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NEW JERSEY

Court of Errors and Appeals.

THE STATE, *ex. rel.*, THOMAS D. KILBURN, *ads.* THE ESSEX PUBLIC ROAD BOARD.	*On Writ of Error to the New Jersey Supreme Court.*

THE DEFENDANT'S BRIEF. 10

A writ of error is brought in this case to review the decision of the Supreme Court published at the November term, 1874, of that Court, setting aside an assessment of \$1,488$\frac{65}{100}$ upon the lands of the defendant in error, on the line of South Orange avenue in the township of South Orange, in the county of Essex, for benefits adjudged to have been received by his lands in consequence of the widening and improvement of that avenue.

The errors assigned by the plaintiff, are in substance: that the Supreme Court determined that the assessment was 20 defective and illegal; that the Court set aside the assessment, although it did not appear that it was greater than the actual benefit received by the lands assessed; and that the judgment was given for the prosecutor, when it ought to have been given for the defendant.

The defendant in error assigned six reasons on his *certiorari* in the Court below for setting aside the assessment. But the first, fifth and sixth reasons were abandoned, and the argument was confined to those objections presented in the remaining three reasons. 30

These three reasons are taken together; and they allege in substance, that the assessment was made upon erroneous principles; that the Commissioners failed to comply with the requirements of law; and that they exceeded the powers conferred upon them by law.

The printed case, p. 12, shows that the Commissioners appointed to make this assessment, confined their assessment to lands laying within lines drawn parallel with the side lines of the avenue, two hundred feet distant therefrom.
10 On the map herewith submitted, the side lines of the avenue and the red lines drawn parallel with the side lines, indicate the boundaries of the lands assessed by the Commissioners.

The act constituting the Essex Public Road Board and the Supplements thereto (*See Laws of* 1870, *pp.* 181 *and* 714) provides that the Assessors, who are thereby authorized to be appointed, "Shall proceeed to consider and determine what lands in the township in which the road is laid," are peculiarly benefited by the laying out of said avenue, and
20 the amount that each lot or parcel is so benefited, and shall assess the same in proportion to the benefits received.

The only intelligent construction that can be given to this language is, that the Assessors must *examine all lands* lying within the limits of their jurisdiction with reference to the question of peculiar benefits, to enable them to determine *what* lands in the township are peculiarly benefited. It is very clear, that it is impossible for the Assessors to determine *what* lands, among all the lands within the township, are benefited, without an examination of *all the lands*
30 *within* the township for that purpose.

Any doubt as to the correctness of this construction is entirely overcome by the language of the 6th section of the Act of February 16, 1870, viz.:

"The moneys necessary to pay the compensation in this act directed to be made for land or property taken, shall be raised by assessing so much thereof, as shall be equal to any peculiar benefit conferred upon *any lands in the* [*township*] *whether adjacent or not to said avenues*, upon such lands so peculiarly benefited in proportion to the benefit received."
40 The first duty, then, of these Assessors, after taking the oath

to honestly and justly perform the duties required of an Assessor under this act, was to examine *all the lands within* the *limits* of the *township*, to the end that they might be able to determine *what* of such lands were peculiarly benefited by the improvement proposed.

These Assessors had no authority or power to fix the territorial limit of their examination of lands with reference to determining what lands were thus benefited. They were not required to act judicially with reference to this first part of their duty, but simply ministerially. They had no 10 statute to construe, no rule of law to interpret and apply: and therefore the nature of the improvements intended, whether in form, or in substance, the laying out of an avenue, or the improvement of an ancient highway, could not be considered by them in the performance of this part of their duty, and neither can such matters be considered by the Court in applying the law to, or judging of the acts of the Assessors as to this part of their duty, and neither can such matters be considered by the Court in applying the law to, or judging of the acts of the Assessors as to this part of 20 their work. Because an old road was made a fine avenue, and thereby the lands lying upon the line of such avenue became valuable for building, these Assessors were not authorized to conclude that those lands were the only lands peculiarly benefited by the improvement, and so arbitrarily determine to confine their "search for benefits," or examination of lands to such lands.

The same statute that authorizes the appointment of these Assessors, and prescribes their duties, also fixes the territorial area throughout which their examination of lands 30 for peculiar benefits must be extended. Nothing in this regard is left by the law to the judgment or discretion of the Assessors.

Section 6 of the act of February 16th, 1870, requires the assessment to be made upon all lands peculiarly benefited in the *county*. Section 1 of the act of March 17th, 1870, provides that no lands shall be assessed for benefits, except for lands taken in the same township, &c., where the lands assessed lie. Wherefore section 6 of the act of February 16th, 1870, must now be read: "The moneys necessary to 40

pay the compensation in this act, directed to be made for lands or property taken, shall be raised by assessing so much thereof as shall be equal to any peculiar benefit conferred upon any lands in the township, whether adjacent or not to said avenue, upon such lands so peculiarly benefited, in proportion to the benefit received."

Hence the Assessors are required by law, to assess *all lands in the township* that are peculiarly benefited by the improvement, without regard to their location. To comply
10 with this requisition of law, they must first determine what lands, of all the lands in the township, are thus peculiarly benefited, and therefore the Assessors are compelled to examine all the lands in the township in their search for lands peculiarly benefited. So clearly and positively is this duty imposed by the act, that there is no escape from its obligation. But the Assessors did not comply with this important and positive requisite of the law, which is the only source of whatever of justice and equity can appertain to such assessments. They did not "consider and
20 determine what lands in the *township* were peculiarly benefited," by the improvement.

But on the contrary, the Assessors seem to have adopted the argument of the counsel of these plaintiffs, in the Court below; that because the lands upon the line of this avenue to the depth of two hundred feet, were by this improvement converted into *eligible building sites*, therefore these were the lands; these narrow strips on each side of the avenue, were the lands, and the only lands peculiarly benefited by this improvement, and these were the only lands to be
30 assessed for benefits. Thus entirely ignoring all other benefits that might accrue to the remainder of the lands of which these two hundred feet are a part, and to other lands elsewhere from increased facilities of access. Disregarding the law as it is, they assumed legislative power, and fixed for themselves the territorial limits within which they were to make their examination for peculiar benefits.

If the Assessors intended to lay the whole burden of this improvement upon these two narrow tracts of land, they could only do it in the manner prescribed by the statute;
40 and they must first consider and determine that these were

the *only lands in the township* peculiarly benefited by the improvement; or, that *no other* lands in the township were peculiarly benefited. But they cannot—as they have attempted to do—throw the entire burden upon these lands by simply neglecting or refusing to "consider and determine" what other lands in the remaining parts of the township were likewise peculiarly benefited by the improvement.

But it is denied in argument that these Assessors thus failed to comply with the law, and to "consider and determine," as to all lands in the township—that they confined 10 their search for benefits to the lands assessed; and the prosecutor is reproved for not calling these Assessors to testify of their doings in this regard. But the prosecutor prefers to trust to the record for his proof;—and replies that by the record it is clearly and positively shown that the Assessors did fail to comply with the law in this regard as we have alleged.

1. They do not say so in their report of their doings in this case. The language of their report is—after stating that they were appointed "Assessors to consider and deter- 20 mine what lands are peculiarly benefited," and then stating that they took the required oath, they say (case, p. 7, *l.* 21,) "*and thereupon proceeded to consider what lands in the township of South Orange, in the County of Essex, are peculiarly benefited by the laying out and widening of said avenue, and the amount that each lot or parcel is so benefited, and to assess the same in proportion to the benefit received.*"

This language does not contain the assertion, nor compel the inference, that the Assessors examined all the lands in the township, or that they *considered* any other lands than 30 those assessed. A negative inference is as fully authorized by the language, as an affirmative one. It is only a general statement, that in their opinion they have performed the duty required by law, and not a statement of their acts. It is in character, precisely like the report of the Assessors in the case of *Bergen* v. *The State*, (3 Vroom, 497) wherein they say—"And we did in our judgment, consider and adjudge that the owners of the several lots and plots of ground were the parties benefited." There is nothing in the language of the report to show how far they extended their examina- 40

tion or consideration, for lands benefited; but it leaves this important, vital fact, entirely out—turning us over to such inferences as we may please to draw from the words used.

