It must be admitted that the County is not liable for 10 their payment by virtue of any express provision of statute. The act which fixes the fees in dispute *does not provide* what person or municipal authority shall pay the fees it prescribes.

It simply and solely enacts what fees officers shall receive for the performance of official acts.

It is also to be observed that the fees in question *are found in connection with fees given to the Sheriff* for his official services in *civil* cases only. 20

A review of the legislation in this State upon official fees will support the finding of the Court below.

It is to be observed that Judge Magie in his opinion filed in the case states that

"Fees of the character of these in question were originally in England, only applicable to persons in confinement on civil process. By statute of George II they were to be fixed by a Court and penalties were imposed on goalers was exacted greater fees than those thus fixed." 30

Citing 2 Burns 321 to 324.

As in this State, prisoners in England were maintained out of the general county rate.

14 Eliz. Ch. 5.

That the County authorities in England did not pay the goaler fees in cases of acquittal and on miscellaneous commitments, appears from the following citations:

If a goaler detains a prisoner in goal after acquittal, 40

unless it be for his fees, (not for meat, drink or lodging) this is an unlawful imprisonment. 2 Coke, Just. p. 53. Cited in Conductor Generalis Ed. 1788, p. 172.

Prisoner not released on *habeas corpus* unless he pays goaler's fees. 2 Hawk. p. 151.

As a matter of historical fact and interest is subjoined an extract from the life of John Howard, who was elected Sheriff of Bedford County in 1773, which reveals the
 10 ~~case in~~ law, and practiced in England in cases like those under consideration in this case :

“The distress of prisoners, of which there are few, who have not some imperfect idea, came more immediately under my notice when I was Sheriff of the County of Bedford, and the circumstances which excited me to activity in their behalf, was the seeing some, who by the verdict of juries were declared not guilty, some of whom the Grand Jury did not find such an appearance of guilt as subjected them to trial, and some whose
 20 prosecutors did not appear against them after having been confined for months dragged back to goal and locked up again till they could pay sundry fees to the goaler and the clerk of the assize.

“In order to redress this hardship I applied to the Justices of the County for a *salary* to the goaler, in lieu of fees.

“The bench was properly affected with the grievance and willing to grant the relief desired, but wanted a precedent for charging the County with the expense.

30 “I therefore rode in several neighboring Counties in search of a precedent, but *I soon learned that the same injustice was practiced in them.*”

Life of Howard, p. 47.

The earliest legislation in New Jersey, respecting fees of the character in dispute appears in “Leaming & Spicer,” page 301, under the head of “Goalers Fees,” in
 “an act establishing fees” passed in 1686, wherein it is enacted that the goaler shall receive for “turning the
 40 key in and out, eight shillings.”

It will be apparent from the preamble of above mentioned act, that the various officers therein named, had been guilty of making their offices more productive, by exacting "extraordinary fees" as their official successors have endeavored to do in more recent times.

And it is no improbable inference that these goalers fees applied solely to civil cases and were paid either by the plaintiff in execution on the defendant therein when discharged, not by the county authorities, who are sought to be charged in their suit, but from the fact that the preamble recites 10

"Whereas it hath been taken into consideration, the great burthen the *several inhabitants* of this Province have sustained and complained under, by reason of extraordinary fees paid by *them* to several officer writ-ten this province;" and further provides that the officers for taking larger fees "shall pay treble damages with costs of court *to the person so exacted from.*"

That the fees provided for by the above mentioned 20 act, whether they accrue in civil or criminal cases, were paid by the prisoners clearly appears in the remonstrance of their grievances by the "General Assembly" to the corrupt and tyrannical Governor, Lord Cornbury, presented in May, 1707, twenty-one years after the passage of said act; wherein, in the enumeration of the oppressive measures which afflict them they declare.

"We think it a great hardship, that persons accused for any crime should be obliged to pay court fees, notwithstanding the jury have not found the bill against 30 them, * * * * when therefore they do not find the bill, it is very reasonable to suppose the accused person innocent, and consequently no fees due from him."

See Smith's History of N. J. p. 290.

Reply To this particular complaint in their humble but firm petition for relief the Governor assures them, that it is the English system in these matters, entirely legal in the 40

province and nothing but their astonishing ignorance has betrayed them into complaining.

Smith's Hist. p. 297-298.

Subsequently, in 1747-8, an act was passed entitled
 "An act for the better enabling the Judges and Justices
 "of this Colony to ascertain and tax bills of cost, and for
 "making provision by law for the payment of the services
 "of the several offices of the Colony and for preventing
 10 "the said officers from taking exorbitant fees." It provided that the Sheriff might receive for taking a prisoner into custody by order of the Court or a Justice of the Peace, two shillings; for discharging the same, nine pence.

Allinson, page 164.

The act regulating fees, in which are found the fees new in dispute was passed originally June 13, 1799, (see Paterson Ed. 1800, page 418 and 424) and has been kept in force from that time to the present.

20 Paterson Ed. 1880, p. 418.

R. L. p. 481.

Rev. Stat. p. 464.

