

PUBLIC OPINION Print—86 and 88 Warren St., Trenton, N. J.

COURT OF ERRORS AND APPEALS.

*The President and Councilmen of
the Village of Passaic,
Plaintiffs in Error,* } *On Writ of
Error to
Supreme
Court.*
vs.
*The State, the Del., Lack. &
Western R. R. Co., Prosecutors,
Defendants in Error.* }

POINTS FOR PLAINTIFFS IN ERROR.

The Supreme Court held, that the mode prescribed by the act of 1869, section 20, for making the assessment, was illegal.

In this there was error.

I.

It is to be presumed that the act was not passed without due regard to well settled constitutional principles.

Roosevelt v. Godard, 52 Barb. 533.

Drainage Case, 6 Vroom 502.

French v. Kirkland, 1 Paige 117.

At the time the act was passed, it was the recognized law that assessments for local improvements could not legally be made in excess of benefits.

Tidewater Co. v. Costar, 3 C. F. Gr. 530.

The case of *Agens v. The City of Newark*, Am. Law Reg., July, 1874, did not introduce a new rule on the subject, but declared what, according to the decisions of this state, was the true rule.

Viewed in the light of this principle, viz., that assessments must not exceed benefits, the words of the act "*in proportion to benefits*," indicate an intention on part of the legislature that the assessments shall be measured by the benefits.

II

The construction adopted by the Supreme Court would lead to a result indicating an intention on the part of the legislature to make an unreasonable discrimination among property owners.

The direction that the assessments shall be "*in proportion to benefits*," requires that some benefit must be received by the land assessed hence.

Land so located as to be neither damaged nor benefited, would escape assessment altogether; whereas, land benefited in a very slight degree might be assessed without limit.

A construction leading to this result should not be adopted.

III.

The construction that makes the words in question contain an implied limitation, that the assessment must not exceed the benefits, is supported by the decisions in this and other states, upon similar language. *Canal Bank vs. Mayor of Albany*, 9 Wend. 250; *Matter of Fourth ave.*, 3 Ib. 452.

The charter of the city of Newark, Laws of 1857, page 166, directs that the cost of opening a street shall be assessed upon the lands benefited thereby, in proportion to the advantage each shall be deemed to acquire. There is no limitation in terms to the amount of actual benefits.

The validity of this provision of the Newark charter has never been questioned in our courts.

On the other hand, in the *Agens* case, the case of the State vs. Newark, 3 Dutcher 190, upholding an assessment made under that provision of the Newark charter, was referred to with approbation.

In *Graham vs. Paterson*, Feb. T., 1875, the act under review requires the assessment to be upon the land fronting upon the improvement in proportion to benefit—precisely the same provision as the one now under review.

The court held that the words contained an implied limitation to the actual benefits.

In the *Drainage* case, 6 Vroom 501, words similar to those in question were construed to imply a limitation to the amount of benefits.

In the opinion in the present case, p. 46, the court refers to the last cited case, and attempts to distinguish it from the present one.

The only difference in the two cases, is as to the extent of territory to be assessed. This difference suggests to valid reason why the same implication as to the amount that might be assessed should not arise in both cases.

The implication does not arise out of the words assigning the territory, but out of the words, "in proportion to benefit." The court says, in the *Drainage* case, 6 Vroom 503: "The words, 'in proportion to the benefit derived from said drainage,' may naturally be construed to mean such portions of the expense as will be according to the benefit received—making the benefit the measure of the portion to be assessed, and the amount not to exceed such benefit."

IV.

The fact that cases may arise where the aggregate of benefits on the assessment district will be less than the cost of the improvement, does not affect the validity of the act.

In those cases the act would be inoperative. Canal Bank vs. Albany, 9 Wend. 244.

State v Hoboken 7 Br 29

Such cases would occur the same, if the limitation to benefits was expressed in terms in the act.

V.

Where an act permits of two constructions, that one should be adopted which would be in favor of the law. French vs. Kirkland, 1 Paige 117; Talbot vs. Hudson, 16 Gray 422; 6 Vroom 501. *Agents v Newark*

THOMAS M. MOORE,

Counsel for Plaintiff's in Error.

N. J. Court of Errors and Appeals.

New Jersey, ss:

The State of New Jersey to the
 [L. s.] Justices of our Supreme Court. 20

Greeting: Because in the record and proceedings and also in the giving of judgment at the term of June, eighteen hundred and seventy-four, in a certain plaint which was in our said Court before you, between The State, The Delaware, Lackawanna and Western Rail Road Company, prosecutors, and The President and Councilmen of the Village of Passaic, Defendants, in a certain Certiorari, directed to "Hugh M. Herrick, Collector of Taxes of the Village of Passaic, in the County of Passaic," manifest error hath intervened to the great damage of the said Defendants in Certiorari, as by their complaint we are informed, and we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be there-

upon given, then you send to us distinctly and openly, under your seal the records and proceedings aforesaid, with all things touching the same, together with this writ, so that we may have the same before our Court of Errors and Appeals, in the last resort in all causes, at Trenton, on the third Tuesday of November instant, that the record and proceedings being inspected we may further cause to be done thereupon for correcting that error, what of right and according to law ought to be done.

10

Witness His Honor THEODORE RUNYON,
Chancellor of our State, at Trenton, the
sixth day of November, A. D., eighteen
hundred and seventy four.

HENRY C. KELSEY,
Clerk.

THOMAS M. MOORE,
Attorney.

The answer of the Justices of the Supreme Court within mentioned:

The records and proceedings in the within writ mentioned as fully as the same remain in our said Court before us, We certify, and send to the Court of Errors and Appeals, as within we are commanded in a schedule to this writ.

M. BEASLEY,

Ch. Jus.

[L. s.]

10

"NEW JERSEY SUPREME COURT.

<p style="text-align: center;">"THE STATE, THE DELAWARE, LACKAWANNA and WESTERN RAIL ROAD COMPANY. vs. 10 THE PRESIDENT and COMMON COUNCIL OF THE VILLAGE OF PASSAIC.</p>	}	<i>On Certiorari.</i>
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This case having been argued at the last term of this Court by the Counsel of the said parties respectively, and the Court having taken until this term to consider thereof, and now being of opinion that the assessment complained of is erroneous and illegal. It is ordered that said assessment, as
20 reversed, set aside, over-ruled, and for nothing holden, and that final judgment be entered accordingly.

Entered June 4th, 1874.

On motion of

JACOB VANATTA,

Att'y, &c."

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE PRESIDENT and COUNCILMEN
OF THE VILLAGE OF PASSAIC,

us.

10 THE STATE, THE DELAWARE, LACK-
AWANNA AND WESTERN RAILROAD
COMPANY, Prosecutors.

Joinder in Error.