And on page 7, line 34, *et sequor*, the same ambiguity exists. They say, "*having viewed the premises.*" The question, what premises? is quite naturally suggested; and it is without an answer, unless we find it in the following lines: "*And we having considered, adjudged, and determined*
10 that the *lots of land hereinafter mentioned, and in said township were peculiarly benefited* TO THE EXTENT OF SAID AGGREGATE AT LEAST." By this language our question is answered in this wise. These Assessors, having determined that the farms and lots of land bordering on this avenue were not the lands to bear the expense of this improvement, but that it was their duty to convert portions of these farms into eligible building sites to be vastly enhanced in value and price by such action, and then to lay the burden upon such building sites; they proceeded further to determine that
20 such building sites should extend back from the side line of said avenue two hundred feet; and that they would cut off from the farms and other parcels of land bordering on the avenue, on each side thereof, by arbitrary lines, parallel with the avenue, drawn and fixed by themselves, two narrow strips of land two hundred feet wide for such building sites. These were the "premises viewed." And having viewed these premises, they "considered, adjudged and determined" that these were the lands—and the only lands "peculiarly benefited" by the improvement; and that these
30 two strips of land only—these *building sites* were "*peculiarly benefited to the extent of said aggregate, at least,*" of the cost of the improvement, and they must bear the burden; wherefore these were the lands required to be assessed.

If there can be any doubt as to the meaning of the language of the Assessors' report, it must be entirely removed by the subsequent action of the Assessors, and The Essex Public Road Board in reference to this report.

This report, together with the map showing these lines
40 drawn upon each side of the avenue, fixing the limit of the

assessments made by these Assessors, are submitted to the Road Board. This report, together with protests and objections presented by parties interested, were considered and "discussed" by the members of the Board, on the 17th of February. After this discussion, Judge Williams, a prominent member of the Board, offered the following resolution: (*Case* p. 8, *l*. 21.)

"That after considering the several protests this day received and sent in by property owners on and near the line of South Orange avenue, be it *Resolved*, That the Commissioners for Assessments be recalled and asked to reconsider these two following questions, viz.: Did you sufficiently comply with the legal requirements to assess benefits on land peculiarly benefited, when you determined to limit your search for benefits to two hundred feet? And, second, whether you should have fixed any limit within the township for assessment?"

This resolution was laid over until Mareh 3d and was then adopted, (*case*, p. 8). This resolution does not inquire of the Assessors if they did confine their search for benefits to two hundred feet. Or if they did fix a limit to their search, or examination, within the township, but it affirmatively and positively charges and asserts that they did so, and then inquires of them if such action on their part was in accordance with the law. Five days later, on March 8th, the Assessors reply in writing. And what is their reply? Do they deny the direct charges or assertions, and show that they did not confine their search for benefits to the two hundred feet, and that they did not fix any limit to their search for benefits within the township? On the contrary, they, by manifest intention, studiously avoid making any answer to these assertions contained in the resolution, either directly, or by inference. Their answer in substance, is simply—We have considered your resolution, and in reply say, that in our opinion we have done our duty in the matter.

Being expressly called upon to admit or deny that they confined their "search for benefits" to lands lying within two hundred feet of the avenue, they could not avoid the duty; and failing to deny the charge, they in so doing admitted it. Nothing short of a simple yea—could be a

more emphatic admission of the truth of the propositions contained in the resolution than is the unnecessary and dishonest evasion by the Assessors of the inquiries put by the Road Board. It certainly does not entitle them to any presumptions in their favor. The prosecutor did not need to call the Assessors to testify. The report, the map, resolution and the reply thereto, most clearly and undeniably establish the truth of his allegation.

Another fact in this connection is noticeable, that under
10 the peculiar pressure of this resolution, and of the positive allegations therein made, and after a deliberation of five days, the Assessors fail to put upon the record the fact, or to assert that they have assessed *all the lands in the township peculiarly benefited.* The Assessors say "*the lands.*" Plaintiff's counsel says, "*all* the lands." Defendant says, "*part* of the lands." Who is correct? What lands have they assessed? It was the duty of these Assessors to so make their report as to make their action in this regard so plain that this question could not arise. If they did assess
20 *all* the lands benefited, they should have distinctly and positively so stated. We understand the rule to be, that what the law requires to be done must affirmatively appear to be done, and when it does not so appear, it is presumed not to be done. *State* v. *Lewis*, 2d Zab., 564.

This assessment is made upon erroneous principles, in that it is not made according to the rule prescribed by the act.

The assessment is unjust and oppressive, because it is arbitrarily laid upon a small tract of land, when it should have been laid upon *all* lands within the township *peculiarly*
30 *benefited.*

It is stipulated that the assessment is confined to the two tracts of land lying within the two lines on the map drawn parallel with the side lines of the avenue, representing two tracts of land two hundred feet wide, the length of the avenue.

This confining of the assessment within fixed and parallel lines, regardless of the size and ownership of the parcels, or lots of land of which these strips are a part, is without precedent, and we can find no rule or principle of law author-
40 izing it.

The law requires that all *lots* or *parcels* of land peculiarly benefited, whether they *are*, or *are not* adjacent to the improvement, shall be assessed. And these words "lots" and "parcels" are understood, and used as having a distinct and positive meaning; which is, an area of land which is distinctly identified and distinguished from adjoining areas, by fences, or other plain and distinct boundaries, and held by one conveyance or title. If this be so, whence comes the authority of Assessors to cut up and divide such "lots" and "parcels," in making their assessments. Suppose a "lot or parcel" of land bordering on the improvement extend two hundred and ten feet back from the line thereof, may the Assessor decide that two hundred feet front of this "lot or parcel" is peculiarly benefited, and shall be assessed therefor, and cut off ten feet? or shall they follow the letter and spirit of the statute, and include the entire lot in their action? And if they may thus fix an arbitrary line at one distance, why not at another distance, and in fact at no distance, and thus make their assessments really in proportion to the frontage of lands on the improvement? 10 20

We insist that the Assessors were bound to assess all "lots and parcels" of land that were peculiarly benefited by the improvement, as they found them; and that in establishing these arbitrary lines, within which to confine their assessment, having no regard to the established boundaries and ownership of the lots and parcels of land, they give evidence that they had other ends in view than a simple assessment of benefits according to the direction of the statute. The presumption is, that upon cross-roads, streets and lanes opening into this avenue, are lands which derive as great benefit from this improvement, as do those lands lying directly on the avenue, and should therefore bear their proportion of the expense. It is unnecessary for the prosecutor to prove this, for the Assessors have shown that they ignored the possible existence of such a fact from the start, and therefore made no examination or investigation in that direction. 30

It is said that the prosecutor has not alleged or proved that the assessment laid upon his land is greater than the peculiar benefit that it has received;—and that therefore 40

if he is right in the position here taken by him the assessment cannot be set aside.

But as the case now stands such proof cannot be required from the prosecutor, to entitle him to avail himself, at this time, of an allegation to that effect, now made even for the first time.

In the *State* v. *Jersey City*, 2 Dutch., on page 450, the Court says—" There is no principle better settled than that Commissioners or other persons exercising a special power, 10 who keep no record of their proceedings, but whose acts are authenticated only by the certificate signed in each particular case, must show on the face of their proceedings, that they have pursued strictly the authority vested in them by the statute under which they act."

The prosecutor is in the position of defendant—and these plaintiffs in error must make a prima facie case, before proof can be required of him, and more especially so, as they are permitted to make their case upon their own records—to create their own evidence.

20 The disposition of the case must depend in a great measure upon the character or sufficiency of the report made by the Assessors of their proceedings. We insist that it is insufficient. It is not certain and comprehensive in its statements.

In *Van Winkle* v. *Rail Road Co.*, 2 Green, on page 166, the Court, quoting from *Rex.* v. *Croke*, Cowper, *30, says, " that a special authority delegated by act of Parliament to particular persons to take away a man's property and estate against his will, must be strictly pursued, and must appear 30 so upon the face of the order, and that where a particular notice in writing is directed to be given by the act, it is not sufficient to say—" Upon proof of due notice having been given,"—*but it ought to appear on the order, what notice was given.*

In *State* v. *Jersey City*, 1 Dutch., 309, the Court repeats the above rule. In this case the Commissioners' report did not show affirmatively for what, or upon what principles the damages were assessed.

State v. *Newark*, 1 Dutch., 399.

