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Notice of Appeal and Assignment of Grounds of Appeal

Filed May 25th, 1917.

New Jersey Supreme Court.

HENRY CLAUSEN, MARY RENNER, FREDERICK CLAUSEN and WILLIAM CLAUSEN, Prosecutors-Respondents, vs. THE MAYOR and COMMISSIONERS OF THE VILLAGE OF RIDGEFIELD PARK and GEORGE VAN BUSKIRK, Clerk of the County of Bergen, Respondents-Appellants.	Notice of Appeal and Assignment of Grounds of Appeal.

To Wm. J. Morrison, Jr.,
Attorney for Prosecutor-Respondents.

Take notice that the defendants appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. Because the New Jersey Supreme Court erroneously set aside the two assessments made by the defendants for the laying out and opening of Overpeck Avenue in Ridgefield Park, New Jersey.

2. Because the New Jersey Supreme Court held that any special benefits accruing to the land in question by reason of the opening of Overpeck Avenue were taken into consideration by the Commissioners in condemnation and an award made therefor.

Dated May 23rd, 1917.

CLIFFORD K. READ,
Attorney for Appellants.

THOMAS J. BROGAN,
Of Counsel.

Service of the foregoing notice and grounds of appeal is acknowledged this 23rd day of May, 1917.

W. J. MORRISON, JR.,
Attorney for Respondents.

Answer to Notice of Appeal and Assignment of Grounds of Appeal

Filed May 28, 1917.

COURT OF ERRORS AND APPEALS OF NEW JERSEY,

HENRY CLAUSEN, MARY RENNER, FREDERICK CLAUSEN and WILLIAM CLAUSEN, Prosecutors-Respondents, vs. THE MAYOR and COMMISSIONERS OF THE VILLAGE OF RIDGEFIELD PARK and GEORGE VAN BUSKIRK, Clerk of the County of Bergen, Respondents-Appellants.	On Appeal from Supreme Court.

The respondents, prosecutors below, answering the appellant's notice of appeal and assignment of grounds of appeal say that there is no error either in the record and proceedings in the New Jersey Supreme Court, or in the judgment of said court, and pray that the said judgment may in all things be affrmed.

WM. J. MORRISON, JR.,
Of Counsel with Prosecutors-Respondents.

Service of the within answer to notice of appeal and assignment of grounds of appeal is hereby acknowledged this 26th day of May, 1917.

CLIFFORD K. READ,
Attorney for Respondents-Appellants.

Opinion of Supreme Court.

Filed February 21st, 1917.

NEW JERSEY SUPREME COURT.

November Term, 1916.

HENRY CLAUSEN and others,

vs.

MAYOR and COMMISSIONERS OF THE VILLAGE OF RIDGEFIELD PARK.

Argued November 8th, 1916; Decided February , 1917. Certiorari.

Before Justices SWAYZE, MINTURN and KALISCH.

WILLIAM J. MORRISON, JR., for Prosecutors.
CLIFFORD K. READ, for Defendants.

Per Curiam:

A writ of certiorari was issued, a return made, and reasons filed, and although the writ and return are not printed at length, we think the case may properly be determined on the agreed state of the case as printed.

Ridgefield Park took proceedings under the Eminent Domain Act of 1900 for condemnation of prosecutors' land for a public street. The Commissioners appraised the lands and assessed the damages to be sustained by the taking and occupancy thereof, and whatever "they were authorized and required by law to assess" at $1,250. Their report states that they award that sum "for the value of said land and for all other damages as aforesaid." The award was paid by the Village of

Ridgefield Park. Afterwards the village took proceedings to assess what remained of the tract of the prosecutors on both sides of the strip taken for a street; the land on one side was assessed at $830.80 and on the other side at $836.57. The assessment for benefits certifies that it is for the extension, laying out and opening of the street and does not exceed the special benefits. The result is, if this assessment is good, that the prosecutors lose their land and are mulcted in several hundred dollars for the cost of an involuntary transfer.

By the statute the Commissioners in the condemnation proceedings are required to make a just and equitable appraisement of the value of the land and an assessment of the amount to be paid for the land and the damages. It is not questioned that they did, as their report certifies, what the statute requires. The question now is whether the damage so ascertained, is distinct from the special benefits or whether it is what remains after deducting the special benefits. In view of previous decisions of this court, we cannot doubt that the special benefits must have been deducted in order to ascertain the amount of the award. The report certifies that they have assessed for land and damages whatever they were authorized and required by law to assess. If the statute left it at all in doubt what the law required, that doubt disappears in view of the course of decision under similar statutes. "Just compensation," we have said, "for taking part of an entire tract of land for public use, cannot, we think, be ascertained without considering all the proximate effects of the taking. These are the withdrawal of the part taken from the dominion of the former owner, the damage done to the residue by the separation, and the benefit immediately accruing to the residue from the devotion of the part taken to a certain public use. Just compensation is ascertained by combining the pecuniary value of all these facts: if any be excluded, what is given is more or less than is just. The value of land taken is no more essential to just compensation than is satisfaction for the damage done to the residue, nor is it more exempt from diminution on account of

benefits conferred." Mangles vs. Chosen Freeholders, 55 N. J. Law, 88. The assessment for benefits is, as it can only be, for special benefits, and since these must have been allowed in ascertaining the damage, the village is not entitled to be paid a second time. A similar view had already been expressed in a somewhat different case by the Court of Errors and Appeals in Davis vs. Newark, 54 N. J. Law, 595.

The assessment must be set aside with costs.

Rule Setting Aside Assessments.

Filed February 26th, 1917.

NEW JERSEY SUPREME COURT.

HENRY CLAUSEN, *et als.*, Prosecutors, vs. MAYOR and COMMISSIONERS OF THE VILLAGE OF RIDGEFIELD PARK, *et als.*, Respondents.	On Certiorari. Rule Setting Aside Assessments.

The Court having heard the argument of counsel, and inspected the assessments reviewed by the writ in this cause, and duly considered the reasons filed, it is ordered that the said assessments be set aside, made void and for nothing holden, with costs.

Entered February 26th, 1917.

On motion of
W. J. MORRISON, Jr.,
Attorney for Prosecutors.

A true copy,
WM. C. GEBHARDT,
Clerk.

State of Case.

NEW JERSEY SUPREME COURT.

HENRY CLAUSEN, MARY RENNER, FREDERICK CLAUSEN and WILLIAM CLAUSEN, Prosecutors, vs. THE MAYOR and COMMISSIONERS OF THE VILLAGE OF RIDGEFIELD PARK and GEORGE VAN BUSKIRK, Clerk of the County of Bergen, Respondents.	On Certiorari.

STATE OF CASE.

The following abridgment of the pleadings and record in this matter is, by consent of counsel for the prosecutors and for the respondents, submitted as the state of case.

Writ of Certiorari.

Allowed October 4th, 1916. Sealed October 6th, 1916.

On the application of Henry Clausen, in behalf of himself and the other prosecutors, who own as co-tenants the premises in question, Mr. Justice Parker, on October 4th, 1916, allowed the writ in this matter. The writ was sealed October 6th, 1916, runs to the Mayor and Commissioners of the Village of Ridgefield Park, in the County of Bergen, and George Van Buskirk, Clerk of the County of Bergen, and requires a return of the proceedings by which the Village of Ridgefield Park had made two certain assessments of the costs, damages and expenses, including the value

of the lands taken for the extension, laying out and opening of Overpeck Avenue, from the northerly line of Preston Street northwardly to the southerly line of Grand Avenue in the Village of Ridgefield Park, in the manner provided by law pretended to have been done under and by virtue of Chapter 243 of the Laws of 1907 (4 C. S. N. J. 5736) and an act of the Legislature of this State entitled, "An Act to Provide for the Assessment and Payment of costs and expenses incurred in constructing sewers and making other improvements in Townships and Villages," approved March 12th, 1878, on certain lots of land in the said Village of Ridgefield Park, among others upon Parcel No. 2 being the easterly portion of Lot 4, in Block S-11 on the tax map of Ridgefield Park, and upon Parcel No. 17, being the westerly portion of Lot 6, Block S-11 on the tax map of Ridgefield Park.