Revision, p. 399 and 405.

*The act of 1799 is the 1st in the legislation of this State which disallows fees in cases where debt is acquitted, indictment quashed
 &c*

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3d. It may be urged on behalf of the plaintiff in error, that the Sheriff should not be compelled to lock and unlock the jail in these cases of miscellaneous commitments without compensation.

There are official acts to the performance of which no fees are annexed, as summoning grand jury; summoning the petit jury, suppressing riots, etc.

Except in cases of indictment found, constables received no pay for their services in criminal cases until

40 1875.

Rev. Sec. 2, p. 408.

Rev. Sec. 135, p. 563.

Justices get nothing for criminal warrants if no indictments be found.

Rev. Sec. 108, p. 287.

Sec. 140, p. 566.

The Sheriff of the county is not the employee of the county or of the Board of Chosen Freeholders

The keeping of the jail in England was incidental to and inseparable from the office of Sheriff.

4 Com. Dig. p. 368.

It is appurtenant to his office in this State ; made so by statute.

Rev. Sec. 14, p. 1,101.

Bouvier defines "Sheriff" as "A county officer representing the Executive or Administrative power of the State within his County."

Title, Sheriff.

See also official oath Revision, p. 1,098.

The onerous duties of turnkey were not performed for the Board of Chosen Freeholders of Morris County, under any employment by or agency for them.

There is no implied obligation therefore that the defendants in error should pay these fees.

The whole tenor of the opinion in the case of the State, Lewis pros. vs. The Board, etc., of Hudson, 8 Vroom, p. 254 is that in the prosecution and conviction of offenders there is no legal liability imposed upon the Boards of Chosen Freeholders, or a County for fees and expenses, except by the express language of the statute.

As to the fees under discussion no liability is imposed on the defendants in error, either by legislation or reasonable implication.

I submit therefore that there was no error in either of

the findings of the Court below on review here, and the plaintiff in error should not prevail.

ALBRIDGE C. SMITH,

Attorney for Defendants in Error.

"THE JERSEYMAN" LAW PRESS PRINT, MORRISTOWN, N. J.

N. J. COURT OF ERRORS AND APPEALS.

FREEMAN

vs.

BOARD OF CHOSEN FREE-
HOLDERS.

} *Error to Morris Circuit.*

H. C. PITNEY, FOR DEFT. IN ERROR.

I.

The first question arises on the item in the bill of particulars of the plaintiff below for \$64.50 for moneys erroneously paid by the plaintiff below to the deft. below.

The first clause in the stipulation (p. 8 of case) states the facts in regard to this item. It was admitted on the argument below, and found by the Judge, that this item had been paid by plff. below to deft. below, and the question was, whether it was properly paid, and whether it should not be recovered back as not due from plff. below to deft. below?

For the reasons given by the learned Judge in the Court below (p. 11 of case) it is clear the deft. below was not en-

titled to credit for this item, and plff. below was entitled to recover it back.

II.

The second question arises out of the offset of the deft. below.

The facts as to this claim are found in the items of the offset itself, and in paragraphs second, third and fourth of the stipulation, p. 8 and 9.

The claim is for "*jail fees*," under the fee bill for receiving and discharging prisoners not committed on civil process and who have not been indicted and tried.

The learned Judge reasoned—and I submit properly—that these fees never were intended to apply to commitments and discharges in criminal and quasi-criminal cases. In fact, they are found among a list of fees applicable exclusively to civil process, and I have been unable to find any where in the fee bill any fee allowed to the Sheriff for any service in criminal cases rendered before conviction.

The items heretofore allowed the Sheriff in the taxed bills of costs must be wholly the creations of custom and long usage.

But admit that—to use the language of the Judge—"a long course of practice seems to have settled that such fees are taceable in the bills of costs for commitments in criminal cases upon conviction or acquittal," there still remains the question, where is the authority to charge them on the County, when not included in any taxed bill of costs?

Before the late act (pamph. laws, 1866, p. 25) providing that taxed costs on acquittal as well as on conviction should be paid by the County, no criminal costs whatever were chargeable to anybody by the Sheriff, Clerk, Court, Prosecutor or witnesses, except in case of conviction. All these fees were contingent on the conviction of the prisoner and were payable by him, except in capital cases. The sentences included the payment of costs, and that the prisoner stand committed, if not sent to the State prison, until the costs be paid. If sent to the State prison, the State paid the costs on the delivery of the body, and by the sentence held the prisoner until costs were paid by him.

If, in any case, the prisoner escaped, the Sheriff could not get his costs.

The provision in sec. 99, Crim. Pro. act, in favor of the witnesses and Attorney General, in cases of escapes, not including the Sheriff, is significant.

There was never any pretence of any right on the part of the Sheriff, Clerk, Court or Prosecutor to demand of the County any payment for costs in criminal cases even after conviction, except in capital cases and in cases where the Board of Freeholders discharged a prisoner committed after conviction to the County jail before his costs were paid, and in cases of poverty under sec. 2 of Revised Statutes of 1846, p. 453. This act had its origin in 1820. See Rev. of 1821, p. 729.