The City Charter required the assessment for benefits to be made upon the owners, "in proportion as nearly as may be, to the advantage each shall be deemed to acquire." The Commissioners reported that an assessment was made *upon the owners benefited*, but not in what proportion—and the report was held to be insufficient to sustain the assessment. The general expression—"*upon the owners benefited*"—is in character and extent of meaning, precisely like the language used in the report under consideration, viz., "proceeded to consider *what lands*"—"and having viewed the premises, —we having considered, adjudged and determined that the lots of lands hereinafter mentioned, were peculiarly benefited to the extent of said aggregate at least." 10

State v. *Lord*, 2 Dutch., 140. Proceedings under the act providing for drainage. It is said—"The freeholders and surveyors in these cases exercise a special statutory jurisdiction affecting property rights, and *their return must show that everything was done that is required* by the statute under which they act, and from which their power is derived." And the opinion cites *State* v. *Van Geison*, 3 Green, 340, and *State* v. *Lewis*, 2 Zab. 564, to this point. 20

State v. *Hardcastle*, 2 Dutch., 143. The certificate of the trustees says that notice was given "in accordance with the act." The Court say that, "it should go further and state what the notice was, and when and where copies of it were set up, in order that it may *appear* that it was in accordance with the act, by something more than the simple allegation of the trustee."

State v. *Jersey City*, 2 Dutch., 444. Repeats the rule as laid down in 2 Green 166, and 1 Dutch. 310. 30

State v. *Jersey City*, 4 Dutch., 500. The assessment was set aside, not alone because it appeared that it might have been in proportion to the frontage, but also and more emphatically because the Commissioners failed to show *affirmatively* and positively that they complied with the requirements of the charter; which provided that such assessment should be made in proportion to the benefits received. It

nowhere appeared either upon the report, map or schedule, that the assessment was so made. The Court says,—"This should have appeared upon the face of the report itself in *affirmative terms.*"

In *State* v. *Town of Bergen*, 5 Dutch., 266, the Assessors reported that they made their assessment on the frontage—according to frontage, to the depth of one hundred feet. "That they considered the lands most benefited by said improvement, to be those situate between Jersey City
10 and the plank road." They then give reasons for their method of assessment. They say in their report "that they considered that mode of making the assessment to be upon the principles of equity, and according to the damage or benefit which the owners of the real estate in the town may suffer, or derive from the said improvement." The town charter provided, "that the Assessors should assess the costs and expenses upon the real estate of said town upon principles of equity, and according to the damage or the benefit which the owners may derive therefrom." The As-
20 sessors say that they considered *the lands most benefited* to be those situate, etc. And then they assert their compliance with the law in the very language of the charter. But they do not say in their report that they assessed the expense on "*all the lands in the town*," according to the damage and benefit. The language of the Court fully authorizes the inference, that if the Assessors had not said in their report that certain property ought not to be assessed, still the report would have been insufficient, for the reason that it did not assert that *all lands in the town* were assessed
30 according to the damage and benefit. And yet the language of that report is as broad as positive, and as affirmative as is the language of the report of the Assessors in the case at bar.

State v. *Bergen*, 1 Vroom, 307. This case brought the same assessment before the Court, and the language of the Court is—"They certify that they made the assessment upon principles of equity," and that, "we did in our judgment, consider and adjudge that the owners of the said several lots and plots of ground were the parties benefited, and

upon whose lots and plots the assessment should be made;" "but this language does not imply that they took into consideration *all* the real estate in the town, and determined what part of it, and how far it was benefited or damaged, and assessed accordingly."

The Town of Bergen v. *The State*, 3 Vroom, 490. This is the preceding case removed to the Court of Errors, where the judgment of the Supreme Court is affirmed, and the same rules of law on this point are repeated. The Chief Justice, in that part of the opinion which relates to the question here raised, says:

"The second section of the charter of the town of Bergen directs the expense of improvements made to the streets to be assessed on the real estate in said town. This description of assessable property, we understand, embraces *all the land in the town*, wherever situate, which is benefited more than it is injured, by the improvement. . . . It was the duty, therefore, of the Assessors, *to take in their view*, when forming their judgment as to the lands benefited, *the whole of the real estate within the corporate limits*, and we do not think that the report of these officers *exhibits with sufficient distinctness*, their conformity to such duty. Their statement in this respect, is in these words, viz.: 'And we did, in our judgment, consider and adjudge that the owners of the said several lots and plots of ground were the parties benefited.' This declaration certainly does not show or imply how far they extended their view for lands benefited, but leaves that vital point entirely uncertain. For aught that appears, they may have been under the delusion that their duty required them to take into their estimate of benefits, only the land in the vicinity of the street which was improved, for under such circumstances, their return that the land mentioned by them was, 'the land benefited' would not have been improper. We think this return substantially defective, as it does not manifest in a clear and unambiguous form, a compliance on the part of the Assessors with the requirement of the town charter, in this important particular." We quote thus largely from this case, because we consider this language of the Chief Justice to be quite as applicable to the report now

before this Court, as it was to the report mentioned in the reported case. The language, or the statement of the one report, in regard to the acts of the Assessors, is no more comprehensive, and no less ambiguous than that of the other. These reports are both equally open to the objection stated in the opinion quoted.

State v. *Cannon*, 4 Vroom, 218. This is another case wherein the same defect in the report of the Assessors appears. The law provided that the surveyors should assess
10 the damages as equitably as may be upon the owners of land in the neighborhood of the road, which in their opinion would be benefited thereby, as nearly as might be in proportion to the benefits which the land should be deemed by them to have derived from the laying out of the road, and certify the same in writing. By their return the surveyors certify that, in their opinion, the lands owned by persons whose names are therein mentioned, and which are near and along the said road, will be benefited to the amount respectively assessed against them. But they do not certify that
20 those are *all* the *lands* in the neighborhood which in their opinion would be benefited by the road, nor that they assessed them according to their benefits. They certify that the lands would be benefited, but how much more land in the neighborhood would be benefited, or in what proportion to benefits these lands were assessed, they do not certify. This return was set aside because it did not certify that the lands assessed were *all the lands benefited* by the road. And such is the defect in the report now in question. The Assessors say that they consider that the lots named
30 are peculiarly benefited to the extent of the sums awarded as damages; but they do not state whether these lots named, are *all the lands in the township* thus benefited.

State v. *Trenton*, 7 Vroom, 499. Here the Court of Errors repeats in clear and emphatic language, the rules of law which we have here relied upon. As to the first, the language of the Court is—

"It is an inflexible rule, founded in the highest considerations of public policy, and absolutely essential to the protection of individual rights, that where power to take

private property for public use is delegated by the legislature to municipal or other corporations, that power must be strictly pursued."

And as to the second rule, the Court says—"It is equally well settled, that persons who exercise a special power whose acts are authenticated only by the certificate signed in each particular case, must show on the face of their certificate that they have strictly pursued the authority vested in them."

We have cited this long array of authorities not only to exhibit the persistent, rigid manner in which the Court has adhered to these two rules above cited; but also to invite the attention of the Court to the almost exact similarity of the language of the reports and returns criticised in the cases cited, to the language of the Assessors in the report, or return now before the Court. The difference in some instances in phraseology is very slight indeed—and there is no difference whatever in most of the cases in the meaning and extent of expression. 10

There is another peculiarity about this report, that is worthy of notice. Without attempting to set out clearly in their report what they did in reference to examining the lands within the township to determine what lands were particularly benefited by this improvement—they seem to arbitrarily dispose of that question in the use of this singular expression,—after giving the aggregate of damages awarded, they say—"the lots of land hereinafter mentioned . . . were peculiarly benefited to the *extent of said aggregate at least.*" If there was nothing more in this report to show a want of legal proceeding by these Assessors, these words would have no peculiar significance; but taken in connection with the assertions made by Judge Williams in his resolutions—the map—the assessment, and the refusal of the Assessors to reply to Judge Williams' allegation and inquiry, this language serves to give point and application to the evidence afforded by the assessment, map, resolutions, and reply, that it is true, as we have before charged, that these Assessors determined in their minds that those *beautiful building sites*, which they had mapped out on the borders of this avenue, 20 30

should bear the entire cost of the widening, &c., of the avenue ; and not caring to trouble themselves further in the matter, they would shut out any questioning as to the proportion of this assessment to benefits, by this sweeping and ambiguous assertion, that these two strips of land are benefited " to the extent of said aggregate *at least*," and we may imagine as much more as we choose.