An order permitting depositions to be taken by either party was made by Mr. Justice Parker on October 4th,

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Return.

Filed October 25th, 1916.

1. An Ordinance of the Village of Ridgefield Park providing for the extension, laying out and opening of Overpeck Avenue from the northerly line of Preston Street, northwardly to the southerly line of Grand Avenue, in the Village of Ridgefield Park, passed March 2nd, 1915.

This ordinance provided that Overpeck Avenue in said village, be extended, laid out and opened northwardly from the northerly line of Preston Street to the southerly line of Grand Avenue, with a particular description of the said extension by reference to a map and by courses and distances, and that the lands embraced within the bounds, courses and distances above described, being the lands required for the purpose of extending, laying out and opening Overpeck Avenue, as herein ordained, be acquired by the Village of Ridgefield Park, by purchase or condemnation for the purposes aforesaid.

2. Eminent Domain proceedings. Commissioners appointed October 9th, 1915. Award filed November 24th, 1915.

On October 9th, 1915, Mr. Justice Parker, upon the application of the Village of Ridgefield Park appointed Messrs. Pell, Skinner and Demarest Commissioners to examine and appraise the lands of the prosecutors and of other owners, and to assess the damages to be sustained in the taking and condemning said lands for the public use of the Village of Ridgefield Park, for the extension of Overpeck Avenue in accordance with the above ordinance.

These Commissioners made their report and award, filed November 24th, 1915, which so far as it relates to prosecutors' lands, is as follows:

> "We do appraise the said lands and assess the damages which will be sustained by reason of the taking and occupancy of the lands owned by Henry Clausen, Nellie K. Clausen, his wife, Frederick Clausen, Antonette Clausen, his wife, William Clausen, Frederica Clausen, his wife, Mary Renner and Henry C. Renner, her husband, being the first tract, herein described, by the Village of Ridgefield Park, for the use as a public street, in the extension, laying out and opening of Overpeck Avenue in said Village of Ridgefield Park, and whatever we, as such Commissioners are authorized and required by law to assess, and having made a just and equitable estimate and appraisement of the value of said land and an assessment of the damages to be paid by said petitioner for such land and damages to the same, for the taking of the same for the purpose aforesaid do award, that petitioner, the said Village of Ridgefield Park, pay to the said owners, occupants and persons interested in said first tract of land herein described, and persons appearing of record to have any interest in said property as set forth in said petition and as set forth herein, the sum of Twelve hundred and fifty Dollars ($1,250.00), for the value of said land and for all other damages as aforesaid."

3. Assessment Proceedings. Commissioners appointed March 4th, 1916. Report filed May 2nd, 1916. Report confirmed September 25th, 1916.

On March 4th, 1916, Luther A. Campbell, Judge of the Bergen County Circuit Court, upon the application of the Village of Ridgefield Park, appointed Messrs. Romeyn, Van Valen and Shaffer, Commissioners to make an assessment of the costs, damages and expenses, including the value of lands taken for the extension, laying out and opening of Overpeck Avenue from the northerly line of Preston Street northwardly to the Southerly line of Grand Avenue in the Village of Ridgefield Park, in the manner provided by law.

These Commissioners made their report, filed May 2nd, 1916, the pertinent parts of which are as follows:

"Did ascertain and determine that the total cost, expense and damage, incurred for the extension, laying out and opening of Overpeck Avenue in said Village, as aforesaid, including the value of lands taken, did amount to the sum of Six thousand, four hundred and ninety-six Dollars and twenty-two cents (6,496.22).

That said amount is made up as follows:

Purchase, award of condemnation commission for lands and real estate	$6,150.00	
Less for sale of house	410.00	
	$5,740.00	
Printing, advertising, surveying and other necessary expenses	635.50	
Interest on $5,994.30 of Bonds outstanding, against this improvement, at the rate of five per cent. per annum, from January 27th, 1916 (date of delivery of said Bonds), to June 22nd, 1916, three months after March 22nd, 1916	120.72	
Total	$6,496.22"	

"We do certify and report that in no case do our assessments upon said lands, as herein stated exceed the special benefits arising from said improvement to the lands so assessed, to wit, the special benefits arising from the extension, laying out and opening of Overpeck Avenue as aforesaid; and we do further report that said lands so specially benefited by said improvement have not been so benefited to the full extent of the costs, damages and expenses thereof, as above stated, but that said lands specially benefited by said improvement have been specially benefited by said improvement in an aggregate amount, of Three thousand seven hundred and fifty-nine Dollars and seventy cents ($3,759.70).

That the surplus of such costs, damages and expenses, remaining after assessing the lands specially benefited to the extent of such special benefit, amounts to the sum of Two thousand seven hundred and thirty-six Dollars and fifty-two ($2,736.52) cents, which should be a debt upon and paid by the Board of Commissioners of the Village of Ridgefield Park, out of the moneys to be raised by general taxation for that purpose.

We further report that having completed our said assessment, we have caused a map to be made as provided by the Act above referred to, showing the location and boundaries of each lot so assessed, and have designated on each lot of land upon said Map, the names of the owners of said lots, so far as they are known to us, the said Commissioners, and we have also caused the lots on said Map to be numbered.

And we hereby certify that the whole amount of said assessment upon all of the lands specially benefited, is the sum of Three thousand, seven hundred and fifty-nine Dollars and seventy cents ($3,759.70) and that the amount assessed against each lot by the number as designated on said map hereto annexed and made a part of this report and the names of the owners set opposite thereto, so far as the same are known to us, the said Commissioners, are as shown on the hereto annexed schedule which is hereby made a part of our report:"

"No. 2: Owners, Henry Clausen, Frederick Clausen, William Clausen and Mary Renner, being the easterly portion of lot 4 in block S-11 on Tax Map, Ridgefield Park, assessment $830.80.

No. 17: Owners, Henry Clausen, Frederick Clausen, William Clausen and Mary Renner, being the westerly portion of lot 6 in block S-11 on Tax Map, Ridgefield Park, assessment $836.57."

This report was confirmed by Judge Campbell by an order dated September 25th, 1916.

Deposition.

Filed October 25th, 1916.

William J. Morrison, Jr., attorney for the prosecutors, deposes that the award made by the Condemnation Commissioners was paid to the prosecutors on or about December 28th, 1915.

Reasons.

Filed October 25th, 1916.

The prosecutors, by William J. Morrison, Jr., their attorney, come and pray that two certain assessments of the costs, damages and expenses, including the value of the lands taken for the extension, laying out and opening of Overpeck Avenue, from the northerly line of Preston Street northwardly to the southerly line of Grand Avenue, in the Village of Ridgefield Park, pretended to have been done under and by virtue of Chapter 243 of the Laws of 1907 (4 C. S. N. J. 5736), and an act of the Legislature of this State entitled, "An Act to provide for the assessment and payment of costs and expenses incurred in constructing sewers and making other improvements in Townships and Villages," approved March 12th, 1878, on certain lots of land in the said Village of Ridgefield Park among others upon Parcel No. 2, being the easterly portion of

Lot 4, in Block S-11 on the tax map of Ridgefield Park, and upon Parcel No. 17, being the westerly portion of Lot 6, Block S-11 on the tax map of Ridgefield Park, may be set aside and reversed and for nothing holden for the following:

Reasons.

1. The award to the prosecutors on the Eminent Domain proceedings, for their lands theretofore taken for the said extension of Overpeck Avenue by the ordinance of March 2nd, 1915, which lands with the lands of the prosecutors upon which the said assessments have now been made, formed one tract or farm, was an award of compensation for all the proximate effects of the taking, viz.: the withdrawal of the part taken from the dominion of the prosecutors, the damage done to the residue by the separation, and the benefit, other than general benefits, immediately accruing to the residue from the devotion of the part taken to public use as an extension of said Overpeck Avenue, and included the special benefits to prosecutors' lands by reason of the extension, laying out and opening of said Overpeck Avenue, for which these two assessments have now been made.