This state of things—the contingency upon conviction of the fees of Sheriff, Clerk, Court, Prosecutor and witnesses—gave rise to the supposition that the court house officers were interested to combine to procure convictions improperly, and that the Court was not always impartial, and after having prevailed from the very beginning of the existence

of an organized government on our soil, was changed by the act of 1866, p. 257, now sec. 105 of the Crim. Pro. act. Sec. 101 of that act, which had its origin in the act of 1820—Rev., 1821, p. 729, 730, sec. 5—was the first and, until 1866, the only exception to the "*contingency*" rule and was made in favor of the court of two justices in order to insure impartiality in that court and to induce small offenders to go before that tribunal and save costs to the County.

It is based on the idea that there can be no liability on the part of the County except upon conviction and by statute.

The provision for the benefit of constables and witnesses in case of an acquittal in section 99 also points in the same direction.

The fees now in question, viz. : jail fees on commitments in cases where there is no indictment, cannot stand on any higher or more favored basis than any other fees of the Sheriff in criminal cases. He gets his fees from the County by statute or not at all, and the statute confines him to taxed costs on indictment.

It more clearly appears that the provision of the fee-bill under consideration applies wholly and only to commitments in civil causes, when we consider that at the common law there were two kinds of jails.

First. The common jail of the county, where all persons charged with crime were confined.

Second. The Sheriff's private jail, where persons committed on civil process were confined. These latter in London were kept by the Sheriff's bailiffs, and were the origin of the "*sponging houses*," so-called from the exorbitant charges made by the bailiffs for accommodations furnished the prisoners.

6 Bacon's Abr. by Gwillim, page *158, Tit. Sheriff, Letter H. 5.

"Every county hath two sorts of gaols, one for prisoners by the sheriff taken for a debt, and this the sheriff may appoint in any house, or where he pleases; the other is for breach of the peace and matter of the crown, which is the county gaol."

And in note, "By the 22 and 23 C. 2, c. 20, §13, it shall not be lawful for any sheriff or gaoler to lodge prisoners for debt and felons together in one room, but they shall be kept apart. * * * By the 1 Ann, c. 6, those taken on an escape-warrant are to be sent to the county gaol."

The author proceeds, "Though the sheriff may remove his gaol from one place to another within his bailiwick, yet he must keep it and his prisoners within it, and not suffer them to go at large out of the prison, though he he himself attends them."

And by the 2 G. 2, c. 22, §1, "No sheriff, bailiff, or other officer shall convey any person by him arrested, by virtue of any process or warrant, to any tavern, ale-house, or other publick victualling or drinking-house, or to the house of such officer, or of any tenant or relation of his, without the free-consent of the person so arrested."

Commitments by Justices of the Peace were all made to the common jail of the county and were directed to the jailor.

3 Bac. Abr., Title Gaol and Gaoler, Letter C.

For criminal commitments, Sheriffs and Jailors formerly charged fees to the person bringing the prisoner.

This was forbidden by 4 E. 3, ch. 10, reciting "That
 " whereas in times past, sheriffs, and gaolers of gaols would
 " not receive thieves, persons appealed, indicted or found
 " with the manner, taken and attached by the constables
 " and townships, without taking great fines and ransoms of
 " them for their receipt, whereby the said constables and
 " townships have been unwilling to take thieves and felons
 " because of such extreme charges, and the thieves and
 " the felons the more encouraged to offend, it is enacted,
 " " That the Sheriffs and gaolers shall receive and safely
 " keep in prison from henceforth, such thieves and felons,
 " " by the delivery of the constables and townships, without
 " " taking anything for the receipt. "

Fees of the Sheriff on arrest in civil cases were attempted to be regulated by 23 H. 6, C. 9 (miscited in the margin of Bacon), and this language is used: " For the Sheriff
 " xx d., the bailiff which maketh the arrest or attachment,
 " four pence, *and the gaoler, if the prisoner be committed*
 " *to his ward, four pence.* "

That this was applicable only to arrests in civil cases is perfectly clear from the context of the statute.

But it is probable that jailors construed it to include persons committed by magistrates.

By the 3 Jac., 1, ch. 10, it was enacted that persons committed to the common jail of the county by any magistrate should pay the costs and expenses of arrest and commitment, if able so to do, and provision was made for selling the property of the prisoner for that purpose.

3 Bac. Abr., Tit. Gaol and Gaoler, Letter E, *354.

The preamble of the statute is "Whereas, his majesty's
 "honest and loving subjects are much charged and bur-
 "thened in conveying felons and other malefactors, &c.,
 "unto gaol, having goods and chattels of their own to
 "defray the charges, to the great encouragement of mal-
 "efactors in their wicked courses, and the discouragement
 "of his majesty's subjects in prosecuting malefactors,
 "&c."

This proves that the costs of criminal prosecutions were
 in those days paid by the complainants.

With regard to fees for discharging prisoners charged
 with crime, these also, up to 1774, were always paid by the
 prisoner personally and not by the county, as appears by
 the statute, 24 G. 4, ch. 20, providing for the discharge of
 all prisoners, not indicted or acquitted, without paying any
 fees.