The Assignment of Errors sets up that it did not appear to the Supreme Court that the said assessment was greater
10 than the actual benefit received. If the position as to the evidence derived from the report of the Assessors, the map, the resolution, and the reply to the same by the Assessors be correct ; if these facts show what we contend they do show, then it did appear to the Court that the assessment against the lands of the prosecutor was greater than the law authorized, because these facts show that there might be, and probably was other lands in the township, and the map shows that there *are* other lands in the township that ought to bear a proportion of this aggregate sum, and whatever
20 portion of this sum other lands ought to bear, is so much in excess of what could be lawfully assessed upon the lands which are assessed, of which lands those of the prosecutor's are a part.

But the prosecutor's case did not call upon him to make any proof upon this subject; it was enough for him to simply assert that or any other objection to the assessment, the probable existence of which he can show by the records, until the Assessors by their report, clearly and distinctly state and show that they have fully and strictly complied with *all* the
30 requirements of the law, by the authority of which they make this assessment; then, and not until then, is the prosecutor required to prove the truth of his objections by extrinsic testimony. Wherefore the Assessors having in this case failed to show *affirmatively* and *positively* that this assessment is made in conformity with *all* the requirements of the law, and that it is not greater than the benefits received ; that it is not greater than the law authorizes, the presumption is against them, that the assessment is greater than it should be ; the case cited above, *State* v. *Lewis*, sus-
40 tains this position.

This action of the Assessors in this case, in establishing the two arbitrary lines on each side of the avenue, two hundred feet distant therefrom, within which to make their assessments—lines which are entirely arbitrary—which have no reference to the several parcels of lands—the farms and curtilages bordering on the avenue, which are entirely unknown to the land owners in the township, which run at right-angles to all the boundaries, and lines of partition of the lots and parcels of land bordering upon the avenue; and which are no where and in no manner authorized, or recog- 10 nized by any section or paragraph of the act creating the Essex Public Road Board or of its supplements, gives rise to a question which we think worthy of the notice of the Court in disposing of this case.

Section 13 of the Act of February 16th, 1870, provides— "And the said Assessors, after taking an oath to honestly and justly peform the duties required of an Assessor under this act, shall proceed to consider and determine what lands in said county [township] are peculiarly benefited by the laying out of said avenues, and the amount that each 20 *lot* or *parcel* is so benefited, and shall assess the *same*," (*i. e. each lot or parcel*,) "in proportion to the benefits received." And after prescribing the manner of proceeding, to make and complete such assessment, the same section further provides—"The said assessment shall be a lien on the said lot or parcel of land until the same shall be paid, from and after the date that the said Commissioners shall approve of said assessment."

The provision is that the assessment shall be a *lien* on the *lots* or *parcels* which are *benefited* and *assessed*. These terms 30 *lots* and *parcels*, are used by the legislature in their common acceptation: and they have the same meaning in the act that they have in their common every-day use by the community; and this meaning is, tracts of land within distinct and known boundary lines, which are recognized and respected by the land owner, and others who may have an interest of any kind therein; and it is these tracts of land that are to be "considered and determined to be peculiarly benefited;" and it is such tracts of land that are to be "assessed in proportion to the benefit it received" by them; and 40

it is such tracts of land that the legislature subjects to the lien of the assessment. It cannot be that Assessors, without any provision of law to such end, can have authority to divide the farms, lots and premises of the land owners bordering on streets and highways by arbitrary and fanciful lines, such as may please them or gratify some particular notion or fancy, and say to the owner, this part of your farm or lot, or garden is benefited, and shall be assessed and subjected to a lien for the same, but that part shall be held 10 freed from all this. There is no possible occasion or reason for such proceeding. It is in no manner authorized or recognized by any law of the State. It is contrary to the general ideas of men, of the duties and burdens imposed by acts creating municipal corporations. It is opposed to the good sense on which law is supposed to be based. It is without precedent. If Assessors may establish such lines across a farm, they may do the same across a common city house lot. And we repeat—if they may establish such a line two hundred feet from the line of the avenue, they may 20 by the same authority fix such line within one foot of the line of the avenue, and thus entirely evade that provision of the law which requires that lots and parcels of land shall be assessed in proportion to the benefits received by them from the improvement.

And again, if Assessors have the power to thus divide tracts of land subject to assessment, they may, if they see fit, impose the lien of an assessment upon the front of one man's lot, and the lien of a like assessment upon the rear of another man's lot. And thus, while one would be compelled 30 to pay his assessment through fear of a sale which might deprive him of his land, the other might refuse to pay, regardless of a sale which could scarcely harm him.

Again, this assessment made within these fixed lines, two hundred feet from the avenue, is in fact an assessment in proportion to frontage. The width of these strips of land is fixed according to taste, or notion of the Assessors, without rule or principle, or reason for choosing one width rather than another. If this defendant's land which borders upon this avenue is benefited by the improvement, every part of 40 it is benefited. And if the front foot of it is peculiarly bene-

fited, then every other foot of it partakes of that peculiar benefit—not only the first two hundred feet, but the last two hundred feet. It is one tract—one body; and by what rule or principle can the Assessors divide it?

Again—The assessment is unjust in character and effect by reason of this act of the Assessors in thus confining their acts to two hundred feet on the front. One lot of land may be two hundred and ten feet in depth from the aveuue and worth a thousand dollars; and an adjoining lot may be one thousand feet in depth, and worth five thousand dollars; and every part of each lot is alike benefited by the improvement, and one land owner derives a much greater benefit therefrom than the other; and yet they are assessed alike. And in case of a lot lying on a side street, one-half of which falls within the lines so fixed, one-half of the owner's dwelling house is assessed, and subjected to a lien, while the other half is exempted. The burden is unequal and unjust.

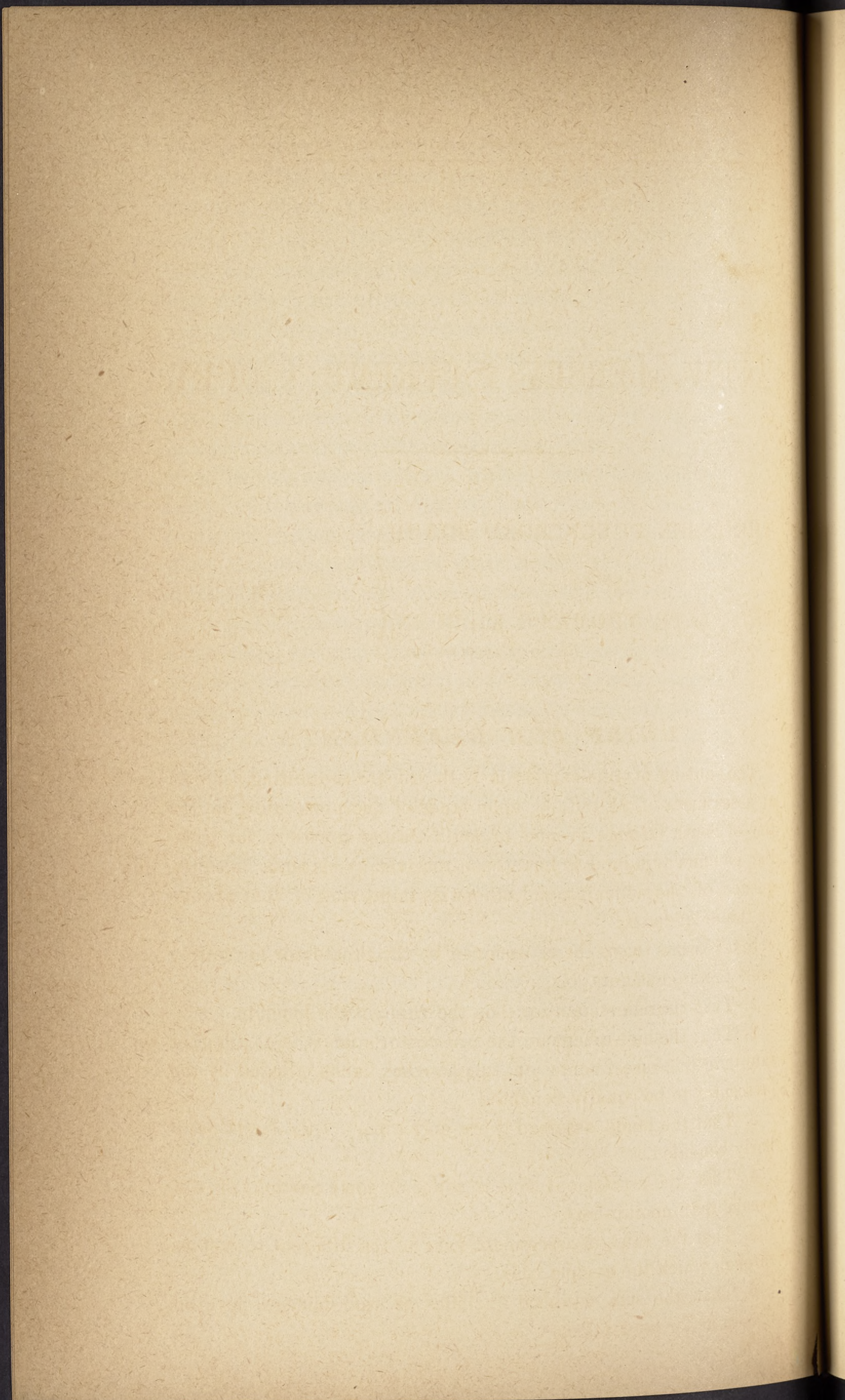
If this action of these Assessors is right and justifiable in this case, then it must be in all cases; and thus property will be subjected to assessment for benefits, where it cannot by any possibility be benefited. As where lots fronting upon a parallel street extend back within the lines fixed by the Assessors, and yet not extending to the improvement for which the assessment is made.