And hereupon, afterwards, to wit: on the _____ day
of January, 1875, before the Court of Errors and Appeals,
in the last resort in all causes, come The Delaware, Lacka-
wanna, and Western Rail Road Company, the prosecutors
below, by Jacob Vanatta their attorney, and say that there
is no error in the record and proceedings aforesaid, or in
20 the giving of the judgment aforesaid, and they pray that
the said The Court of Errors and Appeals may proceed to
examine as well the record and proceedings aforesaid, as the
matters aforesaid above assigned for error, and that this
judgment aforesaid, in form aforesaid given may be in all
things affirmed.

JACOB VANATTA,
Att'y of Df'ts.

NEW JERSEY SUPREME COURT.

10

THE STATE,
 THE DELAWARE, LACKAWANNA and
 WESTERN RAIL ROAD COMPANY.
 Prosecutors.
 vs.
 HUGH M. HERRICK, Collector of
 Taxes of the Village of Pas-
 saic, in the County of Passaic.

Writ of Certiorari.

20

New Jersey, ss:

The State of New Jersey to Hugh
 M. Herrick, collector of taxes of the
 Village of Passaic, in the County of
 Passaic.

[L. s.]

30

Greeting: We, being willing for certain reasons to be
 certified of the proceedings touching a certain assessment
 of taxes against the Delaware, Lackawanna and Western
 Railroad Company, on lot No. 16 on Franklin avenue, for
 the sum of three hundred and forty-two dollars and thirty-
 eight cents, or some other sum, by the said Village of Pas-

saic for grading and work done on Franklin avenue, in the said Village of Passaic, which said assessment was confirmed on the twentieth day of February, eighteen hundred and seventy-one, as is said, do command you that the assessment aforesaid as fully and entirely with all things touching and concerning the same as they may remain before you, by whatever name the same may be called, or however or in whatever name the said assessment may have been made to our Supreme Court, to be held at Trenton, on the first
 10 Tuesday in June next, you certify, and send, together with this writ under your hand and seal, that we may further cause to be done therein what of right and according to the laws and constitutions of this State ought to be done.

Witness, MERCER BEASLEY, Esquire, Chief Justice of our Supreme Court at Trenton, aforesaid, the nineteenth day of May, eighteen hundred and seventy-one.

CHARLES S. SMITH,
 Clerk.

20 VANATTA & DE MOTT,
 Attorneys.

The President and Councilmen of the Village of Passaic do herewith send to the Supreme Court of the State of New Jersey, the proceedings of the Board of Council touching
 30 the assessment against the Delaware, Lackawanna and Western Railroad Company for the grading and work done on Franklin road or avenue, in said Village, with the report of the commissioners of assessment there on, and the assessment map of said grading, and all things touching and concerning the same, as fully as the same remain in the office of the clerk of the Village of Passaic, as within, they are

commanded: the same being certified by said clerk and hereto annexed.

BENJ. B. AYCRIGG,
 Prest. *pro tem.*

[SEAL.]

Attest,

THOMAS NEWELL,
 Village Clerk.

COPY.—PETITION.

10

To the Honorable, the Common Council of the Village of Passaic:

The undersigned respectfully ask your honorable body to order in their behalf the grading and making of the Franklin road from the railroad bridge to the end of your incorporated limits.

Passaic, New Jersey, May 13, 1869.

(Signed)

T. C. STEWART,
 C. A. VAN HOUTEN,
 WILLIAM S. GUTIENES,
 JOHN S. CONKLIN,
 ANTHONY BOYNTON,
 I. PARMLEY,
 J. J. FEASTER,
 W. W. ROSE.

20

Presented to Board of Council and ref'd May 24, 1869.

30

COPY.

An ordinance concerning the Franklin road.

Adopted by the Board of Council of the Village of Passaic, Sept. 6, 1869.

Whereas, a petition has been presented to this council from owners of property on the Franklin road to have said road graded, &c., to the southerly line of the incorporated limits, and ten days' notice of said application having been given—

The Council of the Village of Passaic do ordain as follows:

10 Section 1st. That the Franklin Road be regulated and graded from where it commenced near the Erie Railway to the southerly line of incorporated limits, and the grade so established be marked at proper distances by permanent grade monuments of suitable stone.

Section 2nd. That for the purpose of carrying into effect this ordinance, John J. Feaster, Cornelius A. Van Houten, and John S. Conklin are hereby appointed commissioners to make the estimated cost and assess the same on the lands fronting on said road.

(Signed)

20

CHARLES J. KENWORTHY,
President.

THOMAS NEWELL,
Village Clerk.

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COPY.

Report of Commissioners on Franklin Avenue.

Passaic, January 9th, 1871.

30 To the Honorable Board of Council of the Village of Passaic:

We the undersigned commissioners of assessment appointed by your honorable body in the matter of the improvement of Franklin avenue, in the said Village, report as follows:

We find the total cost of the said improvement to be the sum of eight thousand, three hundred and ninety-three 19-100 dollars, to-wit:

Contractors's account	\$7174 40
Surveyor's account	501 09
Commissioners' fees	27 00
Clerk's fees	7 10
Printing	12 50
Monuments	11 00
Interest on certificates	475 96 10
Collecting	164 14
	<hr/>
	8,393 19

Which said cost we have assessed upon the lands fronting on the said improvement in proportion to the benefit received by each lot or parcel thereof, and do hereby report the names of the several owners of the several lots or parcels fronting on the line of the said improvement as far as practicable, with the amount assessed to each as shown by the schedule hereto annexed. 20

We herewith send a map and list of said improvements showing the number of each lot or parcel, the name of the owners and the amount assessed to each lot or parcel.

Commissioners—CORNELIUS A. VAN HOUTEN,
JOHN S. CONKLIN,
JOHN J. FEASTER.

SCHEDULE

Assessment List for Grading and Regulating Franklin
Avenue :

Lots.	Owners' Names.	No. Feet Front.	Assess- ment.	Collect- ing.	Total.
10	1 Mrs. Westervelt	237-5	206 53	4 13	210 60
	2 W. W. Rose	85-5	74 35	1 49	75 84
	3 Mrs. Westervelt	150	130 44	2 60	133 04
	4 B. B. Marshman....	100	86 96	1 74	88 70
	5 Mr. Scudder.....	50	43 48	0 87	44 35
	6 Mrs. Westervelt.....	421-5	366 24	7 33	373 87
	7 Benj. Merriam.....	108	93 92	1 88	95 80
	8 Henry Kip	712-2	619 3 ³	12 39	631 72
	9 Estate of C. G. Van Riper	743	646 12	12 92	659 04
	10 Mrs. Palmer.....	273-6	239 93	4 76	242 69
	11 Mrs. Boynton.....	776	674 81	13 50	688 31
	12 W. J. Wisnell.....	280	243 48	4 87	248 35
	13 T. B. Stewart	386	335 67	6 71	242 38
	14 Isaac Parmly	382-5	332 44	6 65	339 09
	15 Silas C Hay	382-5	332 44	6 65	339 09
20	16 Delaware and Lacka- wanna R. R. Co. . .	386	335 67	6 71	342 3 ⁸
	17 Mrs. Boynton.....	1060-6	922 30	18 44	940 74
	18 Estate of C. G. Van Riper	1013	880 91	17 62	898 53
	19 William J. Gutienes.	259	225 23	4 50	229 73
	20 T. C. Stewart	72	62 61	1 25	63 86
	21 Culbert.....	80	69 56	1 40	70 96
	22 T. C. Stewart.....	252-5	219 32	4 39	223 71
	23 B. Merriam	100	86 96	1 74	88 70
	24 Mrs. Westervelt	34	29 57	59	30 16
	25 Richard Andrews....	200	173 92	3 48	177 40
	26 Heirs of Froeleigh ..	893	776 56	15 53	792 09
		9438-4	8209 05	164 14	8393 19

30

CORNELIUS H. VAN HOUTEN,
JOHN L. CONKLIN,
JOHN J. FEASTER.