See also 55 G. 3, c. 50, set out at length in 2 Chitty's
 Burn's Justice, p. 1039 (Ed. of 1831.)

Upon the general question, see
Dew vs. Parsons, 2 B. & Ald., 562.

Sewell on Sheriffs, p. *51, *59, *469.

Watson on Sheriffs, p. *39, *42, *43.

2 Burn's Justice by Kyd (1793), pp. 430, 432, 433, 442.

The purpose of this study is to investigate the relationship between the use of the word "and" and the use of the word "or" in English. The study is based on a corpus of 1000 English sentences. The results of the study show that the use of "and" is more frequent than the use of "or" in English. This is true for both written and spoken English. The study also shows that the use of "and" is more frequent than the use of "or" in English when the two words are used together. This is true for both written and spoken English.

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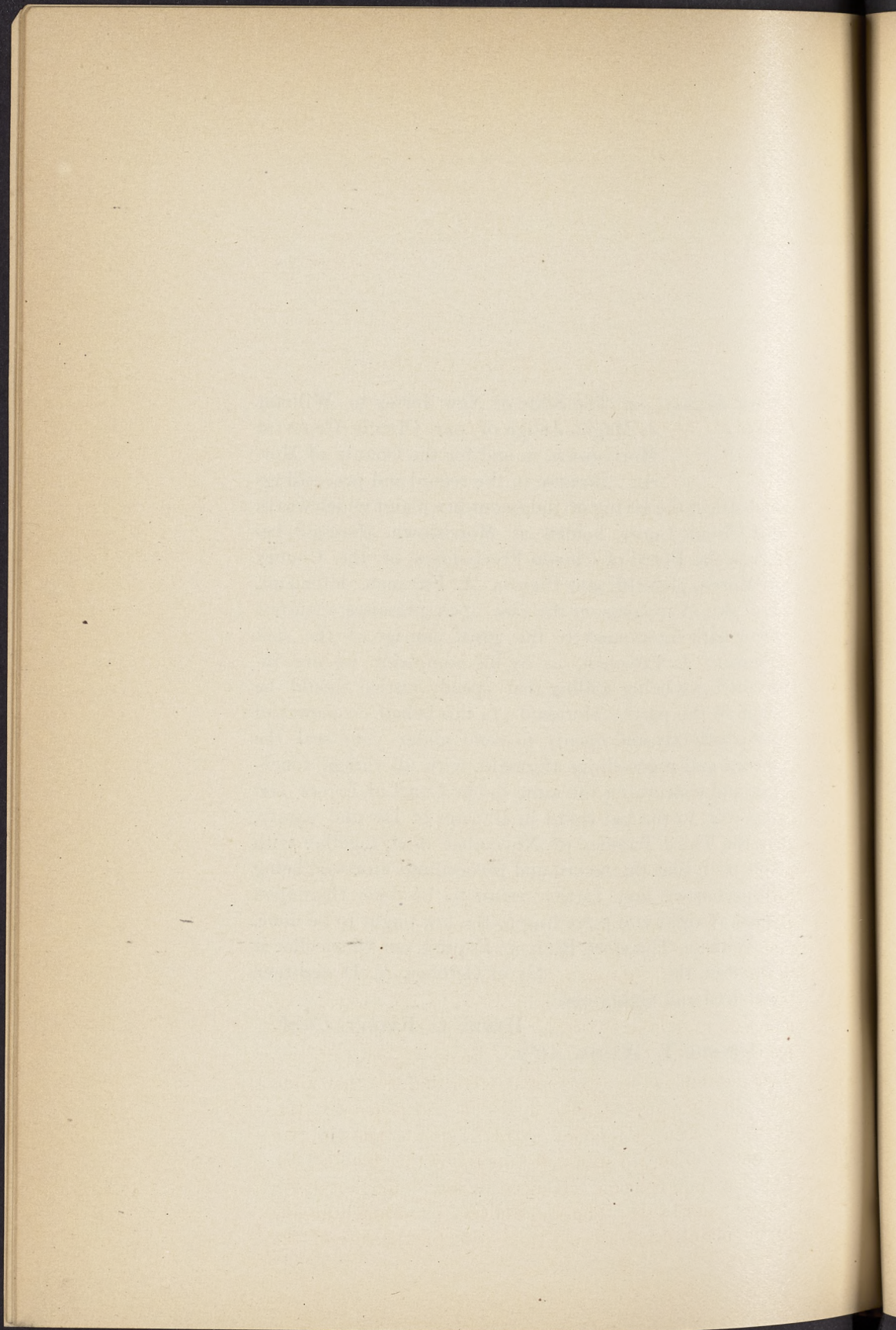
NEW JERSEY, ss: The State of New Jersey to William
J. Magie, Judge of our Circuit Court at
L. S. Morrystown, in and for the County of Morris.