There is no precedent for this action of the Assessors; and there is no rule or principle of law by which it can be justified.

Wherefore, we respectively submit that the assessment under consideration is made upon erroneous principles; and that the report, or return of the Assessors is defective, and not sufficient to sustain the assessment, and the judgment of the Supreme Court should be affirmed.

C. F. & C. E. HILL,

Atty's of Defendant.



Ward & Tichenor, Law Case Printers, 832 Broad Street, Newark, N. J.

NEW JERSEY SUPREME COURT.

THE ESSEX PUBLIC ROAD BOARD
ads.
THE STATE, THOMAS B. KILBURN,
Prosecutor.

On Certiorari.

BRIEF FOR DEFENDANTS. 10

The object of this certiorari is to procure the setting aside of an assessment of $1,488 $\frac{65}{100}$, upon lands of the prosecutor, on the line of South Orange avenue, in South Orange township, for peculiar benefits adjudged to have been received by his lands, in consequence of the widening and otherwise improving of that avenue by the defendants.

Six reasons have been assigned by the prosecutor for setting aside the assessments, viz.:

1. That the assessment exceeds the value of the benefits.

2. That the assessment on the prosecutor's lands, is at a higher rate than the assessments on neighboring lands, alleged by the prosecutor to be equally benefited. 20

3. That the lands assessed were only a part of the lands peculiarly benefited.

4. That the assessment zone is wider on some portions of the avenue than upon others.

5. That the rates of assessment vary in the different townships through which the avenue runs.

6. That the sum assessed includes as well damages for land *injured* as for land *taken.* 30

The prosecutor, however, abandons all the reasons except the third, and relies only upon that, viz.: That the assessors "*confined their assessments to lands lying on each side of said avenue, and* 200 *feet distant from the side lines of said avenue*, for a part of the length of said avenue."

It is admitted that the assessments were confined to, or not extended beyond, a belt of land 200 feet wide on each side of the avenue.

The *legality* or *illegality* of *their action* in this particular, is the
10 sole question before the Court.

What is the *law* or "*rule of action*" prescribed for the assessors?

By an examination and comparison of the act of February 16, 1870, section 13, and that of March 17, 1870, section 1, (*Road Board Pamphlet*, pl. 36 and 46,) it will be found to be as follows, viz.:

They "*shall proceed to consider and determine what lands in said* [*township*] *are peculiarly benefited by the laying out of said avenues, and the amount that each lot or parcel is so benefited, and shall assess the same in proportion to the benefit received.*"

(Section 6 of the act of February 16, 1870, *Road Board Pam-*
20 *phlet*, pl. 29, declares generally the mode of raising money to pay the compensation for property taken, &c., and limits the assessments imposed to the amount of benefit conferred. The "*rule*" prescribed for the assessors, and which is in harmony with section 6, is contained in the sections from which I have quoted.)

The *nature of the improvement* (the benefits flowing from which were to be assessed,) should be considered in applying the law and judging of the action of the assessors.

It was, in *form*, the laying out of an avenue; but not where none previously existed.

30 It was *in substance and effect, the widening, altering the grade, and otherwise improving, of an old highway*—one of the oldest in the county.

This sufficiently appears from the writ and return.

As the *extent*, and therefore the *expense*, of the improvement were limited, so also were the *benefits* thereof limited, not only in *amount*, but in respect to *territorial area*.

An *old road* was made a *beautiful avenue*, and the lands lying upon the same were converted into eligible building sites. *These were the lands* and the *only* lands—"*peculiarly*" benefited by

the improvement; these therefore were the lands required to be assessed.

The law does not provide that all the lands in the township shall be assessed in proportion to benefits; nor that all *benefited lands* in the township shall be assessed in proportion to benefits.

The law *implies* that only a *portion* of the lands in the township is "*peculiarly benefited*" by the improvement, (while other lands in the township and outside of it, but within the county, are *generally benefited*;) and provides a *tribunal* (the assessors)——

(1.) "To consider and determine *what* lands in the township are *peculiarly* benefited." 10

(2.) "To consider and determine * * * the *amount* that *each lot* or *parcel* is so [peculiarly] benefited;" * * *

(3.) To "*assess the same* in *proportion* to *the* [peculiar] *benefit received;*" and ——

(4.) To "make a report to the Board of their '*determinations and assessments.*'"

The law required the performance of a four-fold duty by this tribunal, and they must undoubtedly show a full compliance.

The counsel for the prosecutor admits—or does not deny— 20 that the assessors have performed their duty, and fulfilled the requirements of the law in the *second*, *third* and *fourth* particulars, but denies compliance in respect to the *first* branch of their duty, viz.:

"To *consider and determine what lands* in *the township were peculiarly benefited by the improvement.*"

We insist that they have literally and fully performed this branch of their duty.

The only appropriate evidence of their acts and proceedings is their return, the "*report*" of their "*determinations* and assess- 30 ments;" "determination" of "*what lands in the township were peculiarly benefited*;" "assessments" upon the different lots or parcels composing said lands.

Their report is dated January 25, 1873, and is found on page 5, of the printed case.

After reciting their appointment, and the amount to be assessed, they proceed to say on page 5: "And having viewed the premises, and it appearing to us, and we having *considered*, adjudged, and *determined* that the lots of land hereinafter mentioned and in said township were peculiarly benefited to the extent of said aggre- 40

gate [amount to be raised] at least; and did therefore assess the same upon the several lots hereinafter mentioned,"—referring to an annexed schedule of the lots peculiarly benefited and by them so assessed.

Could a return show a more careful and exact compliance?

The law says to the assessors, "*consider* and *determine what lands* in the township are *peculiarly benefited* by this improvement, and "*report*" your "*determination*."

The assessors say in reply: After viewing the premises, we
10 "consider and determine," and do report that *the lands described in the annexed schedule* are the lands peculiarly benefited.

"*What* lands are peculiarly benefited?" is the question.

"*These* lands," is the answer.

And the answer is as broad and comprehensive as the question. (*State* vs. *Jersey City*, 4 Dutch., 500.)

But the counsel for the prosecutor insists that "the assessors confined their *search* for benefits" to the lands by them actually assessed; and he cites "in proof" of this—

(1) The report; (2) the resolution offered by Judge Williams,
20 (page 6 of the printed case); (3) the reply of the assessors, and (4) the sketch map.

1. As to the *report*, the only legitimate and appropriate evidence in the matter, that proves just the contrary. It proves that the assessors "thereupon proceeded to consider *what lands* in *the township*, &c., are peculiarly benefited, &c.' (See case p. 5, l. 30, *et. seq*).

In other words, it appears by their return, that they searched the *township* for peculiar benefits, and confined their search to no area less than its limits.