2. The said award in the Eminent Domain proceedings was the difference between the fair market value of the farm owned by the prosecutors before any part was taken and the market value of the property after the taking, exclusive of general benefits conferred on lands of the prosecutors in common with other lands in the vicinage, and included the special benefits to prosecutors' lands by reason of the extension, laying out and opening of said Overpeck Avenue, for which these two assessments have now been made.

3. The defendants, Mayor and Commissioners of the Village of Ridgefield Park, having elected to proceed under the Eminent Domain Act to ascertain the compensation to be paid to the prosecutors for their land taken for public use for the extension, laying out, and opening of said Overpeck Avenue, and said pro-

ceedings are exclusive of any subsequent proceedings under any other statute to diminish said compensation or to recover any part thereof from the prosecutors.

4. The first adjudication, the award made by the Eminent Domain Commissioners, while it stands, is conclusive upon the defendants, Mayor and Commissioners of the Village of Ridgefield Park, and cannot be collaterally attacked or reviewed by the subsequent proceeding to recover from the prosecutors by these assessments, the whole or any part of the amount awarded and paid to them in the Eminent Domain proceedings.

Stipulations.

It is stipulated that the above ordinance was passed by virtue of and in compliance with the requirements of the statutes applicable to the Village of Ridgefield Park; that the Eminent Domain proceedings were held by virtue of and in compliance with the Eminent Domain Act of 1900 (2 C. S., page 2182); that the award therein made was paid by the Village of Ridgefield Park to the prosecutors before the assessment proceedings were begun; that the assessments in question were made in the manner provided by "An Act to provide for the assessment and payment of costs and expenses incurred in constructing sewers and making other improvements in Townships and Villages," approved March 12th, 1878; and that the map annexed hereto shows the location of the said Overpeck Avenue as extended by the aforesaid ordinance and the lands of the prosecutors and others affected thereby and mentioned in the aforesaid Eminent Domain and assessment proceedings.

WM. J. MORRISON, JR.,
Attorney for Prosecutors.

CLIFFORD K. READ,
Attorney for Respondents.

Notice of Argument.

Filed October 26th, 1916.

NEW JERSEY SUPREME COURT.

HENRY CLAUSEN, MARY RENNER, FREDERICK CLAUSEN and WILLIAM CLAUSEN,
Prosecutors,

vs.

THE MAYOR and COMMISSIONERS OF THE VILLAGE OF RIDGEFIELD PARK and GEORGE VAN BUSKIRK, Clerk of the County of Bergen,
Respondents.

} On Certiorari.

To
Clifford K. Read,
Attorney of Respondents.

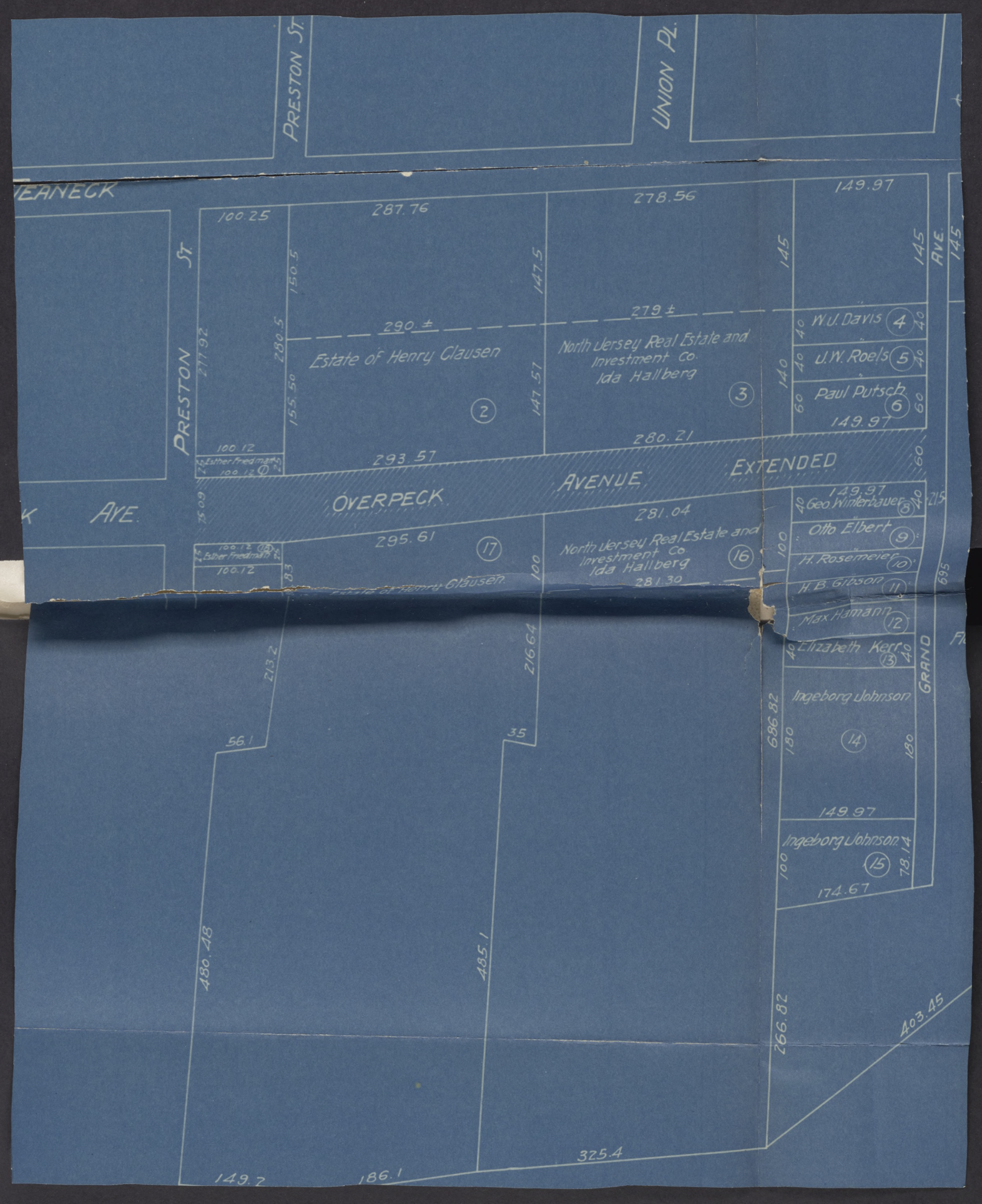
Please take notice of the argument of the above entitled cause on certiorari before the New Jersey Supreme Court at the State House, in the City of Trenton, on the first Tuesday of November, 1916, at eleven o'clock in the forenoon of said day, or as soon thereafter as the court can hear the same.

Respectfully yours,

W. J. MORRISON, JR.,
Attorney of Prosecutors.

Service of the within notice is hereby acknowledged October 26th, 1916.

CLIFFORD K. READ,
Attorney for Respondents.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Estate of Henry Clausen
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North Jersey Real Estate and Investment Co. Ida Hallberg
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W.U. Davis 4
U.W. Roels 5
Paul Putsch 6
149.97
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Esther Friedman
100.12
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Geo. Winterbauer 8
Otto Elbert 9
H. Rosemeier 10
H.B. Gibson 11
Max Hamann 12
Elizabeth Kerr 13
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North Jersey Real Estate and Investment Co. Ida Hallberg
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Ingeborg Johnson
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Ingeborg Johnson
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Court of Errors and Appeals

OF NEW JERSEY.

HENRY CLAUSEN, MARY RENNER, FREDERICK CLAUSEN, WILLIAM CLAUSEN, *Prosecutors-Respondents,* *vs.* THE MAYOR and COMMISSIONERS OF THE VILLAGE OF RIDGEFIELD PARK and GEOGE VAN BUSKIRK, Clerk of the County of Bergen, *Respondents-Appellants.*	*On Certiorari.* *On Appeal from Judgment of Supreme Court.*

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BRIEF OF RESPONDENTS-APPELLANTS.

Statement.

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The Mayor and Commissioners of the Village of Ridgefield Park proceeding under section 6, of the Eminent Domain Act, revision of 1900, volume 2 of the compiled statutes, page 2182, condemned all that parcel of land marked on map (see case, page 16), known as "Overpeck Avenue Extended."