Because in the record and proceedings and also in the giving of judgment in a plaint which was in our Circuit Court, holden at Morrystown aforesaid, between the Board of Chosen Freeholders of the County of Morris, plaintiff, and Pierson A. Freeman, defendant, in a plea of trespass on the case upon promises, manifest error hath intervened to the great damage of the said Pierson A. Freeman, as by his complaint we are informed, we being willing that speedy justice should be done to the parties aforesaid ; in this behalf do command you, distinctly and openly to send under your seal the record and proceedings aforesaid, with all things touching and concerning the same to our Court of Errors and Appeals, in the last resort in all cases of law and equity, on the Third Tuesday of November next, together with this writ, that the record and proceedings aforesaid being inspected we may further cause to be done thereupon what of right and according to the law ought to be done.

Witness, Theodore Runyon, Esquire, our Chancellor at Trenton, the day of October, A. D. eighteen hundred and eighty-one.

HENRY C. KELSEY, *Clerk.*

GEORGE T. WERTS, *Att'y.*



NEW JERSEY
Court of Errors and Appeals.

MORRIS CIRCUIT COURT.

PIERSON A. FREEMAN
ads.
The Board of Chosen Freeholders
of Morris County.

GEORGE T. WERTS,
Att'y Plff in Error.

A. C. SMITH,
Att'y Deft in Error.

MORRIS COUNTY, ss :

Pierson A. Freeman the defendant in this suit was summoned to answer the Board of Chosen Freeholders of the County of Morris, the plaintiff therein, of a plea of trespass on the case upon promises and thereupon the plaintiff by Albridge C. Smith its attorney complains: For that whereas the defendant heretofore, to wit; on the eighteenth day of August in the year of our Lord one thousand eight hundred and seventy-nine, at Morristown, in the County of Morris was indebted to the plaintiff in the sum of two thousand dollars for goods, wares and merchandise before that time sold and delivered by the plaintiff to the defendant at his request; and in two thousand dollars for work and labor before that time done and performed and materials furnished by the plaintiff for the defendant at his request; and in two thousand dollars for so much money by the plaintiff before that time lent and advanced to the defendant at his request; and in two thousand dollars for so much money by the plaintiff before that time paid for the use of the

defendant at his request ; and in two thousand dollars for so much money by the defendant before that time had and received for the use of the plaintiff ; and in two thousand dollars for interest upon and for the forbearance by the plaintiff to the defendant at his request of divers large sums of money before that time due and owing from the defendant to the plaintiff, and in two thousand dollars for so much money then and there found to be due from the defendant to the plaintiff on an account stated between them ; and being so indebted, the defendant in consideration thereof then and there promised the plaintiff to pay it the said several sums of money on request. Yet the defendant has disregarded his said several promises and has not paid the said several sums of money nor any of them or any part thereof although often requested so to do but to do so has hitherto wholly refused and still does refuse to the damage of the plaintiff two thousand dollars and therefore it brings its suit, &c.

Notice is hereby given that this action is brought to recover the amount due on a certain account of which the following is a true copy :

Pierson A. Freeman,	
To Bd. of Chosen Freeholders, Dr.,	
To Error in footings of costs State <i>vs.</i> Hollenback,	\$13 36
“ Overcharge of 17 1-2 cts. on 566 extra meals,	99 05
“ Costs <i>vs.</i> Peer, paid through mistake,	34 07
“ Error in footings on bills rendered,	30 00
“ Overcharge 17 1-2 cts. on 159 extra meals to prisoners,	27 82
“ Overcharge 17 1-2 cts. on 647 extra meals to prisoners,	113 22
“ Costs <i>vs.</i> Stewart, erroneously collected of the County,	129 86
“ Overcharge of 17 1-2 cts. on 293 extra meals,	51 27
“ Erroneously paid for taking Jane Tharp to the Asylum,	2 00
“ Erroneously paid for taking J. P. Reger to	

the Asylum,	2 00
“ Additional error in State <i>vs.</i> Peer,	27 82
“ Witness fees State <i>vs.</i> Nixon,	64 50
	<hr/>
	\$594 96

And said plaintiff will claim final judgment when the proper time arrives for said sum of \$594.96 besides costs.

A. C. SMITH,

Att’y of Plff.

And the said defendant by Augustus W. Bell his attorney comes and defends the wrong and injury when &c., and says that he did not undertake or promise in manner and form as the said plaintiffs hath above thereof complained against him, and of this he puts himself upon the country, &c.

And for a further plea in this behalf the defendant, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him because he says that heretofore, to wit; on the first day of August eighteen hundred and seventy-nine at the said county of Morris he paid to the plaintiffs the said several sums of money in the said declaration mentioned and this he, the defendant, is ready to verify; wherefore he prays judgement if the plaintiffs ought to have or maintain their aforesaid action against him the defendant.

STATE OF NEW JERSEY, Morris County, *ss* :

Pierson A. Freeman puts in his place Augustus W. Bell, his attorney at the suit of the Board of Chosen Freeholders of the County of Morris in a plea of trespass on the case upon promises.