Above report received and filed Jan. 9, 1871.

Assessment laid and confirmed by the Board of Council
of the Village of Passaic, February 20th, 1871.

I do hereby certify that the above petition or ordinance report and assessment list of the commissioners all concerning Franklin Avenue are true and correct copies of the same now on file in my office, together with a copy of the assessment of the same.

In witness whereof, I have hereunto set my hand this fifth day of June, A. D., 1871.

THOMAS NEWELL,
Village Clerk.

10

(Assessment Map for grading Franklin Avenue from the Newark Road south-westerly to the village limits.)

Franklin

Total.

110 60
75 84
33 04
88 70
44 35
373 87
95 80
331 72

559 04
242 69
688 31
248 35
242 38
339 09
339 09

342 33
940 74

398 53
229 73
63 86
70 96
223 71
88 70
30 16
177 40
792 09

393 19

council

NEW JERSEY SUPREME COURT

10

THE STATE,
 THE DELAWARE, LACKAWANNA AND
 WESTERN RAIL ROAD COMPANY.

Prosecutors.

vs.

THE PRESIDENT and COUNCIL-
 MEN OF THE VILLAGE OF
 PASSAIC.

*On Certiorari, in matter of
 Assessment for the grading
 and regulating of Franklin
 avenue.*

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And the said prosecutors, by Jacob Vanatta, their attorney, come, and to the Court here assign reasons why the said assessment should be reversed, set aside and for nothing holden, as follows, namely :

1. Because the Board of Council of the said village of Passaic did not advertise, according to law, the application of the applicants named in the return to the writ for the grading and making of Franklin road, otherwise called Franklin Avenue.

30

2. Because the said Board of Council did not give notice nor advertise, according to law, its purpose or intention to pass the ordinance set out in said return, entitled "An Ordinance Concerning the Franklin Road."

3. Because the said prosecutors had no sufficient or legal notice of the intent or purpose to pass the said ordinance.

4. Because the commissioners appointed in and by said ordinance were not discrete, impartial and disinterested freeholders and residents in said village.

5. Because the said three commissioners were applicants and every one of them was an applicant in writing to the Common Council of the village of Passaic "to order on their behalf the grading and making of the Franklin road, from the railroad bridge to the end of the incorporated limits" and, therefore, were neither impartial or disinterested in the premises. 10

6. Because the said commissioners, named in said ordinance, before they entered upon the performance of the duties assigned to them by said ordinance, or at any other time, were not sworn, or affirmed, to examine the whole matter impartially and to the best of their judgment, skill and ability.

7. Because the said commissioners named in said ordinance did not give to the said prosecutors any manner of notice of their meeting or meetings for the purpose of considering of and making the said assessment against the said prosecutors, and gave the said prosecutors no opportunity to be heard by and before the said commissioners in respect to making the said assessment. 20

8. Because the said prosecutors had no notice of the making of the said report of the said commissioners nor of any time, or place when or where they could be heard before the said council in opposition to, against, or for the connection, or entire rejection of said report. 30

9. Because the said assessments as against the prosecutors is erroneous because the lot of ground for and in respect of which said assessment was made, belonged to and was when said assessment was made, and still is, owned by the Morris & Essex Railroad Company, and was not and

is not owned by the said prosecutors, except as lessees of the Morris & Essex Railroad Company.

10. Because the said grading and regulation of Franklin road, otherwise called Franklin avenue, conferred no benefit whatsoever upon the lot of land in respect of and for which said assessment was made, and said lot has not received, and will not receive, any benefit whatsoever from or by reason of said grading and regulation.

10 11. Because, if any benefit whatever, has been received by said lot from said grading, the amount thereof is not and was not so much as the amount assessed to and in respect of said lot.

12. Because said lot is, and at the time of the said assessment was owned by the Morris & Essex Railroad Company, which company is by law subjected to a tax of one-half of one per cent on the cost of its roads, and which tax of one-half per cent is by law in lien and satisfaction of all other taxation, or imposition whatsoever by or under
20 the authority of this State, or any law thereof; and therefore, said lot is exempt from and not subject to the said assessment, or any part thereof.

13. Because said assessment is contrary to law and is in divers other respects illegal and erroneous.

JACOB VANATTA,
Attorney of Prosecutors.

NEW JERSEY SUPREME COURT.

THE STATE, THE DELAWARE, LACK-
AWANNA AND WESTERN RAILROAD
COMPANY, Prosecutors.

vs.

THE PRESIDENT and COUNCILMEN
OF THE VILLAGE OF PASSAIC,

On Certiorari.

10

20

Examination of witnesses &c., taken in the above cause, before William P. Douglass, Master in Chancery as Supreme Court Commissioner, at his office in Jersey City, on January 7th, 1873, at 10 o'clock in the forenoon, in the presence of Jacob Vanatta, Esquire, of counsel with prosecutor, no one appearing for the defendant in Certiorari.

JACOB VANATTA, a witness produced on the part of the prosecutors being duly sworn, says:

30

I sent written notice of this examination to Mr. John Hopper, the attorney of the defendants, and also with the notice a copy thereof, and on the copy an acknowledgement of service written, accompanied with a letter, in which I requested him to sign the acknowledgement and return it to me. I intended to, and think I did enclose a postage

stamp to pay the return postage on the notice. The envelope containing the letter, notice and copy addressed to John Hopper, Esq., Paterson, New Jersey, I deposited personally, in the Post Office at Morristown. My recollection and belief as to the time of depositing the letter thus addressed, is that it was done on the afternoon of the first of January instant, about two o'clock, in ample time to have reached Mr. Hopper, if not on that evening, by early in the morning of the second of January. I am quite sure, and indeed, certain beyond a doubt, that the letter was deposited not later than Thursday, January 2d, and early enough to leave Morristown by the afternoon mail, which leaves about 3:20 p.m. I shall have no doubt about the notice being sent on Wednesday, unless the production of the papers should convince me that it was Thursday. My communications with Paterson by mail long since satisfied me that letters sent from Morristown by the afternoon mail reach Paterson the same evening, or very early the next morning. I have no doubt Mr. Hopper received the letter more than four days prior to this day. He has not returned the copy of the notice, or in any manner acknowledged the receipt of my letter or notice.

JACOB VANATTA.

Subscribed and sworn at Jersey

City this seventh day of January,

A. D., 1873, before me,

WILLIAM P. DOUGLASS,

Master in Chancery of New Jersey.