The prosecutors owned that tract of land which fronts on Teaneck Road, and extends some hundreds of feet to the rear embracing the said parcel of land condemned. There was no entrance to this property save from Teaneck Road. Except for this frontage on Teaneck Road, the property of the prosecutors was really "Land-Locked." Subsequently to these condemnation proceedings the Bergen County Circuit Court upon application of the Village of Ridgefield Park appointed three commissioners to assess upon lands benefited thereby, the cost, damages and expenses, including value of the lands taken, for the extension of Overpeck Avenue (see case, page 9, lines 1 to 13). On

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May 2nd, 1916, these commissioners reported their assessments which were among others; No. 2, $830.80 on that part of prosecutors lands fronting on the westerly side of Overpeck Avenue as extended; and No. 17, $836.57 on that part of prosecutors' lands fronting on the easterly side of Overpeck Avenue as extended (see case, page 9, lines 14-40). This report was confirmed by Judge Campbell of the Bergen County Circuit Court by an order dated September 25th, 1916. (See case, page 11, lines 9 to 10.) On October 4th, 1916, upon prosecutors' application Mr. Justice Parker allowed a writ of certiorari requiring the return of the proceedings by which these two assessments were made. The writ was sealed October 6th, 1916. (See case, page 6, lines 30 to 42; page 7, lines 1 to 19.) The return and reasons were filed October 25th, 1916. (See case, page 7, line 23; page 11, line 25.) The facts of the case were stipulated (see case, page 13, line 15).

Case was noticed for argument before the Supreme Court at Trenton on the first Tuesday in November, 1916. (See case, page 14, lines 1 to 40.) February 21st, 1917, opinion of Supreme Court was filed setting aside said assessments of benefits. (See case, page 3, lines 1 to 42; page 4, lines 1 to 42; page 5, lines 2 to 10.)

No question is raised by the prosecutors in certiorari as to the validity of the ordinance providing for this street opening, nor is any question raised as to the regularity of the proceedings taken by virtue of section 6 of the Eminent Domain Act. It is also admitted in said stipulations filed in certiorari proceedings (see case, page 13, line 25) that the assessments in question were made in the manner provided by "An Act to provide for the assessment and payment of costs and expenses incurred in construction of sewers and making other improvements in Townships and Villages," approved March 12th, 1878; and that the map annexed hereto shows the location of the said Overpeck Avenue as extended by the aforesaid ordinance and the lands of the prosecutors and others affected thereby and mentioned in the aforesaid eminent domain and assess-

ment proceedings. (See case, page 13, lines 15 to 40.)

This appeal brings up for review the judgment of the Supreme Court, setting aside said assessments.

The prosecutors make the point that these assessments are the cost of the mere transfer of the ownership of the land from the individual to the municipality which land is to be used as a public street. This statement is not an accurate one because there is the added expense which is not at all incidental to the transfer, *i. e.,* making the survey, advertising under the statute, staking out monuments, printing and the like. To get down to the real point at issue the prosecutors vigorously contend that under section 6 of the Eminent Domain Act above referred to, they have been already assessed for special benefits received by their lands on account of this improvement.

POINT ONE.

The Eminent Domain Act in question gives no authority to the appellants herein to assess special benefits.

It must be borne in mind that the charter of the Village of Ridgefield Park contains no provision for the appointment of an assessment commission applicable to the case under consideration, but that these proceedings were conducted by virtue of the Eminent Domain Act because that is the only act under which this appellant could proceed. Section 6 of the Eminent Domain Act recites "that the Commissioners * * * shall meet at the time and place appointed and proceed to view and examine the land or other property and make a *just and equitable appraisement of the value of the same, and an assessment of the amount to be paid by the petitioner for such land or other property and damage aforesaid,* as of the date of the filing of the petition and order thereon * * * ." Section 6 above referred, which is the section under which these proceedings were taken makes no mention whatever of deductions for special benefits and it is an assumption not warranted by the language of the statute or by the

cases that touch the issue, to argue that special benefits must be considered at the time of the condemnation. For the sake of argument we can well imagine a tract of land like that of the prosecutors in certiorari which would be entirely "land-locked." Its value consequently would be very small. If some large improvement were to be projected whereby a boulevard was to be constructed through that section we can readily see if such boulevard was laid right through such land as we have described that it would increase the value of such property a great many times and yet section 6 of this act says "that a just and equitable appraisement of the value of the land must be made *and an assessment of the amount of damages to be paid by the petitioner* (*i. e.,* the municipality) for such lands or other property and damage aforesaid." Surely in a case of this kind if special benefits were considered by a commission in condemnation and under the contention of opposing counsel they would have to be considered, certainly nothing would be due and owing *from* the petitioner or municipality to the owners of such lands but on the other hand a large amount would certainly be due from the owners of the lands to the petitioner (*i. e.,* municipality or township) by reason of these special benefits and yet this section of the act under which we are proceeding negatives all idea of *payment by any land owner* whose land is taken, to the municipality even though as we have just argued the special benefits conferred by the improvement might be, as in this case they were, largely in excess of the value of the land taken and damages awarded. As to the case of Mangles vs. The Board of Freeholders quoted above it must be remembered that "just compensation" cannot be considered synonymous to "an assessment of the amount to be paid by petitioner for such land, etc.," as opposing counsel seems to have taken it to mean. It was a proceeding under a distinct and separate statute which expressly required consideration of *benefits* in the award made. In a word the statute by which that case was conducted was an act

to authorize Boards of Freeholders of counties to open public roads while appellants are proceeding under the Eminent Domain Act of 1900. These two statutes though they are miles apart seem to be the main support of the prosecutors in certiorari to maintain their position in this case. In the case of Davis vs. Newark, 54 N. J. L., 595, we find a situation that is not even analogous to this case, although counsel relies to some extent upon it. In this case a condemnation was had by the City of Newark and the proceeding itself conducted by its own Board of Assessment Commissioners, permanent appointees of the city. It was a proceeding taken by virtue of the charter of the city itself and again we find that it has absolutely nothing to do with the Eminent Domain Act of 1900. It further holds that by provision of the charter P. L. 1857, p. 116, section 100-103; P. L. 1866, p. 571, section 1; P. L. 1869, p. 672, section 3, the proper award for damages on alteration of grade is to be made after public notice, and with due regard to both the *injury* and the *benefit* arising from the public improvement." Here we find that the "injury and the benefit" are expressly set forth together in accordance with the charter of the City of Newark, which also recites that they must be considered together in the one proceeding.

POINT TWO.

The appelants were not legally authorized under the statute to do more than pay for the land taken and pay damage done remainder. They could not set off benefits.

Appellant, the Village of Ridgefield Park, relies for the validity of its proceedings now called in question upon the following statutes, namely Chapter 243 of the Laws of 1907 (4 C. S. N. J., 5736), being a supplement to "An Act for the Formation and Government of Villages"; The General Eminent Domain Act of this State, P. L. 1900, p. 79 (C. S. N. J., 2182), section 17 of which provides that "The practice prescribed by this Act shall supersede the existing practice in all con-

demnation cases for the ascertainment of compensation, except in cases of the taking of land for a public improvement, where payment of the award for land taken and damages is authorized by the Statute to be set off against or made wholly or partially in benefits to be assessed for the same improvement, in which cases the procedure prescribed by this Act shall not be exclusive of the procedure authorized by such Statutes, and the Municipal Corporation or other public body taking land for a public improvement, may elect to proceed under such Statute, and on such election, the procedure prescribed by this Act shall not apply to such taking.''

''An Act to provide for the Assessment and Payment of the costs and expenses incurred in constructing Sewers and making other improvements in Townships and Villages.'' (C. S. N. J., 3652, p. 1; 1878, p. 70.)

POINT THREE.

Compulsory acquisition of property for streets and payment thereof by assessing special benefits involves the exercise of two different high and sovereign powers, namely, that of eminent domain by which property is taken and that of taxation, Dillon on Municipal Corporation 5th Ed., section 1053. The Eminent Domain Act of 1900 exists for the former purpose and no intendment in favor of the latter purpose can be gathered from its title or its phraseology.