Take notice that the defendant on the trial of this cause will insist upon and give in evidence under the above pleas that the said plaintiffs before the commencement of this suit were and still are indebted

to him in five thousand dollars for goods, wares and merchandise sold and delivered by the defendant to the plaintiffs at their request; and in five thousand dollars for money lent and advanced by the defendant to the plaintiffs at their request; and in five thousand dollars for money paid, laid out and expended by the defendant for the plaintiffs at their request and in five thousand dollars for money had and received by the plaintiffs for the defendant in five thousand dollars for interest for the forbearance by the defendant at the request of the plaintiffs of money due and owing from the plaintiff to the defendant; and in five thousand dollars for money found to be due and owing from the plaintiffs to the defendant on an account stated between them; and the defendant on the trial of the cause will set off so much of said moneys as may be necessary for the purpose, against any demand which the plaintiff may prove on the trial against the defendant and the defendant will claim judgment against the plaintiff for any balance that may be found due to him.

Dated Oct. 21, 1879.

And the said plaintiff as to the plea of the said defendant by him first above pleaded, and whereof he puts himself upon the country, doth the like. And the said plaintiffs as to the plea of the said defendant by him secondly above pleaded, saith that the said plaintiffs by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, the said defendant, because they say that the said defendant did not pay to the said plaintiffs the said sum of two thousand dollars in the said plaintiffs' declaration mentioned or any part thereof, in manner and form as the said defendant hath above in his said plea in that behalf alleged. And this the said plaintiffs pray may be inquired of by the country, &c.. Therefore let the jury come before our said Circuit Court, at Morristown, in the said county of Morris on the third Tuesday of January in the year eighteen hundred and eighty, by whom, &c., who neither, &c., to recognize, &c., because as well, &c., and the same day is given to the parties aforesaid, which day before

our said court at Morristown aforesaid, came the parties aforesaid, by their attorneys aforesaid, and by agreement of the attorneys aforesaid, the right by trial by jury having been waived after which day until the twenty-first day of January, eighteen hundred and eighty one.

The cause aforesaid between the parties aforesaid was continued from term to term by *curia advisare vult* at which day came the parties aforesaid by their attorneys aforesaid and the decision of the cause having been submitted to the court, the judge thereof saith that the said defendant Pierson A. Freeman did undertake and promise as is complained against him in the said plaintiffs declaration, and he did assess the damages of the plaintiffs at the sum of four hundred and thirty-one dollars and forty-four cents besides costs, of suit to be taxed.

Therefore it is considered that the said the Board of Chosen Freeholders of Morris County do recover against the said Pierson A. Freeman its damages in form aforesaid assessed, also fifty-two dollars and eighty cents for its costs and charges by it about its suit in this behalf expended and now here by our said court to the said the Board of Chosen Freeholders of Morris County, with its assent adjudged which said damages, costs and charges, amount in the whole to the sum of four hundred and eighty-four dollars and twenty cents. And the said Pierson A. Freeman, in mercy &c., Judgement signed Jan. 21, 1881.

STATE OF NEW JERSEY, }
 County of Morris, } ss: I, MELVIN S. CONDIT,
 Clerk of the County of
 Morris, and also Clerk of the Circuit Court of the County of Morris do hereby certify that the foregoing is a true and correct copy of the record of the judgement recovered in said court by the Board of Chosen Freeholders of Morris County against Pierson A. Freeman as fully as the same remains in my office in book "T" of Circuit court judgements for said county on pages 193, &c.

In testimony whereof I have hereunto set my hand

and affixed the seal of said court at Morristown this
 { L. S. } fourth day of November, A. D. eighteen
 hundred and eighty-one.

The case was tried before the Court (jury being waived), upon the following agreed upon state of the case.

MORRIS CIRCUIT COURT.

The Board of Chosen Freeholders of the County of Morris vs. PIERSON A. FREEMAN.	}	<i>In Case Stipulation of Counsel.</i>
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The following facts are admitted by the respective counsel of the parties in the above entitled cause as a state of the case.

First: The defendant admits that the amount claimed in the bill of particulars annexed to plaintiff's declaration is due to the plaintiffs, to wit; the sum of \$595.06—except an item therein shown of \$64.50, which item is for witness fees in the criminal case of the State vs. Nixon, wherein the defendant was convicted and committed to the State Prison—these witness fees were disallowed by Judge Dalrymple in taxing the costs in the case—see particulars annexed to declaration. See *Crim. Procedure*, sec. 96 and 98.

Second: The plaintiffs admit that the amount of the defendant's bill of particulars hereunto annexed, and which exhibits the defendant's counter claim is due from the plaintiffs to the defendant—except, however, the item of \$386.09 for jail fees which said item and the said Nixon witness fees of \$64.50 are the sole subject matters of controversy in this suit.

Third: It is admitted that the defendant, through the proper taxed bills of costs in each criminal case, has been paid any and all jail fees, upon those prisoners, who, after indictment found were upon trial either acquitted or convicted.

Fourth: It is also admitted by the parties in said cause that the item of \$386.09 in controversy, is made up of jail fees for all persons committed and discharged by the defendant, as Sheriff, not embraced in the class defined in paragraph "third" hereof.