30 2. As to the *resolution*, it has no legal bearing on the case. Giving it its utmost scope, it does not show what the *assessors did*, or the *principle* of *their action*; it shows only the *opinion* or, rather, *apprehension*, of the Road Board—apprehension which evidently vanished on receiving the reply of the assessors, whose report they thereupon ratified and confirmed, thereby implying clearly that they deemed it in conformity with the law.

3. As to the *reply* of the assessors, it shows that they "made the assessments upon *the lands* peculiarly benefited," etc.; not upon *lands* peculiarly benefited, nor upon *some* of the lands peculiarly benefited, but "upon *the* lands peculiarly benefited."
40

There is nothing evasive or ambiguous in this reply. It has a tone of sincerity and honesty pervading it, and it means, if it means anything, that they made the assessments upon *all* the land *they* considered to be peculiarly benefited.

4. As to the *sketch map*—it shows where the assessors *found* the peculiar benefits, but not where they *searched* for them.

The difficulty with the prosecutor is, that he insists on substituting *his* judgment for that of the tribunal appointed by law.

The law left it to the *assessors* to determine *what* lands were peculiarly benefited - their location, and extent. 10

Because the area of assessment *adjoins* the improvement, and extends a *uniform* distance from it—the assessment is therefore alleged to be "arbitrary."

If the assessors had adjudged an acre in each of the four corners of the township to be the lands peculiarly benefited, the prosecutor would doubtless have applauded their judgment.

Those "parallel lines" are abhorred by the prosecutor, as "arbitrary," because they inclose *his* land. He would have appreciated the *justice*, as well as the beauty of a graceful curve—*away* from his domain. 20

WHY DID NOT THE PROSECUTOR ATTEMPT, BY EXAMINING THE ASSESSORS, UNDER A RULE OF THIS COURT, TO PROVE WHAT HE RELIES ON AS THE GROUND FOR SETTING ASIDE THIS ASSESSMENT?

The action of the assessors conforms to the law in every respect, nor does it violate any of the general principles enunciated in the cases cited by the prosecutor's counsel.

The questions in those cases were of construction of local statutes, and of conformity or non-conformity to their requirements, as to the mode of imposing assessments, which statutes were quite unlike the one under consideration. 30

In the case of the *State* v. *Hudson City*, 3 Dutch., 214, the charter required the commissioners (1) to examine the whole matter, (2) to report what real estate ought to be assessed for the improvement, and (3) to report what proportion of the whole expense should be assessed on each separate parcel.

The report of the Commissioners not only failed to show compliance with these requirements, but manifested positively a total disregard of those requirements, without the least examination of the matter, without attempting to ascertain *what* real estate *ought* to be assessed, and without aiming to apportion the expense 40

according to, and on the basis of benefits; "they merely applied the Procrustean rule of *dividing* the aggregate expense by the number of lots fronting on the avenue, and placing it equally on all," *without regard to benefits.*

In the case of the *State* v. *Jersey City*, 4 Dutch., 500, the requirements of the law were the same as in the last case. The report was somewhat more full, and showed that the Commissioners had (1) examined into the whole matter, (2) determined what real estate ought to be assessed for the improvement, and (3) what
10 proportion of the expense should be assessed on each separate parcel.

The Court said that the report showed a "compliance with the provisions of the charter, if the *principle* adopted to ascertain what property is benefited, and the proportionate benefit received, be correct."

It is to be observed that under the second requirement, in determining "what real estate *ought* to be assessed," and, under the third, in determining "what proportion of the expense *should* be assessed on each separate parcel"—the Commissioners did not
20 show—nor did it appear anywhere in their report—that their "determination" was on the *principle* of *benefits*. On the contrary, it appeared that they determined what real estate "*ought*" to be assessed, and how much each parcel "*should*" be *assessed*, on the principle of *frontage*, *without regard to benefits*. The Court say, "they *add up* the various bills of expense, and *divide* the amount by the number of feet *frontage* on the street."

In the case of the *State* v. *Hudson City*, 5 Dutch., 104, the requirements of the law were the same as in the two preceding cases; but the Commissioners made *no report at all*—the Court
30 saying: "the only document which the Commissioners have returned to the Common Council, is a *map*, elaborately made by a surveyor, showing a profile of the part of the avenue which was improved." * * * *

"It possesses none of the properties of the report which was required of them. It was their duty to report in terms, by writing, with their signatures, upon all the several matters specified in the section, defining their duties, so that their report and accompanying map would have been two distinct instruments. The whole thing is manifestly the work of the engineers, bearing
40 *no impress of the exercise* of judgment by the Commissioners. In

this proceeding, there has been a total failure on the part of the Commissioners to execute the duties required by the charter."

It appeared clearly that the expenses were merely *apportioned* according to *frontage*, not *assessed* on the *basis of benefits.*

In the case of the *State* vs. *Town of Bergen*, 5 Dutch., 266, the requirement was that the assessors should "assess the costs and expenses upon *the real estate of said town*, upon principles of equity, and according to the damage or the benefit which the owners may derive therefrom." In this case, the *law itself defined* the *assessment district*, and made it co-extensive with the limits of the town. 10

The assessors reported that they had assessed *only the property on the lines of the improvement*, and according to *frontage*, and the assessment was set aside as in reckless defiance of the law.

The case of the *State* vs *Town of Bergen*, 1 Vr., 307, there was a like wanton disregard of the same statute, and a reversal for the same reason as in the last case.

The case of the *Town of Bergen* vs. *the State*, 3 Vr., 490, was the preceding case removed into the Court of Errors and Appeals, where the judgment below was affirmed, and the same principles laid down. 20

In the case of the *State* vs. *Gardner*, 5 Vr., 327, the statute required "that the costs and expenses of the improvements should be raised by an equitable assessment on the lands fronting thereon, *in proportion* to the benefits received."

It appeared that the Commissioners, instead of ascertaining and determining how much each lot was *benefited*, merely *calculated* how much it *measured*, and apportioned the costs and expenses according to lineal *measurement*, instead of assessing them "*in proportion to benefits.*" 30

The case under consideration differs from the foregoing cases, *toto coelo.*

South Orange township was not constituted an assessment district, like the town of Bergen, thereby making it necessary to assess *all* the land therein, to some extent. It was delegated to the assessors to define the assessment district—to "determine *what lands*" therein were *peculiarly* benefited.

Their report—unlike those in the cases of the *State* v. *Hudson City*, 3 Dutch., 214, the *State* v. *Jersey City*, 4 Dutch., 500, and 5 Dutch., 104,—*shows* that the assessment district was determined on the *principle of peculiar benefits.* 40

The case of the *State* v. *Gardner*, had no reference to the assessment district, but to the *principle* on *which* the several lots therein *should be assessed*.

In the case at bar, there is no *pretense*, as there is no proof, that the assessments upon the different lots within the assessment district, were imposed on an erroneous principle; for the counsel for the prosecutor says: "We do not question that the assessors in this case, may have *graduated their assessments upon the several properties within their fixed limits of* 200 *feet according to the*
10 *best of their judgment*."

The counsel for the prosecutor subjoins a *query*, as to the power of the assessors to include a part of a man's land in the assessment district, and exclude the residue, "except for some particular reason;" but I am unable to perceive what the question of the *ownership* of a lot has to do with the amount of benefit it receives, or the extent of its liability to assessment.

The proceeding is *in rem*, not *in personam*.

But the only effect of enlarging the assessment district, would be to diminish the amount assessed against the prosecutor; so that
20 the error, if any, is an *excessive* assessment.

It is not alleged, nor is it proved, that the "assessment was greater than the actual benefit."

The assessment, therefore, could not be set aside on that ground, even if the prosecutor were right in his position—a position found to be untenable. (See *Road Board Pamphlet*, *pl*. 36.)

JOHN W. TAYLOR,
Counsel for the Defendants.

Court of Errors and Appeals.