The benefits in this case exceeded the award by more than $400, and how by the process of set off under the eminent domain statute, could these have been recovered by the village? Manifestly they could not have been, and would consequently have been lost to the village.

The Village of Ridgefield Park was under necessity to proceed under the General Eminent Domain Act, and did so proceed in order to acquire title to lands for the extension, laying out and opening of Overpeck Avenue for the reason that the Supplement of the Village Act of 1891 above alluded to does not provide a

definite procedure for acquiring title for lands taken for public use, and for the further reason that it does not provide for the setting off of benefits to be assessed for an improvement against the damages for land taken.

The General Eminent Domain Act of 1900 above alluded to, does not expressly or impliedly provide a method whereby payment of the award for land taken and damages is authorized to be set off against or made wholly or partially in benefits to be assessed for an improvement.

No such legislative intent to offset benefits against compensation and damages for land taken can be gathered from the General Eminent Domain Act of 1900, and section 17 of said act above alluded to, tends to preclude such a construction of the statute in question.

It manifestly could not have been the intention of the Legislature that special benefits for a street improvement or any other improvement should be set off as against such compensation and damages for the reason that the General Eminent Domain Act is equally applicable to the taking of lands for public use by either a public or private or quasipublic corporation, and the Legislature never could have intended in the case of taking of lands by a private corporation that special benefits to remaining portion of lands where a part of the land owner's lands are taken, should be set off against such damages and compensation.

Sullivan V. North Hudson R. R. Co., 51 N. J. L., p. 524.

The taking of private property for a public use is a procedure in derogation of private vested rights and the general eminent domain statute should accordingly receive a strict construction and interpretation.

Compensation to be awarded to the land owner for the taking of land for public use may consist in special benefits to be set off as against damages and compen-

sation for land taken only where the statute under which proceedings for such taking are conducted, expressly authorizes such a set off of special benefits. In Swayze v. N. J. Midland R. R. Co., 36 N. J. L., p. 299, the Court said:

> "Our Constitution, Article 1, Section 16, ordains that private property shall not be taken for public use, without just compensation. Article IV, Section 7, Paragraph 9, further provides that individual or private corporations, shall not be authorized to take private property for public use, without just compensation first made to the owners. We have no clause excluding benefits in the consideration of the compensation to be made, what therefore is a just compensation is left for Legislative enactment or judicial determination."

In that case it was held that commissioners appointed to assess the value of lands and damages against a railway company could not in the absence of legislative authority consider the advantages to the land owner. It is submitted that the Legislature has not determined by the language of the General Eminent Domain Act, that a part of the compensation to be awarded to a land owner may consist in special benefits to be set off as against damages and compensation for land taken, nor has judicial determination upon this statue laid down any such rule of interpretation. In Glazier v. N. J., etc., R. Co., 60 N. J. L., 353, it was definitely decided that since under the constitutional provision, a private corporation is compelled to make compensation before taking the land, compensation cannot consist in part of benefits to be derived after the land has been taken. See also Randolph v. Chosen Freeholders, 63 N. J. L., 155, and Baltimore, etc., R. Co. v. Bouvier, 70 N. J. Eq., 158.

In New Jersey, the question under consideration first arose in State v. Miller, 23 N. J. L., 383, which was an action to set aside the proceedings for the establishment of a highway. One of the grounds of complaint was the failure of surveyors in making their estimate of

damages to take into consideration the benefits or advantages resulting to the land owner from the laying out of the road. The act under which the original proceedings were instituted was *silent* as to the *set off* of benefits. In view of this fact, the Court held that the surveyors were not bound to estimate first the damages and then the benefits, to deduct the latter from the former and to assess the remainder as damages. In Williamson v. East Amwell, 28 N. J. L., p. 270, the Court held:

> "That inasmuch as it had decided in State v. Miller, *supra,* that the assessment tribunal was not bound to deduct benefits, it could be authorized to do so only by a *statute.*"

To the same effect is Swanton v. Pierson, 37 N. J. L., 363; see also Morris, etc., R. Co. v. Orange, 63 N. J. L., 252; 43 Atl., 730. Also Crater v. Fritts, 44 N. J. L., p. 374. Also Loweree v. Newark, 38 N. J. L., 151. Lambertville v. Clevinger, 30 N. J. L., p. 53.

In Swayze v. N. J. Midland R. R. Co., 36 N. J. L., 299, the Supreme Court says:

> "It is true that in the general definitions which have been given to the term 'damages' in the proceedings for condemnation of lands by Municipalities and Railroad companies, questions have arisen and differences of opinion are expressed as to whether this term includes an offset of benefits to remaining property, which are common to the owners of lands taken and others in the same locality. The former being generally disapproved and the latter being sometimes allowed, *but it will be found that such construction is usually limited or extended by express legislative or constitutional provisions in the several States where the question has arisen.*"

The Court referring to Cooley on Const. Lim., 565, *et seq;* Dillon on Mun. Corp., 486, *et seq;* I Redf. on Railways, Ch. 11, 71.

The Court quotes further from Judge Dillon in his work on Municipal Corporations as follows:

"That in determining the quantum of damages, regard must always be had to any special constitutional or statutory provisions relating to the subject and the previous course of decision in which those provisions have not unfrequently originated."

It is submitted that there is no legislative provision of the kind contended for in the General Eminent Domain Act of 1900, nor is the act in question susceptible of any such reasonable construction, particularly in view of the fact that such statute should be strictly construed.

The plain inference from these last mentioned cases is that under statutes authorizing the appropriation of property in eminent domain proceedings, benefits cannot in the absence of legislative direction, be considered.

The case of Mangles v. Chosen Freeholders, 55 N. J. L., p. 188, much relied upon by opposing counsel, was based upon a statute which expressly provided that benefits should be considered in making an award upon lands taken.

The case of Packard v. Bergen Neck Railway Co., 48 N. J. Eq., 281, also much relied upon by opposing counsel, was a case of condemnation under the Railroad Act of 1873, and manifestly does not apply because in the condemnation of lands for railroad uses, there could be no such thing as special benefits in the sense that the expression "special benefits" is used in connection with the making of public improvements by a municipality.

The case of Davis v. Newark, 54 N. J. L., 595, also much relied upon by attorney for the prosecutors, was a case concerning damages for change of grade, and the proceedings were based upon a statute which has no application to the case at hand.

A consideration of the case of Rettinger v. Passaic, 45 N. J. L., p. 146, discloses the fact that there was an improvement in this case, which consisted of the opening or widening of a public street, and the mode of determining the damages resulting to owners of land taken for such an improvement, was prescribed by

section 61 of the original charter of Passaic, which expressly required the commissioners to have "due regard, both to the value of lands and real estate and to the injury or benefit to the owner or owners thereof by making such improvement as aforesaid."

It is respectfully submitted that the assessments against the lands of the prosecutors should be sustained.

CLIFFORD K. READ,
THOMAS J. BROGAN,
Counsel of Respondents-Appellants.

New Jersey Court of Errors and Appeals

HENRY CLAUSEN, MARY RENNER, FREDERICK CLAUSEN and WILLIAM CLAUSEN, Prosecutors-Respondents, vs. THE MAYOR and COMMISSIONERS OF THE VILLAGE OF RIDGEFIELD PARK and GEORGE VAN BUSKIRK, Clerk of the County of Bergen, Respondents-Appellants.	On Certiorari. Appeal from Supreme Court.

BRIEF FOR PROSECUORS-RESPONDENTS.

Statement.

In this case the Supreme Court set aside two assessments of the cost of extending a street through respondents' lands, made upon the residuum of their lands after that part of the lands lying in the street as extended, had been taken by the municipality by right of Eminent Domain, and after the amount of compensation had been fixed by proceedings under the Eminent Domain Act of 1900, and paid by the municipality.

The prosecutors below, now respondents, are the owners of a tract of land lying east of and fronting on Teaneck Road, an established highway extending north and south through the Village of Ridgefield Park, Bergen County, New Jersey. The respondents below, now appellants, are the governing body of that municipality, and the County Clerk, with whom were filed the papers in the proceedings to be discussed. Overpeck Avenue is a highway about 300 feet east of and parallel to Teaneck Road, and before the proceedings hereinafter mentioned, terminated at Preston Street about 100 feet south of these lands (see map, Case, page 15).