30 WILLIAM UNRUH, a witness produced on the part of the prosecutors, being duly sworn, says:

I reside in Newark, New Jersey. I am a civil engineer in the employ of the Delaware, Lackawanna & Western Railroad Company. I have been in their employ for four years, on the Morris & Essex division, including the Boon-

ton branch. I was engaged in the location of the Boonton branch through the Village of Passaic, at the time of the construction of that branch. I had charge of the land matters on that line.

I am acquainted with the property of the Company in the village of Passaic, and have been ever since the line was located.

I know a lot of land which they own on the westerly side of Brook avenue and northerly side of Franklin avenue, being the lot in the westerly corner of the intersection of those two avenues. The Company purchased that lot of Elizabeth Gutenze. I do not remember the date of the deed. The whole lot contained three ten-hundredths acres. The Boonton branch is located diagonally across that lot, from the north-west corner to the south-east corner. The regular width of the branch is ninety-nine feet ; that is the minimum width. The right of way each side of that lot is at least ninety-nine feet ; that is the width on the southerly end ; and it is one hundred and thirty-two feet at the north end of the lot. Taking away the ninety-nine feet there will be no frontage for the westerly part of that lot on Franklin avenue ; I mean that part of the lot lying west of the railroad. There is one track now laid across that lot ; the grading is done for two. The first track was laid with reference to laying a second one at an early day. I presume the other track will be laid during the ensuing season. A considerable part of the Boonton branch has already a double track, and the laying of the second track was begun as soon as the first track was finished. The remainder of the lot outside of the right of way was purchased with a view to erect a station there and, I presume, is still held for that purpose ; I know nothing to the contrary.

The part of the lot lying east of the right of way contains one acre running to the centres of the avenues, about thirty-four one-hundredths of that is contained in the streets.

The land east of the right of way is intended, I presume, to be used for a passenger station. I should judge the amount of land there is not more than is needed ; It depends on the wants of the community. Should the village grow much it would be inadequate in a few years to the want of the people.

The land west of the right of way is intended to be used in connection with land on the east for depot purposes and other railroad purposes. Communication between that
10 part of lot and Franklin avenue would have to be had across the railroad and through the easterly part of the lot. The Boonton branch crosses Franklin avenue on a bridge. The elevation of the bridge from the top surface of Franklin avenue to the top of the rails on the bridge is sixteen feet and four inches; from the surface of the street to the under-
side of the bridge is about thirteen feet in the clear.

The grade of the street at the corner made by the inter-
section of Brook avenue and Franklin avenue has not been
20 altered materially since the railroad was located and constructed.

Westerly of that point and about one hundred feet from the corner, an excavation commences on Franklin and continues westerly until at a point distant three hundred and fifty feet from the corner of the lot ; the cutting is about six feet ; thence it diminishes and runs out to a grade at a point about seven hundred and eighty feet westerly from the corner.

30 Q. Prior to that excavation being made in Franklin avenue, what was the difference of elevation between the surface of Franklin avenue and the surface of the lot in question easterly of the right of way of the railroad ?

A. Franklin avenue ran on the surface of the ground and you could drive from that avenue on the lot in question east of where the railroad is, with a very slight, if any, rise.

Since the excavation has been made it has cut off communication from the lot in question with Franklin avenue, except for the first hundred feet from the corner.

Q. Has the grading of Franklin avenue, done since May, 1869, been of any benefit to the lot in question, looking to use of the lot for railroad purposes?

A. No, sir; it has been detrimental in respect to gaining access to Franklin avenue, diminishing that access requiring a heavier grade from Franklin avenue by any road that might be constructed from Franklin avenue to the railroad. I should not suppose that the grading of Franklin avenue had increased the value of that part of lot which lies west of the railroad; it has increased its inaccessibility, that is it has cut it off from all communication with Franklin avenue. The minimum space for passing between the highway and railroad for passage under the railroad is twelve feet. The railroad crosses the lot in question on an embankment of an average height of nine feet.

Q. Suppose the railroad was taken away from this lot entirely and the lot were viewed without reference to any railroad in that vicinity, would the alteration of the grade of Franklin avenue along this lot increase its value.

A. I should not suppose so; the additional expense of adapting the lot to the altered grade would more than counteravail any advantages which would result from the alteration; you would either have to grade the surface of the lot back from the avenue or else put up a retaining wall on the line between the avenue and the lot. The grading of Franklin avenue has been of no benefit to the lot in question, on the contrary, I think it has hurt it very much for the purposes for which it is intended. Being shown a map, witness says: This map was made under my supervision and direction; it shows the location of Brook avenue; Franklin avenue, the railroad and property adjacent correctly. The

heavy brown coloring in Franklin avenue, represents the distance on the avenue in which the cutting has been made; the depths of that cutting when it comes in connection with the railroad bridge, is about six feet.

The map above shown to witness is here offered in evidence, and marked Exhibit P 1, on the part of the prosecutors.

WILLIAM UNRUH.

10 Sworn and subscribed at Jersey
City, this 7th day of January,
A. D., 1873, before me.

WILLIAM P. DOUGLASS,
Master in Chancery.

The examination was continued on Thursday, August 7th, 1873, at ten o'clock in the forenoon, in the presence of Jacob
20 Vanatta, Esq., of counsel for the prosecutors, and Thomas
M. Moore, Esq., who appeared on the part of the defendants
in Certiorari.

WILLIAM J. STEWART, a witness produced on part of the
prosecution, being duly sworn, says :

30 I live in Passaic County, at a place called Delawanna, on
the Boonton branch, about three-quarters of a mile from
this junction of the railroad with Franklin avenue, in the
village of Passaic, following the railroad.

I am acquainted with most of the people in that part of
the village of Passaic. I know Cornelius A. Van Houten ;
in 1869 and 1870, he resided on the corner of Van Houten
lane and the River road, about fifteen hundred feet easterly

from Franklin avenue. I suppose he uses Franklin avenue occasionally, but not very frequently. I could not say how near his land comes to Franklin avenue, but my impression is that it comes all the way, in a large land holder. I know John S. Conklin; in 1869 and 1870, he resided in Brook avenue, between Franklin avenue and River road, about eight or nine hundred feet, very likely a thousand feet from Franklin avenue. I should say his land came to about that distance from Franklin avenue. He usually goes to the Erie Bridge station. There is a station on the Erie, over the Passaic river, called the Bridge Station; he going from his place to that station he would probably take the River road; Franklin avenue also goes to the same station. I think he owns about twelve acres of land. I know John J. Feaster; in 1869 and 1870, he resided on Brook avenue, west of Franklin avenue; I should judge about two thousand feet west. I do not know that he owns any land there at all; there is a large piece of land there known as Feaster's land. I do not know whether he has the title or his wife. It contains about twenty-five acres. I don't think this land comes within two thousand feet of Franklin avenue. Feaster has been in possession of it for a good many years. There is but one Cornelius A. Van Houten, but one John S. Conklin and but one John J. Feaster in Passaic, that I know of.