THE ESSEX PUBLIC ROAD BOARD,
vs.
THE STATE,
(THOMAS D. KILBURN, *Prosecutor.*)

On Error to Supreme Court

10

NEW JERSEY, ss:

The State of New Jersey to the Justices of our Supreme
[L. S.] *Court of Judicature, Greeting :*

Because in the record and proceedings, and also in the giving of judgment in a certain proceeding, which was in our said Court before you, between ourselves (Thomas D. Kilburn, prosecutor,) and the Essex Public Road Board, in a matter of certiorari, as it is said, manifest error hath intervened, to the great damage of the said The Essex Public Road Board, as by their complaint we are informed. We, 20 being willing that the error (if any there be) should in due manner be corrected, and full and speedy justice done to the parties of said in this behalf, do command you, that if judgment be given thereupon, then without delay you distinctly and openly send under your seals the record and proceedings aforesaid, with all things touching the same, to our Court of Errors and Appeals in the last resort in all causes, to be held at Trenton, on the third Tuesday of November instant, together with this writ; that the record and proceedings aforesaid being inspected, we may further cause to 30 be done thereupon what of right and according to law ought to be done.

Witness, THEODORE RUNYON, Esq. our Chancellor at Tren-

ton, the tenth day of November, in the year of our Lord eighteen hundred and seventy-four.

HENRY C. KELSEY, *Clerk.*

TAYLOR & YOUNG, *Atty's.*

The answer of the Justices of the Supreme Court of New Jersey within named. The record and proceedings, whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals in a certain schedule to this writ annexed, as within
10 commanded.

M. BEASLEY, [L. S.]
Chief Justice.

New Jersey Supreme Court.

THE STATE, *ex. rel.*,
THOMAS D. KILBURN,
vs.
THE ESSEX PUBLIC ROAD BOARD.

} *Certiorari.*

10

NEW JERSEY, *ss:* The State of New Jersey to the Essex Public Road Board, Greeting:

{ L. S. } We being willing for certain reasons to be certified of a certain assessment of benefits made by Joseph Booth, Henry N. Parkhurst, J. Ward Tichenor, Edmund Condit and William Bush, for the costs and expenses of laying out, widening and grading South Orange avenue, from the line of the city of Newark to Passaic river, bearing date January 25th, A.D. 1873, by which the sum of thirty-four thousand five hundred and sixty-three dollars and forty-eight cents was assessed upon sundry persons in the said assessment mentioned, and of a report made by the same Assessors re-affirming their first report, said second report bearing date March 8th, A.D. 1873, together with all other reports, resolutions and proceedings relating to the same, do command you, that under your official seal, you distinctly and openly certify and send to our Justices of our Supreme Court, to be held at Trenton, on the first Tuesday of November next, the said assessment reports above mentioned, and all other reports, resolutions and proceedings relating to, or concerning the same, as fully and entirely as the same remain before you, together with this writ; that therein may be done what of right and according to law ought to be done.

20

30

Witness, the Honorable MERCER BEASLEY, Chief Justice of our said Supreme Court, at Trenton, the second day of September, in the year of our Lord one thousand eight hundred and seventy-three.

BENJ. F. LEE, *Clerk.*

C. F. & C. E. HILL, *Attys. of Prosecutor.*

We, the Essex Public Road Board, do herewith send to the Supreme Court of the State of New Jersey, the assessment and proceedings within mentioned, as within we are
10 commanded.

By order of the Board.

CHAS. T. GRAY, *Clerk.*

RETURN.

ESSEX PUBLIC ROAD BOARD OFFICE,
Monday, August 29th, 1870,
3 o'clock, P. M.

The Appraisers of South Orange avenue presented their report and bills, which, after examination, were laid on the table for the present.

20 September 12th, 1870, 3 P. M.

The report of the Appraisers of Damages for South Orange avenue, from the Newark city line to the line of Millburn township, (presented at the last meeting), was examined and accepted, and ordered copied on the minutes.

TO THE HONORABLE THE ESSEX PUBLIC ROAD BOARD:

Gentlemen:—The Appraisers appointed by the Court of Common Pleas, for the county of Essex, upon the application of the Essex Public Road Board, to appraise the damages to the owners of lands through which South Orange avenue
30 is located, and to the buildings thereon, beg leave to submit the following statement of their proceedings and adjudication of awards to the parties entitled to damages, on that

part of South Orange avenue lying between the Newark city line and the line between Millburn and South Orange townships, is as follows:

To Thomas D. Kilburn, four hundred and thirteen $\frac{56}{100}$ dollars, being for land, in two tracts taken, $293; and for damages, grade, trees and fences, $120.56. Total, $413.56.

First tract, beginning at the northeast corner of land at William Gleim, on the original south line of South Orange avenue, and running easterly along said line five hundred and seventy-five feet to its intersection with the newly adopted south line of said avenue; thence westerly along said line five hundred and eighty feet to the land of William Gleim; thence northerly along his line twelve feet to the point of beginning.

Second tract, beginning at the northwest corner of land of William Gleim, on the original south line of South Orange avenue, and running westerly along said line nine hundred and thirty-two feet to land of Eugene Kelly; thence southerly along his line ten feet to the newly adopted south line of said avenue; thence easterly along said line nine hundred and thirty-eight feet to land of William Gleim; thence along his line northerly eleven feet to the beginning.

(The other appraisements, amounting in the aggregate to \$34,563.$\frac{48}{100}$, including the above \$413.$\frac{56}{100}$, and the judgment for Eugene Kelly \$1,008.$\frac{02}{100}$, and also bill of the Delaware, Lackawanna and Western Railroad Co., for laying switch, \$408.$\frac{11}{100}$, not herein estimated.)

MONDAY, February 26, 1872

The Court of Common Pleas this morning appointed the following named persons Appraisers to estimate damages by reason of the alteration of the grade of some part of South Orange avenue, viz.: Joseph Booth, William Jacobus, Edmund Condit, Henry N. Parkhurst and J. Ward Tichenor.

TO THE ESSEX PUBLIC ROAD BOARD:

We, the subscribers, Commissioners appointed by the Court of Common Pleas of the county of Essex to ascertain and assess or appraise the damages occasioned by the alteration of the grade of South Orange avenue, in the widening,

reconstructing and improving of said avenue, in the township of South Orange, between the boundary line of the city of Newark and the top of the first mountain, to the owners of land and real estate upon the line of said avenue, do respectfully report that, having taken and subscribed before a Judge of said Court, an oath to act fairly and impartially in the matter entrusted to us, according to the best of our skill and judgment, we proceeded to view and did view the premises, and having heard the parties interested, who appeared
10 before us, and the evidence of the witnesses produced by them and by the Essex Public Road Board, and having considered of the matter, we do ascertain and assess or appraise the damages occasioned to said owners respectively, by the alteration of said grade, as follows:

That is to say—To Samuel McGee, $50; to Kitchell & Hallidy, $400; to P. J. Smith, $500; to Robert McGee, $100; to Daniel T. Smith, $150; to Moses Peck, $150; to James Reilley, $100. Total, $1,450.

JOSEPH BOOTH,
20 WILLIAM JACOBUS,
HENRY N. PARKHURST,
EDMUND CONDIT,
J. WARD TICHENOR,
Commissioners on South Orange avenue.

Newark, N. J., May 25, 1872.

MONDAY, Sept. 16, 1872.

The Clerk reported the appointment on the 13th inst. by the Court of Common Pleas, of the following named parties as Assessors of Benefits for South Orange avenue, viz.: Joseph Booth, Edmund Condit, Wm. Bush, Henry N. Park-
30 hurst and J. Ward Tichenor.

REPORT TO THE ESSEX PUBLIC ROAD BOARD, DATED JANUARY 25, 1873.