On March 2nd, 1915, the Village passed an ordinance extending, laying out and opening Overpeck Avenue northwardly from Preston Street to Grand Avenue, approximately parallel to Teaneck Road, and across these lands and others (Case, page 7, lines 22-42 and map-Case, page 15).

The owners and the Village were unable to agree upon the compensation to be made for the lands so taken for the extension of Overpeck Avenue, and the Village began proceedings under the Eminent Domain Act of 1900. Commissioners were appointed on October 9th, 1915, by Mr. Justice Parker (Case, page 8, lines 4-12) and on November 24th, 1915, made an award of $1,250 (Case, page 8, lines 12-40). This award was paid on or about December 28th, 1915 (Case, page 11, lines 15-20).

The Village then applied for the appointment of commissioners to assess upon lands benefited thereby, the cost, damages and expenses, including the value of the lands taken, for the extension of Overpeck Avenue, and on March 4th, 1916, commissioners were appointed by Judge Campbell of the Bergen Circuit Court (Case, page 9, lines 4-14).

This cost, to be so assessed, was made up of the purchase price, including the award to prosecutors-respondents in the condemnation proceeding, of the lands acquired for the extension, together with incidental expenses and interest on bonds outstanding against this improvement (Case, page 9, lines 16-40).

On March 2nd, 1916, these commissioners reported their assessments which were, among others: No. 2, $830.80 on that part of these lands fronting on the westerly side of Overpeck Avenue as extended; and No. 17, $836.57 on that part of these lands fronting on the easterly side of Overpeck Avenue as extended (Case, page 11, lines 1-8). This report was confirmed by Judge Campbell's order on September 25th, 1916 (Case, page 11, lines 9-10).

On October 4th, 1916, upon the landowners' application, Mr. Justice Parker allowed the certiorari requiring a return of the proceedings by which these two assessments were made (Case, page 6, lines 30-45, page 7, lines 1-18). The writ was sealed October 6th, 1916 (Case, page 6, line 30). The return and reasons were filed October 25th, 1916 (Case, page 7, line 23; page 11, line 26).

The prosecutors-respondents do not question the validity of the ordinance extending Overpeck Avenue, nor of the Eminent Domain proceedings, and admit that the assessments were made in the manner provided by the Act of March 12th, 1878 (Case, page 13, lines 25-40). The state of case contains a map (Case, page 13, lines 30-35) showing the extension of Overpeck Avenue in relation to these lands and the other premises in that vicinity.

The prosecutors below specified four reasons for setting aside these two assessments, which may be stated briefly as follows:

FIRST.—The award in the Eminent Domain proceedings was compensation for the withdrawal from the dominion of the prosecutors, of that part of their lands taken by the Village, and the damage done to the residue by the separation, less the benefit, other than general benefit, immediately accruing to the residue from the use, as part of Overpeck Avenue, of the land taken; and included the special benefits for which these assessments were made.

SECOND.—The award in the Eminent Domain proceedings was the difference between the fair market value of prosecutors' lands before the taking, and the market value after the taking, which included the special benefits for which these assessments are made.

THIRD.—The Village, having elected to proceed under the Eminent Domain Act, such proceedings are exclusive of any subsequent proceedings under any other statute.

FOURTH.—The award by the Eminent Domain commissioners is conclusive, and cannot be collaterally attacked by the subsequent assessment proceedings to diminish or recover the compensation theretofore fixed and paid to the prosecutors (Case, page 12, lines 10-45, page 13, lines 1-12).

I.

These assessments are for the cost (including incidental expenses) of the mere transfer of the ownership of the land in the street from the private owners to the municipality for use as a street, and are the equivalent of the benefit received by, or value added to the lands assessed by reason of that transfer.

The items of the cost assessed are:	
Purchase, award of condemnation commission for lands and real estate..	$6,150.00
Less for sale of house.....	410.00
	$5,740.00
Printing, advertising, surveying and other necessary expenses.....	635.50
Interest on $5,994.30 of Bonds outstanding against this improvement....	120.72
Total	$6,496.22

(See Case, page 9, lines 15-40.)

There are no charges for grading, paving, or otherwise improving the street and, therefore, the assessment is for the cost (including incidental expenses) of the mere transfer of the ownership of the land in the street from the private owners to the municipality for use as a street.

Such an assessment is based upon and must be measured by the benefit received by or value added to the lands assessed by that transfer, and is usually called an assessment for special benefits.

As stated by Mr. Justice Swayze in Lehigh Valley Railroad Company vs. Dover (80 N. J. L., 63, at page 65):

"The general principles governing special assessments are well settled, and it seems almost superfluous to repeat what was so well said by Chief Justice Beasley in the case of Agens vs. Newark, 8 Vroom, 415. The principle, as he states it, is that the cost of a public improvement may be imposed on particularized property to the extent to which such property is exceptionally benefitted, and that any special burden beyond that measure is illegal."

These assessments extend to the full measure of the benefit received or value added to the remaining lands by the transfer, for the commissioners report that "the lands so specially benefitted by said improvement have not been so benefitted to the full extent of the costs" but have been "specially benefitted by said improvement in an aggregate amount of $3,759.70," and that the balance of the cost should be raised by general taxation (Case, page 10, lines 7-24).

IT IS RESPECTFULLY SUBMITTED THAT, BY THESE ASSESSMENTS, THE LANDOWNERS ARE REQUIRED TO PAY THE FULL EQUIVALENT OF THE SPECIAL BENEFIT RECEIVED BY OR VALUE ADDED TO THEIR LANDS BY THE MERE TRANSFER OF THE OWNERSHIP OF THE LAND IN THE STREET FROM THE PRIVATE OWNERS TO THE MUNICIPALITY FOR USE AS A STREET.

II.

The special benefit received by these lands by the transfer of the ownership of the land in the street from the private owners to the municipality for use as a street, was included, as one of the necessary elements of compensation, in the award in the eminent domain proceedings.

The United States Constitution provides that private property shall not be taken for public use, without just compensation (Amendments:—Art. V, U. S. Comp, Stat. 1913, Vol. 1, page LVI). This is also the requirement of the New Jersey Constitution (Const. of N. J., Art. 1, Sect. 16; 1 C. S. N. J., page LVIII).

The terms "compensation," "just compensation," "adequate compensation," and the like, found in constitutions and the statutes in reference to the subject of Eminent Domain, means a full indemnity for the loss sustained by the owner of property when the property is taken or injured for public use (Am. & Eng. Ency. Law, 2nd Ed., Vol. 10, page 1132).

Blackstone, speaking of the power of the Legislature to take private property for public use, says:

> "The legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained." 1 Black. Comm., 139.

This compensation, or full indemnity for the loss, is the payment for which, in the opinion of the commissioners or other tribunal empowered to ascertain it, the owner should have been willing to sell his land.

The analogy of a taking by right of Eminent Domain and a sale was recognized by Mr. Justice Trenchard in Manning vs. N. J. Short Line Railroad Company, 80 N. J. L., 349, in which he says at page 352:

> "The condemnation is, therefore, a legal substitute for a voluntary conveyance."

The effect of the right of Eminent Domain against an individual amounts to nothing more than a power to oblige a private owner to sell or convey when the public necessary requires it. Fletcher vs. Peck, 6 Cranch, 145.

In Butler vs. Sewer Commissioners, 39 N. J. L., 665, Mr. Justice Reed says at page 670:

> "As every person selling land which is parcel of other land, is influenced in fixing his price, by the nature and permanency of the use of the part sold, through its influence upon the salable value of the remaining portion, so those who are adjusting the price for a compulsory sale under condemnation proceedings, violate no constitutional right of the land owner, when, under legislative sanction, they resort to similar considerations."