Fifth: To whatever balance shall be found due to the plaintiff from the defendant, shall be added interest from Aug. 21, 1879, as part of the judgment.

Sixth: The items of defendant's counter claim hereto annexed, are claimed as official fees due him as late Sheriff of the County of Morris.

Board of Chosen Freeholders of Morris County,	
To P. A. FREEMAN, Late Sheriff, Dr.,	
To jail fees on 168 prisoners committed and discharged from Nov., 1875, to May, 1876, at 46 cts.,	\$77.28
To jail fees on 176 prisoners, committed and discharged from May, 1876, to Nov., 1876, at 46 cts.	80.96
To jail fees on 139 prisoners committed and discharged from Nov., 1876, to May, 1877, at 46 cts.	63.94
To jail fees on 196 prisoners committed and discharged from May, 1877, to Nov., 1877, at 46 cts.	90.16
To jail fees on 126 prisoners, committed and discharged from Nov., 1877, to May, 1878, at 46 cts.	57.96
To jail fees on 137 prisoners, committed and discharged from May, 1878, to Nov., 1878, at 46 cts.	63.02
	<hr/> \$433.32
Deduct 9 cts. on 29 prisoners committed between Sept., 1878 and Nov., 1878	2.61
	<hr/> \$430.71
Deduct 96 jail fees paid in taxed costs at 46 cts.	44.62
	<hr/>
Disputed item of defendants counter claim,	\$386.09

Error in Oct. term of Court 1875, attendance 16 days at 75 cts.	12.00
Error in Reform School bill, 12 prisoners, at 50 cts.	6.00
Error in Jan. term 1876 attendance 36 days, at 75 cts.	27.00
Error in May term 1876 attendance 38 days at 75 cts.	28.50
Fees attending Court,	105.00
	<hr/>
	\$564.59

By "jail fees" in the above particulars is meant two items in statute relating to "fees and costs" Revision page 405, to wit: "Every person committed to prison, 25 cts." "discharging every person from prison, 12 cts." making in all 37 cents for each prisoner, to which is added 55 per centum under the statute of March 14, 1871. Revision page, 410.

It is admitted that the number of prisoners committed and discharged as stated in the defendant's counter claim by him as Sheriff and keeper of the jail, under legal process and by order of court on expiration of term of imprisonment, was so committed and discharged, and that the residue of them was committed under civil process.

AUGUSTUS W. BELL,
Att'y of Deft.

A. C. SMITH,
Att'y of Plff.

The following is the opinion of the court.

MORRIS CIRCUIT.

The Board of Chosen Freeholders of Morris County	} <i>In Case.</i>
<i>v.</i>	
PIERSON A. FREEMAN.	

This action has been tried without a jury, upon facts agreed on by the attorneys of the parties and contained

in a stipulation on file.

The amount claimed in plaintiffs bill of particulars is, by that stipulation admitted to be due, except one item amounting to \$64.50. That item appears to be for money obtained by defendant from plaintiff for fees paid by defendant as Sheriff in the case of the State vs. Nixon. Those fees were claimed by def't. to have been properly paid out by him to witnesses. A bill of costs was made up for taxation upon that claim. Judge Dalrymple, before whom the bill came, disallowed the claim and struck it out of the taxed bill of costs. Nixon had been convicted and sentenced to imprisonment in the State Prison. In such case, the bill of costs is payable by the State by the express provisions of the statute. The claim of the Sheriff if good at all, was enforceable against the State, and by means of the taxed bill of costs. In respect to that claim the adjudication of the taxing officer was conclusive. There was no claim against the county because the statute made express provision for another mode of payment, if the fees were rightly paid. If wrongly paid the county were not responsible.—98 Rev. Stat. Con. Proc'd.

It is true that there is a certain power in the county for payment of expenses incurred in the arrest and prosecution of criminals. State, Lewis, Pros. vs. Hudson 8 Vr. 254; but it does not extend to cases where a statute forms a mode of determining the amount a public officer may demand, or expressly provides for payment by parties other than the county. I think this item should be allowed to plaintiff. In this action defendant filed a notice of set-off. By the stipulation, items in the bill of particulars served by defendant, to the amount of \$178.50, ought to be allowed him. There is a contest in respect to the other items in defendant's bill of particulars amounting to \$386.09. These items arise upon defendant's claims to be paid by the county the sums fixed by the fee bill for the commitment and discharge of persons from the common jail of the County of Morris during defendant's term of office as Sheriff of said county. The fees in question are fixed by the act "to regulate fees" in

the section "fees of Sheriff's" in these words—"every person committed to prison 25 cents—" "discharge every person from prison, 12 cents." Defendant admits that in every instance where the prisoner has been indicted and either convicted or acquitted, he has received these fees. They were in such cases taxed in the bills of costs and collected from the State or County. The disputed fees relate to prisoners who have never been indicted, including therefore those committed on charges of crime and discharged for want of indictment or on convictions before two Justices or under the tramp act or otherwise.