Being cross-examined, witness says:

I think Mr. Conklin owns the property I have spoken of in his own name; I have heard him describe the purchasing of it; have heard him call it his land, and there never was any doubt in any one's mind, but that it was his land. I do not know how the Feaster property stands; whether Mr. Feaster owns it or his wife. I am personally acquainted

with the three men named. I think they are fair and honorable men.

W. W. STEWART.

Subscribed and sworn at Jersey
City this seventh day of Au-
gust, A. D., 1873, before me,

WILLIAM P. DOUGLASS,

Master in Chancery.

10

The counsel for the plaintiff in certiorari here declared his case closed.

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">THE STATE,</p> <p style="text-align: center;">THE DELAWARE, LACKAWANNA and WESTERN RAIL ROAD COMPANY.</p> <p style="text-align: center;">Prosecutors.</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">THE PRESIDENT and COUNCIL- MEN OF THE VILLAGE OF PASSAIC.</p>	}	10
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Examination of witnesses, &c., taken in the above cause, on the part of the defendant before William P. Douglass, Master in Chancery, as Supreme Court Commissioner, at his office in Jersey City, on Friday, September 5, 1873, at 20 10 o'clock A.M., in the presence of Jacob Vanatta, Esquire, of counsel with prosecutor, and Thomas M. Moore of counsel with defendant.

Defendant's counsel offers in evidence copies of certain papers certified by John Duffus, City Clerk of the City of

Passaic, which are marked as Exhibit D. 1, on the part of the defendant.

(Objected to by counsel for prosecutors.)

THOMAS NEWELL, a witness produced on the part of the prosecutors being duly sworn, says:

In 1869 I was the Clerk of the Village of Passaic; my term of office began in April or May of that year; I was the
 10 first clerk; I put up notices for the improvement of Franklin avenue; they were put up after the committee on streets and assessments had reported favorably on the improvement, and after the preliminary deposit had been made with the treasurer at least ten days before the ordinance was presented.

Q. What was the contents of the notice?

(Objected to on the ground that the notice itself is the best evidence of its contents. Answer to the question
 20 waived.)

A. I kept no copy of the notice except one that, I think was posted in the post office, and that was burnt by the fire there lately; it was a printed form of notice, and I wrote in the substance of the notice.

Being shown a paper witness says:

That is a copy of the printed part of the notice.

30 Paper offered in evidence and marked as Exhibit D. 2, on the part of defendant.

I do not know where I could get any copy of the notice that was posted; I cannot get any of the original notices that were posted.

Q. What was written in the printed notice?

Objected to, as the loss or absence of the original notice is not sufficiently or legally accounted for.

A. To the best of my recollection it was in relation to the improvement of the Franklin Road, giving notice that application had been made to open and regulate it ; the exact language I could not give. I put the notices up myself, they were put up along the line of the improvement as near as practicable ; there were five notices put up. It was my business as Village Clerk either to post these notices myself or see that they were posted. 10

Q. As Village Clerk at that time in the case of an application for grading a street or otherwise improving it, how many notices was it your custom to post ?

(Objected to as irrelevant and immaterial.)

A. Do I understand you to mean by that the whole improvement ?

Q. Yes.

A. There are three sets of notices.

Q. What is the first notice that you were accustomed to post ? 20

A. That application has been made to the Board of Council for a certain street improvement ; I would post that notice after I had evidence that the preliminary deposit had been made with the treasurer and ten days before the ordinance for such improvement is presented to the council.

Q. What is the character of the second notice ?

A. The second notice is to give notice that the preliminary report and map of the commissioners has been filed with the Clerk. 30

Q. At what time would you give that notice ?

A. Within ten days after the filing of such report and map.

Q. In what manner would you give the notice ?

A. By printed notices, by posting them up on or near the line of the proposed improvement in five places ?

Q. What is the character of the third notice you were accustomed to give ?

A. The third notice was given after the filing of the final report, the assessment list and map of the Commissioners, giving notice that that has been done and that the Board of Council will meet on a certain day to consider objections; I think that is all.

Q. In what manner was that notice given ?

A. It was posted up the same as the others.

10 Q. Did you post these three different notices in the case of Franklin street in accordance with the custom you have spoken of ?

A. I did.

Q. Did you give any notice of the filing of the preliminary report of the commissioners ?

A. Yes, sir.

Q. Within what time did you give such notice ?

A. Within ten days after the filing of the report.

Q. Did you preserve any copy of that notice ?

20 A. No.

Q. Is the original of these notices in your possession ?

A. No, sir.

Q. Do you know any place or any person, at which or from whom you can get any copy or the original of those notices ?

A. I do not.

Q. Was the second notice printed or written ?

A. Filled in with pen and ink on a printed form.

30 Being shown a paper and asked if that is a copy of the printed form, witness says,

A. It is.

Paper last shown to witness offered in evidence and marked as Exhibit D. 3, on the part of the defendant.

Q. What was written in the blank form ?

(Objected on the ground that the absence of the original is not legally or sufficiently accounted for.)

A. To the best of my recollection it was giving notice that the report of the commissioners on Franklin road for proposed improvements on said street, had been filed with the Village Clerk.

Q. Where were those notices posted, and at how many places?

A. On or near the line of Franklin avenue, and in five places. 10

Q. Were the places public and conspicuous or not?

A. They were.

Q. Did you post any notice after the filing of the final report of the commissioners?

A. I did.

Q. Did you retain a copy?

A. I did not.

Q. Do you know where you can obtain a copy?

A. I do not.

Q. Was any copy ever filed in your office as Village Clerk? 20

A. No, sir.

Q. Were the notices printed or written?

A. Marked in with pen and ink on a printed form.

Being shown a paper and being asked "Is that a copy of the printed form?" witness says,

A. It is.

Q. What was written on it?

(Objected to on the same grounds that a similar previous question was objected to.) 30

A. To the best of my knowledge and recollection it gave notice that the final report of the commissioners had been filed with the Clerk and also gave twenty days notice to persons interested, that the Council would meet to receive and

consider all objections that might be presented in writing, why said assessment should not be laid and confirmed.

Q. Were those notices posted, on thick or thin paper ?

A. On this same kind of paper, this is one of the blank forms (showing the last notice shown.)

Q. Were these notices posted in places where they were protected from the weather.

A. No, sir; they were posted on the line of the improvement wherever I could find a place to tack them up.

10 Q. Were they posted within the width of the street, within that part that must be graded ?

A. They were posted about on the line on a rail fence or on a tree, whatever happened to be handy.

The last notice shown to witness is here offered in evidence and marked Exhibit D. 4, on the part of defendant.

Being cross-examined, witness says:

20

Q. Please state when your office of Village Clerk commenced, and when you finally went out of that office and ceased to act in it ?

A. I think it was either in April or May of 1869 that I commenced, and I resigned the office on the third of March, 1873; during all the period between those dates I was Village Clerk.

30 Q. Were the proceedings of the President and Councilmen of the Village of Passaic, while you were Clerk of that Village, recorded in a book, and if so by whom ?