There can be no doubt that a person voluntarily selling part of his land to a municipality for use as a street, would consider, in fixing the selling price, the influence of the new street upon the salable value of the remaining portion of his lands,

which is the special benefit for which assessments such as those now under review are made; and the consideration of those benefits is, therefore, a proper element to be considered by those adjusting the price for a compulsory sale under condemnation proceedings.

Mr. Justice Dixon, in Mangles vs. Chosen Freeholders, 55 N. J. L., 88, at page 92, says:

> "Just compensation for taking part of an entire tract of land for public use cannot, we think, be ascertained without considering all the proximate effects of the taking. These are the withdrawal of the part taken from the dominion of the former owner, the damage done to the residue by the separation, and the benefit immediately accruing to the residue from the devotion of the part taken to a certain public use. Just compensation is ascertained by combining the pecuniary value of all these facts; if any be excluded, what is given is more or less than is just. The value of the land taken is no more essential to just compensation than is satisfaction for the damage done to the residue, nor is it more exempt from diminution on accounts of benefits conferred.
>
> "There is, however, a possibility of benefit to accrue from certain public uses for which land is taken, like the opening of highways, which should not be considered, for two reasons; first, because this benefit is to arise, if at all, in the indefinite future, while the compensation must be such as is just at the time of the taking; second, because it is so uncertain in character as to be incapable of present estimation. Such benefit is that which may spring from the growth of population, if it should be attracted by the public improve-

> ment for which the land is taken, and from similar sources. It is usually styled general benefit, because it affects the whole community or neighborhood. But any benefit, which accompanies the act of taking the land for the contemplated use, and which admits of reasonable computation, may enter into the award."

The analogy of a taking of Eminent Domain and a sale underlies the established rule for ascertaining compensation when part only of a tract is taken. Mr. Justice Mahlon Pitney, in Newark vs. Weeks, 71 N. J. L., 448, at page 455, says:

> "Just compensation requires that the landowner shall be made whole for the damage directly resulting to the property in consequence of the public work. In ordinary condemnation cases, where the award of compensation precedes the taking, the Courts, of necessity, resort to the fiction of a supposed purchaser and seller, willing, but not compelled to negotiate on fair terms, and reaching a fair agreement as to the value of the property as it stands before the taking and the lesser value as it will be after the proposed taking. The result is the difference in market value. Packard vs. Bergen Neck Railroad Co., 25 Vroom, 553, 560; Butler Rubber Co. vs. Newark, 32 Id., 32, 52; Ingersoll vs. Newton, 15 Dick. Ch. Rep., 399."

In Butler Rubber Co. vs. Newark, 61 N. J. L., 32, at page 52, the same rule was applied in a proceeding by the City of Newark, under Gen. Stat., page 1388, Sec. 57, etc. This statute (Section 57) requires the appointment of commission-

ers "to examine and appraise the said lands * * * and assess the damages"; requires the commissioners to "view and examine the said lands * * * and to make a just and equitable appraisement and assessment as aforesaid," and (Section 58) makes it the duty of the jury on appeal to the Circuit Court, "to assess the value of the lands * * * and damages sustained."

In Ingersoll vs. Newton, 60 N. J. Eq., 399, a case in which the town of Newton exercised the power of Eminent Domain, this rule was applied in the Court of Errors and Appeals, reversing an award of compensation fixed by another method by Vice Chancellor Pitney.

In the present case, the market value of the prosecutors' lands, as they remained after the taking, was the value of the two parcels each having a frontage on the newly extended street. Excluding the general benefit common to all lands in the vicinity, this value included the value of these parts of prosecutors' lands as they were before the taking, minus the damage by the separation into two parcels, and plus the added value by reason of this new frontage on the extended street; and the last item is exactly the same added value or special benefit for which these assessments are made.

Until the enactment of the general Eminent Domain Act of 1900, the method of fixing compensation for lands taken either by municipalities, or by railroads or other public utility corporations, as required by the several charters and other statutes, was expressed by many different although similar wordings, but the constitutional principle of compensation was, of course, the fundamental requirement. In the 1900 Act, Section 1 (2 C. S., page 2182) provides that in all cases compensation

shall be ascertained in the manner directed by that act. Section 5 (2 C. S., page 2184) provides that Commissioners shall be appointed "to examine and appraise the said land or property (i. e. the land to be taken) and to assess the damages," and Section 6 (2 C. S., page 2184) directs the Commissioners to "make a just and equitable appraisal of the value of the same (the land or property) and an assessment of the amount to be paid by the petitioner for such land or other property and damage aforesaid." Section 13 (2 C. S., page 2187) requires the jury, on an appeal to the Circuit Court to "assess the value of the land or other property and the damages sustained."

The construction to be put upon these words, as part of the 1900 Act, had not been settled by our Courts until the Supreme Court construed that Act in this case, so far as the respondents' attorney can find.

The apparently conflicting rules stated in the decisions in condemnation cases prior to the 1900 act is readily removed by an algebraic statement of the problems arising in the cases, so as to develop a formula applicable to all cases. Let the amount of the award of just compensation be designated by A; the value of the entire parcel before the taking of any of it, by V; the value of the part taken, by T; the value of what the owner has after the taking, by R; the damages done to the residue by the taking, by D; and the benefit immediately accruing to the residue from the devotion of the part taken to the use for which it is taken, by B.

The rule stated by Mr. Justice Dixon in Mangles vs. Chosen Freeholders, 55 N. J. L., 88, may then be expressed by the formula $A = T + D - B$.

The rule stated by Mr. Justice Pitney in Newark

vs. Weeks, 71 N. J. L., 448, may be expressed by the formula A = V — R.

But to ascertain the value of R, the residue after the proposed taking, we must consider the value of the whole before the taking (V) and deduct that part of the original value which is represented by the part taken (—T) and we must then make a deduction for the damages resulting from the taking (—D) and add the special benefits resulting from the taking (+B), or algebraically stated, R = V — T — D + B or —R = —V + T + D — B. And substituting this value for —R in the formula given by Justice Pitney's rule, we have

A = V — V + T + D — B = T + D — B, which is the the same formula given by Justice Dixon's rule.

In cases of condemnation by private corporations, such as Railroads, for example Glazier vs. N. J., etc., R. R. Co., 60 N. J. L., 353, in which it was held that as a private corporation is compelled by the Constitution to make compensation before taking the land, compensation cannot consist in part of benefits to be derived after the land has been taken, or in other words, the value of B at the time of making the award is zero; and Packard vs. Bergen Neck Railway Company, 54 N. J. L., 229 (Supreme Court) and 54 N. J. L., 553 (this Court) in which it was held that:

> "The circumstances in this case, as exhibited at the trial, make it clear that this road could not have had any effect in the way of adding anything to the salable value of this property, and consequently, the landowner would not have been benefited if the rule of damages had in this connection been formulated in the charge with the utmost nicety,"

or in other words, the value of B in that case was zero, the formula A = T + D — B, is in accord with the rule laid down by these decisions, for when B is zero, benefits cannot be deducted or more accurately speaking, have no value to be deducted, and therefore, do not affect the result.

This formula is in accord with the rules in all other forms of condemnation also. When an entire parcel of land is taken, the measure of the award is the market value of the whole parcel. 15 Cyc. 685. Butler Rubber Co. vs. Newark, 61 N. J. L., 32. And the formula A = T + D — B is in accord with this rule, for when the entire parcel is taken the value of both D and B is zero.

When property is injured but no part is taken, the measure of the award is the difference between the value of the property immediately before the construction of the improvement and its value afterward. 15 Cyc. 691. And formula A = T + D — B is in accord with this rule, for when property is injured but no part is taken, the value of T is zero, and D — B is the net damage to the property, or the difference in value before and after the improvement is constructed.

Whenever the courts of this state have construed the words used in the statutes prior to the 1900 act, requiring the condemnation commissioners or jury upon appeal to appraise the value of the lands taken and to assess the damages, they have always required the award or verdict, A, to be the algebraic sum of the value of what was taken, T, and the net damages, D — B, which is as above demonstrated, the same as to require the difference in market value before and after the taking to be ascertained, or in other words, they have applied the formula A = T + D — B.