Whereas, the Court of Common Pleas of the county of Essex, on request of the Essex Public Road Board, did on 13th day of September, in the year of our Lord 1872, appoint Joseph Booth, of the township of East Orange, Edmund Condit, of the township of West Orange, William Bush, of the township of Caldwell, Henry N. Parkhurst, of the city

of Newark, and J. Ward Tichenor, of the township of Bloomfield, being five disinterested freeholders, residing in the county of Essex, and State of New Jersey, Assessors to consider and determine what lands are peculiarly benefited by the laying out by the said Road Board of South Orange avenue, in said county, in accordance with the act of the Legislature, of the State of New Jersey, entitled "An Act constituting a Public Road Board for the laying out, constructing, appropriating, improving and maintaining public carriage roads in the county of Essex," approved March 31st, 1869, and of the several supplements thereto; 10

Now, therefore, we, the aforesaid Assessors, having first severally taken an oath honestly and justly to perform the duties required of an Assessor under the supplemental act of February 16th, 1870, and having given at least ten days' previous public notice of our meeting hereinafter mentioned for the performance of our said duties, specifying in said notice the purpose of said meeting, pursuant to the said supplemental act, did accordingly meet at the office of the Essex Public Road Board, No. 834 Broad street, in the city of Newark, N. J., on the 25th day of January, 1873, and thereupon proceeded to consider what lands in the township of South Orange, in the county of Essex, are peculiarly benefited by the laying out and widening of said avenue, and the amount that each lot or parcel is so benefited, and to assess the same in proportion to the benefit received. And the said Board, having laid before us a copy of all the appraisements made under the ninth section of the said supplemental act, in respect to the said avenue, with proper maps, whereby it appeared to us that the aggregate amount of damages appraised as compensation for lands in said township of South Orange, taken for and injuriously affected by the construction of said avenue, was $33,923.34; and having viewed the premises, and it appearing to us, and we having considered, adjudged and determined that the lots of lands hereinafter mentioned, and in said township, were peculiarly benefited to the extent of said aggregate at least, we did therefore assess the same upon the several lots hereinafter mentioned and designated by number, and by the names of the owners thereof respectively, so far as

(Margin line numbers: 10, 20, 30, 40)

known to us, in proportion to the peculiar benefit received, as justly and equitably as might be, after hearing all parties interested who appeared before us. And we do certify and report, that the following is a correct statement or schedule of the lots so assessed, designated by numbers corresponding to the numbers of said lots respectively marked on the map accompanying this report, together with the names of the owners or reputed owners thereof respectively, as far as could be ascertained, and the amounts assessed upon or
10 against the same respectively as aforesaid. That is to say, we have assessed upon Thomas D. Kilburn on the lot No. 44 A, six hundred and three $\frac{25}{100}$ dollars, and upon lot No. 44 B, eight hundred and eighty-five $\frac{40}{100}$ dollars. Total, \$1,488$\frac{65}{100}$.

(The remaining assessments are not here estimated.)

February 17, 1873.

Protests of parties assessed for benefits on South Orange avenue were then examined, and a number of the aggrieved parties appeared and made verbal objections. After dis-
20 cussion, Judge Williams offered the following resolution, to wit: "That after considering the several protests this day received and sent in by property owners on and near the line of South Orange avenue, be it resolved, That the Commissioners for assessments be recalled and asked to reconsider these two following questions, viz.: Did you sufficiently comply with the legal requirements to assess the benefits on the land peculiarly benefited, when you determined to limit your search for benefits to 200 feet? And, second, whether you should have fixed any limit within the township for
30 assessment?" The resolution and protests were laid over.

March 3, 1873.

The resolution of Judge Williams, laid over 17th ult., recalling the Commissioners of Assessment for South Orange avenue to reconsider certain queries embraced in said resolution, was, on motion of Judge Williams, adopted.

March 10, 1873.

A communication was received from the Assessors of

benefits for South Orange avenue, signed by them all, and dated March 8th, 1873, re-affirming their late report, to wit:

To the Essex Public Road Board:

Gentlemen: In accordance with your request, we have examined the protests and remonstrances laid before you in reference to the assessments for benefits on South Orange avenue, and are unable to find any sufficient reason for revising the same. We have also considered the resolution adopted by you, and in reply desire to say that we have made the assessments upon the lands peculiarly benefited to the extent of, and in proportion to the benefits received, according to the best of our own skill and judgment, and have complied with the legal requirements of the charter as nearly as we have been able to understand the same. 10

Joseph Booth,
Henry N. Parkhurst,
J. Ward Tichenor,
Edmund Condit,
William Bush,
} *Assessors of Benefits on South Orange Avenue.*

Dated, Newark, March 8th, 1873. 20

On motion of Judge Williams, the said report was received and ordered on file.

The foregoing copied from the record.

Chas. T. Gray, *Clerk.*

New Jersey Supreme Court.

THOMAS D. KILBURN, *vs.* THE ESSEX PUBLIC ROAD BOARD.	*On Certiorari.*

10

REASONS.

The said Thomas D. Kilburn, the plaintiff in the above-mentioned cause, assigns the following as reasons why the assessments mentioned in the writ of certiorari in said cause are unlawful and should be set aside:

First, The plaintiff's lands are assessed a greater sum of money than the actual value of the benefits accruing to the said lands from the improvements, on account of which the said assessments are made.

Second, That the said assessments are partial and unequal, 20 in that lands of equal value with the plaintiff's lands, lying adjoining and near to the plaintiff's lands, and benefited equally with the plaintiff's lands by the said improvements, are assessed a less amount than the plaintiff's lands, without reason for such difference.

Third, That the Assessors did not assess all the lands peculiarly benefited by the improvements of said South Orange avenue; but the said Assessors confined their assessment to lands lying on each side of said avenue, and within certain fixed lines drawn parallel with the side lines of said 30 avenue, and two hundred feet distant from the side lines of said avenue, for a part of the length of said avenue, and one hundred feet distant from the side lines of said avenue for another part of the length of said avenue.

Fourth, That the said assessment is unequal and unjust in that, for a part of the length of said avenue the said assessments are extended to lands lying on each side of the avenue, and within two hundred feet of said avenue ; and for the remainder of the length of said avenue the said assessments are confined to lands lying within one hundred feet of said avenue, on each side thereof.

Fifth, That the Assessors assessed lands on said avenue lying within the township of South Orange unequally with, and at different rates of, assessment of lands on said avenue 10 lying in other townships ; whereas their rates of assessment should have been equal in all the townships through which said avenue runs.

Sixth. The said assessments were made for money to pay for lands, buildings, and other property taken ; and also for damages to lands injuriously affected by the construction of said avenue, whereas the said Assessors could not assess for moneys to pay for injuries arising from the construction of said avenue, but only for land and property.

C. F. & C. E. HILL, *Attys. of Plaintiff.* 20

New Jersey Supreme Court.

THE STATE, *ex. rel.*, THOMAS D. KILBURN, *Prosecutors*, *vs.* THE ESSEX PUBLIC ROAD BOARD.	*On Certiorari.*

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It is agreed by and between the parties to this suit, that the Assessors appointed by the above named defendants to assess benefits for the improvements on South Orange avenue, in making the assessments brought up by the above proceedings, confined their assessments for benefits to premises lying within lines drawn parallel with the side lines of said avenue, two hundred feet distant from said side lines, throughout their examination and assessments.

JOHN W. TAYLOR, *Atty. for Defendants.*

20 C. F. & C. E. HILL, *Attys. for Prosecutor.*

New Jersey Supreme Court.

November Term, 1874.

THE STATE, THOMAS D. KILBURN, *vs.* THE ESSEX PUBLIC ROAD BOARD.	*On Certiorari.*

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The Court having heard the argument of counsel and inspected the assessment removed by the writ in the cause, and duly considered the reasons filed, It is ordered that said assessment be set aside, made void and for nothing holden, with costs to the prosecutors.

Entered November 11th, 1874.

On motion of

C. F. & C. E. HILL, *Atty's.*

Court of Errors and Appeals.

OF THE TERM OF NOVEMBER, A.D. 1874.

THE ESSEX PUBLIC ROAD BOARD, *vs.* THE STATE, (THOMAS D. KILBURN, *Prosecutor.*)	*On Error to Supreme Court*

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ASSIGNMENT OF ERRORS.

Afterwards, to wit, on the third Tuesday of November, in this same term, before the Court of Errors and Appeals, comes the said The Essex Public Road Board, by Taylor & Young, their attorneys, and say that in the record and proceedings aforesaid, and also in giving judgment aforesaid, there is manifest error in this, to wit, that the said Supreme Court, in and by their said judgment, did determine that the said assessment against the said Thomas D. Kilburn was defective and illegal.

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2. And also there is error in this, to wit, that the said Court set aside said assessment, although it did not appear to said Court that said assessment was greater than the actual benefit received by the assessed lands of the said prosecutor, from the laying out and opening of South Orange avenue, in said record and proceedings mentioned.

3. And also there is error in this, to wit, that the judgment aforesaid, by the record aforesaid, appears to have been given for the said Thomas D. Kilburn against the said The Essex Public Road Board, whereas, by the law of the

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land, the said judgment ought to have been given for the said The Essex Public Road Board against the said Thomas D. Kilburn.

And the said The Essex Public Road Board pray that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

TAYLOR & YOUNG, 10

Attys. for Pltffs. in Error.

Joinder in Error, by the defendant.