A. They were recorded in books, and by me, mostly.

Q. Who else besides you made a record of those proceedings ?

A. Some of the Councilmen sometimes acted as Clerk *pro tem.*

Q. When a Councilman acted as Clerk *pro tem.*, did he actually record the proceedings in a book or books of the municipality, or did he merely take memoranda on pieces of paper which you or some body else entered in the book or books subsequently?

(Objected to.)

A. He wrote them in and signed his name as Clerk *pro tem.*; he wrote them in the book.

Q. While you were Clerk how many books did the Village of Passaic have in which to record the proceedings of the President and Councilmen of the Village of Passaic. 10

(Objected to.)

A. I do not remember.

Q. Please describe what sort of books they were, and why there were more than one used for that purpose?

(Objected to.)

A. They were regular blank books; these books, and of course we used quite a number of them. 20

A. Please describe as fully as you can the length, width and thickness of those blank books, and by asking for the thickness I wish you to give us the best idea you can of how many quires of paper each contained.

(Objected to.)

A. I should think about 8 or 9 inches wide and twelve or thirteen inches long, and perhaps about half an inch thick; I do not know how many quires of paper were contained in each one of these books. 30

Q. Were all the proceedings of the President and Councilmen of the Village of Passaic entered in one of those books exclusively until it was full, and then their proceedings continued in a new book, or were two or more books in use during the same period of time so that part of their pro-

ceedings were entered in one book and another part of their proceedings entered in another book ?

(Objected to.)

A. They were entered in one book until that was full and then started in a new one.

Q. When a commission appointed to make an assessment in respect of a street improvement, made their report to the President and Councilmen of the Village of Passaic, was the report of the commission recorded at length in the
10 book of proceedings of the President and Councilmen or not ?

(Objected to.)

A. No, sir; they were not.

Q. What was done with the report in such case by the Clerk, if anything ?

A. It was received and ordered on file as a general thing.

Q. The Clerk did not mark it filed without the order of
20 the Council then, if I understand you ?

A. I would like to qualify the previous answer in this respect, that if I understood the charter right, the first report, maps, and assessment lists of the commissioners were handed to me direct and placed on file, and as a general thing I turned them over to the Board of Council, and they were generally read examined by the board; sometimes they ordered them on file, but it was not really necessary as I had already filed them in accordance with the provisions of the charter.

30 Q. Do you mean that when commissioners made a report of an assessment for a street improvement, that the practice was for the commissioners to hand their report to you, and that you filed it in your office of Village Clerk, and marked it as filed in your office before the President and Councilmen or the Board of Council ordered the report to be filed ?

A. Yes, sir; in accordance with the nineteenth and twentieth sections of the charter.

Q. If the President and Councilmen of the Board of Council afterwards refused to adopt and rejected that report, what would become of it then; would it still remain in your office on file, or be taken away, and if taken away, who took it away, and what would be done with it after its rejection?

(Objected to.)

10

A. That would depend upon the nature of the action of the President and Council; if they wished to refer it back to the Commissioners it would be handed to them. I am speaking now of the preliminary report and assessment; the only rejection I ever knew of, was the referring the report back to the Commissioners if it was not right, if you call that rejection; they reject a report in one sense when they refer it back because they won't accept it.

Q. You were the Clerk on May 24, 1869, were you not?

20

A. Yes, sir.

Q. In Exhibit D, I, I perceive that the first extract is in these words, "May 24, 1869, Councilman Herrick presented a petition of property owners on Franklin Road, which was received and referred to the Committee on Streets and Assessments." Was that petition entered or recorded in the book of the minutes of the proceedings of the Council?

(Objected to.)

30

A. I presume not if it is not in that abstract.

Q. Was the petition preserved, and if so, where is it?

A. It was, and I presume it is, on file in the office of the present City Clerk.

Q. Can you tell us whose names were signed to that petition, or any of them, and if so tell all, or as many of them as you can recollect.

(Objected to on the ground that the petition itself should be produced.)

A. I don't remember, with one exception ; I remember that T. C. Stewart's name was on it ; I remember that from his peculiar signature ; I saw the petition at that time and I have seen it since.

Q. Did you know the persons whose names were signed to it ?

10 A. I could tell if I knew what the names were.

Q. Do you recollect whether any of the persons whose names were on that petition owned any land bounding on Franklin Road or Avenue ?

A. It seems to me that Anthony Boynton's name or his wife's name was on that petition, and if so they owned property on that road.

Q. The entry in the minutes is that the petition was the petition of property owners on the Franklin Road ; what I want to know is whether this entry in that respect is true
20 or not ?

A. I do not know, but I presume it is.

Q. You made the entry in the book, did you not ?

A. I believe I did.

Q. Was the entry you made true or not true ?

A. I think it was true.

Q. Were any of the persons whose name or names were to that petition not the owner or owners of any land bounding on the Franklin Road, or in other words did the petition have to it the name of any person who was not an
30 owner of land bounding on Franklin Avenue ?

A. I do not know.

Q. That petition as returned with the writ of certiorari in this case has to it the names of T. C. Stewart, C. A. Van Houten, William S. Gutierrez, John S. Conklin, Anthony Boynton, I. Parmly, J. J. Feaster and W. W. Rose. Do you know these persons and every of them ?

A. I know some of them I don't think I know Parmley ;
I know all the rest.

Q. Do you know whether Parmley owned any land bounding on Franklin Road at that time ?

(Objected on the ground that his deed would be better evidence.)

A. I don't know to a certainty, and yet I have every reason to believe that he did. 10

Q. Did J. J. Feaster own any land bounding on that avenue at that time ?

A. I don't know.

Q. Do you know whether John S. Conklin owned any and bounded on that road at that time ?

A. I don't know, sir.

Q. Do you know whether C. A. Van Houten owned any land bounding on that road at that time ?

A. I don't know, sir. 20

Q. Do you know any one in that region of country by the name of Cornelius H. Van Houten ?

A. No, sir.

Q. Give us the names in full of the gentlemen who were the Commissioners, and who made the assessment for grading Franklin Avenue.

A. I don't remember, but it seems to me that John J. Feaster and Cornelius A. Van Houten were two of them, but I am not certain of it ; Probably John S. Conklin was one of them, but I do not remember. 30

Q. Do you know whether Anthony Boynton owned any land bounding on Franklin Avenue at that time ?

A. I know he lived there, but I do not know whether the property was in his name or that of Caroline, his wife.

Q. Have you not always understood that he did not own a foot of land in the County of Passaic ?

A. I have always understood it to be ; the common talk was that the property there was in his wife's name.

Being shown Exhibit D. 1.

Q. Please look at the last leaf of that Exhibit headed "Assessment List for the grading of Franklin Avenue," and signed or purporting to be signed at the bottom by Cornelius A. Van Houten, John J. Feaster and John S. Conklin, and tell us whether or not that is a true copy of the assessment made by those Commissioners for the grading of
10 Franklin Road or Avenue ?