Fees of the character of those in question, were originally in England only applicable to persons in confinement on civil process. By statute of Geo. II they were to be fixed by a Court, and penalties were once imposed on Goalers who exacted greater fees than those thus fixed.—2 Burns 312-324. The first trace of such fees that I find in our legislation is in the act "for establishing fees" passed in 1686 by the E. Jersey Assembly. Under the head "Gaolers fees," occur these curious words "Turning the key in and out, eight shillings," Leam. and Spi. 301. By a subsequent act passed in 1747-8 and entitled "An act for the better enabling the Judges and Justices of the Colony to ascertain and have bills of costs and for making provision by law for the payment of the services of the several officers of the Colony and for preventing the said officers from taking exorbitant fees," it was provided that the Sheriff might receive "for taking a prisoner into custody by order of the Court or a Justice of the Peace, 2 shillings." "for discharging the same, 9 pence," Allison, 164. In 1799 the provision in the present act was enacted and has been kept in force—Pat. 418. R. L. 481. Rev. St. 464. Rev. 405.

From this review I think it may well be questioned whether the legislation was ever designed to give these fees to the Sheriff in any other than commitments on civil process. But a long course of practice of which I am bound to take judicial notice, seems to have settled

that such fees are taxable in the bills of costs for commitments in criminal cases upon the conviction or acquittal of the prisoner.

But can they be claimed of the County in cases in which no bill of costs can be taxed?

There is no statutory provision imposing their payment on the county unless it be implied from the language of the fee bill. I do not think such implication arises from that bill. It was not designed by that bill to settle who should make payment of the specified costs. The only object of that bill was to fix the amount to be paid for certain services, by whom the payment is to be made on other statutes. The County and State are expressly required to pay certain bills of costs, *i. e.* on indictment and conviction or acquittal of the prisoner. Rev. St. Com. Proc. §§ 98-99, 105. The cases in question in this action are left unprovided for.

Nor do I think there is any implied obligation on the County to pay these fees. The case above referred to—*State, Lewis, Pros. v. Hudson*—seems to indicate that while the County officers may exercise a proper discretion in respect to the payment of expenses incurred in prosecution of crime there is no legal obligation imposed except such as exist in the express language of the statutes.

I conclude therefore that these items cannot be allowed defendant.

By the stipulation, interest is to be allowed on plaintiff's claim, from Aug. 21, 1879. There is no agreement as to interest on the set-off, nor are there any facts from which I can determine whether interest should be allowed, or if so, from what time.

I therefore allow the whole claim of plaintiff, as appears by stipulation,	\$595 06
Interest thereon from Aug. 21, '79, to Jan. 21, '80,	14 88
	<hr/>
Amounting to,	\$609 94
I disallow defendant's set off, except the last	

five items. These I allow, amounting to, 178 50

431 44

The balance, four hundred and thirty-one dollars and forty-four cents, I find to be due plaintiff from defendant, and which plaintiff ought to recover of defendant in this action.

Let judgment be entered for that amount, nisi, &c.

W. J. MAGIE, J.

Jan. 21, 1880.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

PIERSON A. FREEMAN, <i>Plff. in Error,</i>	} <i>Assignment of Error.</i>
<i>v.</i>	
The Board of Chosen Freeholders of the County of Morris.	

And now at this day the said plaintiff in error assigns the following causes of error.

First. Because the said Circuit Court, before whom said case was tried, on said stipulation of facts agreed on between the respective attorneys of the said parties, decided that said The Board of Chosen Freeholders of the County of Morris, was entitled to and should recover of and from the said defendant the said sum of \$64.50, witness fees, in the case of the State *vs.* Nixon, mentioned and referred to in said stipulation, and claimed in and by the plaintiff's bill of particulars. Whereas the said Court should have decided that the said plaintiff was not entitled to recover the same or any part thereof, of or from the said defendant.

Second. Because the said Court, before whom said case was tried, disallowed the item of \$386.09, mentioned in said stipulation and included and claimed in and by the defendant's set-off or bill of particulars. Whereas by the law of the land the same should have been allowed

the defendant against the plaintiffs.

Third. Because the said Court in rendering judgment in said case rendered payment against the defendant, and in favor of the plaintiff, for the said two items of \$64.50 and \$386.09. Whereas by the law of the land judgment for said two items ought not to have been rendered against the defendant—but the same should have been allowed the said defendant against the plaintiff, and thereupon the said Pierson A. Freeman prays that the judgment aforesaid for the errors aforesaid and others in the record and proceedings aforesaid of appearing, may be reversed, annulled and for nothing holden, and that he may be restored to all things he hath lost on occasion thereof.

GEORGE T. WERTS,
Atty Plff in Error.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

The Board of Chosen Freeholders of the County of Morris <i>ads.</i> PIERSON A. FREEMAN.	} <i>Joinder in Error.</i>
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And the said defendants in error, by Albridge C. Smith, their attorney, come into Court here and say, that there is no error, either in the record or proceedings aforesaid, or in giving the judgment aforesaid, and they pray that the Court, now 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 things be affirmed, &c.