A. I presume it is ; I see the seal of the City of Passaic attached to it and the City Clerk's attestation.

Q. When was that report and assessment made ?

A. It is dated here October 6, 1869.

Q. Was that report confirmed by the Board of Council of the Village of Passaic ?

A. I presume from this that this is the first or preliminary report and assessment of the Commissioner's estimate of the
20 probable cost ; there was not any confirming about it—it was filed.

Q. Did the Board of Council take any action with regard to that report ?

A. I don't recollect, sir.

Q. Was there any notice given that that report had been filed, and that objections to it could be made, naming time and place when those objections could be heard ?

A. The notices filed in on blank form of which Exhibit
30 D. 3, is a copy, were posted up on or near the line of the improvement.

Q. When ?

A. Within ten days of the filing of the report and assessment list of the commissioners.

Q. When was that report and assessment list filed ? See if you can tell us.

A. I cannot tell the exact day ; I suppose it was filed with me on the day of the date of it. You can see the date on the back of the report.

Q. Why do you think it was filed on that day ?

A. I think so for the reason that I see that date on the back of it.

Q. Did you yourself put up notices similar to Exhibit D. 3, in respect to this report, dated October 6, 1869, or did somebody else do it ?

A. I did. 10

Q. Can you tell on what day in what month and what day of the month you put them up ?

A. I cannot tell you the exact date, but it must have been in October.

Q. Did you mark on that report dated October 6, 1869, the date on which it was filed and sign your name to it as Clerk ?

A. I guess not ; if it is not endorsed on the report in that exhibit. 20

Q. Then there is no way of telling now when it was filed, is there ?

A. None, unless it is in that abstract from the minutes, Exhibit D. 1. I see in that abstract that after being referred back to the commissioners to be corrected, it was received and filed by the Council, October 18th, 1869.

Q. Is the assessment at the end of Exhibit D 1, the original or the corrected assessment mentioned in the minutes of October 18th, 1869 ?

A. I do not know, sir. 30

Q. Now, when you put up a notice similar to Exhibit D 3, in respect of the report of the commissioners, did your notice refer to the original report, or did it refer to the corrected report referred to in those minutes under the date of October 18th, 1869 ?

A. It must have referred to the corrected report.

Q. Why do you think so?

A. From the reason that the original report was referred back to the commissioners for correction, and hence there was no need of my putting up any notices of that report.

Q. Then you gave no notice with regard to the original report?

A. No, sir.

Q. When did you put up the notices with regard to the corrected report; in what month and on what day of that month?

A. It must have been in October, and within ten days after the filing of that corrected report.

Q. Why do you think it was within ten days?

A. Because that is the time specified in the charter, Section 19.

Q. At what places did you put up those notices? Please name or describe them.

A. One of them I put up on a large tree which stood in Franklin road. Another I put on a rail fence; another one I put up near the Passaic Bridge Railroad station, and the others were put there somewhere along the line of the road on a gate-post or something of that kind.

Q. Did you ever make any affidavit as to when and where you put those notices?

A. No, sir; I don't think I ever did.

Q. Were you sworn at any time previous to this day to testify when and where you put up those notices?

A. I don't remember that I ever was.

Q. Was that notice published in any newspaper, and if so, in what one, and when, and how long?

A. I don't think it ever was.

Q. Can you tell whether the corrected report referred to in these minutes differed in any respect from the original report of the commissioners, and if so, what were the cor-

rections made, and if you cannot recollect them, tell us where they are to be found if in writing ?

A. I don't remember I cannot tell.

Q. Can you say whether or not there were any corrections written or verbal ?

A. I am sure I cannot remember.

Q. Did those commissioners make any report in respect of Franklin avenue after October 18th, 1869 ?

A. I believe they did.

Q. Was there any notice given in regard to that report ? 10

A. Yes, sir.

Q. What notice was given ?

A. Notice that the report of the commississioners for estimating the cost of the improvement on Franklin avenue had been filed with the clerk, and giving notice also that the Board of Council would meet at the time stated therein to receive and consider all objections in writing, why said assessment should not be confirmed by the Board of Council.

20

Q. Who put up those notices ?

A. I did.

Q. When did you put them up ?

A. Within the time specified by the Charter. The time is not specified in the Charter. I put them up soon after the report was filed, giving twenty days' notice when the Board would meet, as above stated.

Q. In what month did you put up those notices ?

A. I don't remember.

Q. Did you keep any copy ?

30

A. No, sir; not that I remember

Q. Did you make any memoranda of the time and place when and where you put them up ?

A. I think I made a private memorandum of the time when I put them up on a slip of paper.

Q. Where is that memorandum ?

A. It is destroyed long ago. It was a little memorandum that I put in my pocket-book when I was making out my bills of charges.

Q. Did you ever make an affidavit as to when and where you put up these notices?

A. No, sir; I don't think I ever did.

Q. Prior to this day, did you ever testify under oath as to when and where you put up those notices last mentioned?

A. I don't remember that I ever did.

10 Q. Was the last mentioned notice published in any newspaper, and if so, in what one and when and for how long?

A. I don't remember that it ever was published in any newspaper.

Q. Please tell us as definitely as you can how many of the last mentioned notices you posted and the places at which you posted them?

A. As near as I can remember, at about the same places where I posted up the other notices.

20 Q. On your previous answer you spoke of a certain tree; please tell us as nearly as you can where that tree was; that is, near whose land it was located and on what part of the road it was?

A. As near as I can remember, it was on the right hand side of the road going from Passaic Bridge station, and in the neighborhood of where Mr. Boynton lived.

Q. After the petition for granting Franklin road was presented, was there any notice given that the Board of Council proposed to take action with regard to the improvement of Franklin road, as prayed for in that petition; please state
30 what notice was given of that?

A. Notice on blank form the same as Exhibit D 2.

Q. Who filed up those blanks?

A. I am pretty sure I did.

Q. Did you put them up, and if so, state when and in what month?

A. I put them up and my impression is that I put them up in July or August, to the best of my recollection, at least ten days before the ordinance was presented ; any way they might have been up considerably longer than that ?

Q. At what places did you but them up ; name them all ?

A. Well I don't remember all ; but they were at or near the same places where I put the other notices up.

Q. Did you keep any copy of the notice ?

A. I think there was one posted in the Post Office at that time or on the bulletin board of the Council. I did not 10
keep one.

Q. Was this last mentioned notice published in any newspaper, and if so, in what one and when and how often ?

A. I don't think it was published, sir.

Q. Prior to this day, did you ever make any affidavit, or state under oath when and where you put up these last-mentioned notices ?

A. No, sir ; I don't remember that I ever did.

Witness being shown Exhibit D 2.

Q. Now, tell us what words you wrote in the blank part 20
of that notice for the purpose of giving the notices we have last been talking about.

A. As near as I remember, it is worded something like this: "to grade and make or regulate the Franklin road from the railroad bridge to the end of the incorporated limits," and signed "Thomas Newell, Village Clerk." The date I don't remembered exactly.

Being re-examined in chief, witness says:

Q. Do not the assessment list and the report go together 30
as one thing ?

A. Yes, sir.

Q. Did you, or did you not, endorse on the assessment list the date when it was filed ?

A. I did the date it was filed with me.

Q. What was that date ?

A. October 6th, 1869.

Q. Do you remember anything about this report in Exhibit D 1 ever being corrected ?

A. I do not.

Q. At the foot of the report I find the following : "The figures 16,080 written over erasure in original and also figure 3 changed to 2 in original in the amount \$6,032.06." Look at that note and the report and see if you cannot
10 remember whether that was the correction made by the commissioners or not ?

A. I don't remember, sir.

Q. Did the commissioners take away the last mentioned report to amend it ?

A. I think they did.

Q. Did you make any record of the time when they brought it back ?

A. When it was received and filed by the Council the time was entered on the minutes.

20 Q. What time was that ?

A. I see from the abstract from the minutes Exhibit D 1 that it was October 18th, 1869.

Q. Do you know whether the notice of the filing of the last mentioned report was made within ten days after the filing of the original, or within ten days after the filing of the corrected report ?

A. It must have been within ten days after the filing of the corrected report.

Q. What makes you think so ?

30 A. For the simple reason that the original report when presented was referred back to the commissioners for correction; therefore, it was not necessary to post notices as it then stood.

Q. Did you make any memorandum in the minutes of time or about the time these different notices were given or posted ?

A. I think I made a minute in the margin as a hint to myself not to forget to post them.

Q. In the minutes I see "Notice No. 1 posted" in brackets; was that a memorandum made by you?

A. Yes.

Q. What is meant by that memorandum "Notice No. 1?"

A. That means that I posted notices on blank forms same as Exhibit D 2.

Q. What do you mean by "Notice No. 2" in the memorandum "Notices No. 2 posted?"

10

A. The same fact in regard to notices in blank forms the same as Exhibit D 3.

Q. In the memorandum "Posted Notices No. 3," what notice is meant?

A. The same fact in regard to notices on blank form the same as Exhibit D 4.

Q. Was the time appointed in Notice No. 3 one of their stated meetings?

A. I think it was; I am quite sure of it?

Q. What was your custom as to the day on which the 20 Council would meet to hear objections?

A. It was to give the date of a regular meeting of the Council.

Q. In the year 1869, was there any newspaper published in Passaic?

A. My memory don't go back quite as far as that.

Q. Last question repeated?

A. I don't think there was.

Being re-cross-examined witness says:

30

Q. You say that the commissioners took away the original report dated October 6th, 1869; when they returned the report corrected, were the corrections made on the same paper they had taken away, or had an entirely new report been written out on other paper?

A. I don't know.

Q. Can you give us any idea of the corrections they made, and if so, give us the best and fullest idea you can?

A. I don't know what the corrections, if any, were.

THOMAS NEWELL.

Sworn and subscribed at Jersey
City, this 5th day of September,
A. D., 1873, before me.

WILLIAM P. DOUGLASS,
Master in Chancery of New Jersey.

10

On September 30th, 1873, the complainant's counsel produced and offered in evidence a copy of a deed made by Elizabeth R. Gutienez, and William S. Gutienez, her husband to the Morris & Essex Railroad Company, dated October 21st, 1869; acknowledged October 21st, 1869, and recorded on the same day in Book T. 3 of Deeds for Passaic County on pages 254, &c. and which is offered pursuant to arrangement between counsel made on the last day evidence was taken, and marked as Exhibit P 2, on part of the prosecutors.

20

NEW JERSEY SUPREME COURT.

JUNE TERM, 1874.

10

THE STATE,
THE DEL., LACK. AND WEST. R. R.
COMPANY.

vs.

THE VILLAGE OF PASSAIC.

On Certiorari.

20

Argued at February Term, 1874, before BEDLE, DALRYMPLE,
and SCUDDER, Justices.

BEDLE, J.

This Certiorari brings before us an assessment against
the prosecutors, for grading Franklin Avenue.

The proceedings were had under an Act to Incorporate
the Village of Passaic. (Laws 1869, p. 317.) 30

The error of this assessment is, that it was imposed in
strict conformity, so far as the principle of it is concerned,
to Sections 19 and 20 of that Act.

Section 19 provides for a preliminary assessment by three
Commissioners, who shall estimate the whole cost of the

improvement, and assess it upon the lands fronting on the improvement in proportion to the benefit to be received by each lot or parcel of land.

After that if there are no remonstrances to defeat the improvement, it is made.

And then by section 20, all the expense and costs incurred are finally assessed by the three commissioners upon the same lands, in proportion to the benefits received, as estimated by the three commissioners.

The Act requires the lands fronting on the improvement to bear the whole burthen of the cost, and the mode of its distribution merely, is according to the benefits, but not limited by the actual benefits.

Since the case of the State (Agens) vs. The City of Newark, decided in the Court of Errors, an assessment for an improvement of this character cannot be sustained when made according to a statute fixing a standard otherwise than the actual benefits, and limited only by political territorial divisions, if the Legislature choose to make any such limitation.

The rule heretofore prevailing in this Court that such improvements are presumed to benefit land equal to the burthen imposed by the Legislature, until the contrary appears, can now no longer, since that decision, be maintained.

In the Chatham drainage case, 6 Vroom, 502, language similar to this in question was construed so as to be limited to the actual benefits.

But in the drainage Act the territory that ought to contribute to the expense was to be selected by the commissioners.

In the case before us, the Legislature has fixed the limit of frontage and provided that the whole expense shall be assessed there.

Since this certiorari was brought, an Act was passed, incorporating Passaic as a city, (Laws 1873. p. 484), Section 84 of which undertakes to validate all assessments made under the Charter of 1869, but which does not help the difficulty before us; part of that section is in these words: "all such assessments are hereby declared to be valid and effectual in law as if every provision of the Charter of the Village of Passaic, under which said assessments were made, had been fully complied with, except in cases where it shall appear to the Supreme Court that the commissioners who made such assessments, have not properly assessed the lands and real estate, by *said Charter directed to be assessed*, in proportion to the benefit to be received thereby, in which cases said assessments may for that cause be set aside."

The Legislature merely intended by that section to make valid proceedings not done in conformity to the Act of 1869, 20 the same as if had been complied with, and then to impose upon the land owners the *onus* of showing that the assessments as to benefits had not been made according to the Charter.

There is no intention in that Section to require the land owners to show that the assessment exceeds the actual benefits, if he wished to contest it.

A claim to that extent would involve the right of the Legislature to declare valid an assessment made under an Act contrary to fundamental law unless the land owner could show as a matter of fact that the commissioners had assumed to restrain it within the standard of actual benefits. 30

Such legislation would impose an expense and burthen on the owner, that would often practically speaking amount to

a deprivation of his rights and which I think ought not to be and could not be sustained.

But by fair construction Section 84 does not reach that far.

The ordinance should not be disturbed for any of the reasons urged in the argument, the work having been completed when the writ was allowed, but the assessment proceedings should all be set aside as to the prosecutors.

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