Let it be tested by the cases cited by the appellant. In Sullivan vs. North Hudson R. R. Co., 51

N. J. L., 518 (on Appellant's Brief, page 7, lines 31-32) an elevated railroad was to be constructed upon a city street. Mr. Justice Dixon said (at pages 543-544) "the value to the land owner of the right of way (the easement) taken by the Company must be nominal or nearly so," that is, the value of T was zero or nearly so; and at page 540, "of special benefits, there are none in the present case," that is, the value of B is zero. And a judgment for the amount of the damages, D, plus a nominal value, T, for the easement, was affirmed.

In Swayze vs. N. J. Midland R. R. Co., 36 N. J. L., page 295 (on Appellant's Brief, page 8, line 4, and page 9, lines 21-22) the Court decided that the assessment was made in a manner not warranted by the defendant's charter, but Mr. Justice Scudder said at page 300:

> "This would seem to be a more just and equitable method of estimating the damages the land owner will sustain, by allowing such as are above the special and peculiar benefits he will receive, and it is difficult to see why he should have any more. It is the measure of his actual loss or injury."

His words "by allowing such (damages in addition to the value of the land taken) as are above the special and peculiar benefits he will receive" are expressed by $A = T + D - B$, and the formula applies.

Glazier vs. N. J., etc., R. Co., 60 N. J. L., 353, cited by appellant (page 8, line 28) has already been shown to state a rule to which the formula applies.

In Randolph vs. Chosen Freeholders, 63 N. J. L., 155, cited by appellant (page 8, lines 33-34), there

was an application before any award was made, for a writ of certiorari to review the proceedings by which commissioners were appointed, and the statute under consideration expressly provided for the consideration of benefits. Mr. Justice Collins said (at page 162) :

> "But in any case the doctrine does not exclude the taking into account of special benefits to lands a part of which only is taken, for those are as much involved in the ascertainment of the just compensation of the constitution as are the damages to such lands."

In Baltimore, etc. R. Co. vs. Bouvier, 70 N. J. Eq., 158, cited by appellant (page 8, lines 34-35), Vice Chancellor Pitney (at page 184) refers to the difference in market value before and after the taking, which is as already shown, a rule expressed by the formula.

As to State vs. Miller, 23 N. J. L., 383 (cited, page 8, line 37) and Williamson vs. East Amwell, 28 N. J. L., 270 (cited, page 9, line 8) the Court pointed out in the quotation from the latter case printed by the appellant, that the deduction of benefits could be authorized by a statute, which is exactly what the respondent contends has been done by the 1900 Eminent Domain Act, construed in the light of the cases from which the above formula is deduced. Swanton vs. Pierson, 37 N. J. L., 263 (cited, page 9, lines 16-17) cites and follows the two cases last mentioned.

In Morris and Essex R. R. Co. vs. Orange, 63 N. J. L., 252 (cited, page 9, lines 17-18), eight of the Justices of this Court concurred in the opinion of Mr. Justice Depue. This case concerned an assessment of damages and for benefits for laying out a street across the railroad. At page 270, Justice

Depue says that the railroad is entitled to merely nominal compensation for the use of the locus in quo for a highway crossing, i. e. the value of T is zero; and that adequate compensation should be made for necessary structural charges, i. e. the value of D is substantial; and (at page 271) he says:

> "The report which was brought under review in the Supreme Court assessed the company for benefits. We think in principle this was erroneous. The sum assessed is small, but the principle on which assessments for benefits for the opening of streets are made does not justify any assessment against the company for benefits arising from the opening of this street."

Or in other words there were no special benefits in this case, i. e., the value of B was zero, and by substituting these values in the formula we find that it expresses the rule laid down by this court in that case.

Crater vs. Fritts, 44 N. J. L., 374, is cited (page 9, lines 18-19), but as it is questioned, if not expressly overruled, by Justice Collins in Randolph vs. Freeholders of Union, 63 N. J. L., 155, at 162, no further discussion is necessary.

In Loweree vs. Newark, 38 N. J. L., 151 (cited, page 9, line 19), it was expressly held that:

> 2. The peculiar benefit derived by the owner from the improvement, in respect of which he may lawfully be compelled to contribute towards the costs and expenses, may be taken as part of his compensation for lands taken, and the legislature may constitutionally provide, that the assessment for benefits may be

set off in an action by the owner to recover the assessment for the damages for the taking of lands.

Which is exactly what respondent contends the legislature has done in the 1900 Eminent Domain Act, construed as above stated by the decisions from this formula is deduced.

In Lambertville vs. Clevinger, 30 N. J. L., 53 (cited, page 9, line 20) it is expressly stated that the land owner is entitled to the benefit which he derives, in common with other property holders on the street, by making of the improvement, and the benefit he receives in common with others cannot be deducted from his damages, i. e., general benefits cannot be deducted. This the respondent concedes.

The respondents contend, therefore, that the earlier decisions construing similar words directing an appraisal of the land and assessment of the damages as used in the other statutes, and also the constitutional requirement that "just compensation shall be made," lead to a construction of the 1900 Eminent Domain Act requiring the assessment commissioners or a jury on appeal to make an award which is the algebraic sum of the value of the parcel taken, the damages to the remaining land and the benefits received by the remaining land, or in other words, requiring them to apply the formula $A = T + D - B$, which is merely the representation by algebraic symbols of the rule stated by Justice Dixon, in Mangles vs. Freeholders, supra, which was cited and followed by the Supreme Court in this case, and that the apparent conflict in the earlier decisions is removed by substituting for one or more of the quantities indicated by this formula a zero value when that particular element of compensation was without value or, in other words, absent from the case.

And if in any application of this formula, A = T + D — B, the value of B is so large that it exceeds the sum of T + D, so that the algebraic total, or value of A, is a negative quantity, this does not disprove the formula, but merely indicated that instead of a payment to the owner of an award, there is to be a payment by the owner of an assessment, a result ordinarily reached by exercise of the Taxing Power, but as Justice Dixon said in Mangles vs. Freeholders, 55 N. J. L., 88, at page 93:

> "That a right to charge landowners for special benefits conferred by a municipal improvement pertains to the taxing power does not prove that a similar right may not belong to the power of eminent domain. Sometimes the same result may be attained by force of different branches of the sovereign prerogative. Thus private property may be taken for public use under the police power or under the war power, as well as under the power of eminent domain."

Even in cases arising from the exercise of the Taxing Power, the formula is good, for in cases in which an assessment for benefits for an improvement is made under this power, the value of T, that which is taken, is zero, for nothing is taken; and the amount of the assessment, (–A) which may be levied on lands must not, by the rule established by our decisions in assessment cases, exceed the special benefits received. And it is a further confirmation of this formula that we find it decided in cases like Norwood vs. Baker, 172 U. S., 269, and French vs. Barber Asphalt Co., 181 U. S., 324, that the exaction from the owner of abutting property of an assessment in substantial excess of the

special benefits, is to the extent of such cases, a taking under the guise of taxation of private property for public use without compensation, an act of confiscation and not a valid exercise of the taxing power. These special benefits are the gross benefit diminished by any damage which the property sustains by reason of the improvement. So that in using the formula, $A = T + D - B$ for assessments under the taxing power, T is zero, and B exceeds D and the result is a negative quantity. This result is interpreted by saying that instead of an award to be paid to the owner as in Eminent Domain, there is an assessment to be paid by the owner in assessment proceedings under the Taxing Power.

And although it is true as appellant suggests (Brief, page 4, lines 6-31) that the 1900 Eminent Domain Act makes no provision for a payment by the land owner to the body proceeding under that act, in cases in which the value of B exceeds the sum of T + D, so that the result, A, is negative, this does not prove that the formula should not be applied in cases in which the result (A) is positive as it is in nearly all cases of Eminent Domain, but it does prove, at most, that this one possible result of a condemnation, i. e., one by which the owner would be benefited to an extent greater than the sum of the value of the land taken and the damages, was not foreseen, or at least was not provided for by the Legislature by the procedure prescribed by this act. However, this contingency was provided for in cases in which other acts and municipal charters might be applied in cases within the exception in Section 17. When the value of the "land taken and damages is authorized by statute to be set off against benefits" we have the case in which B is greater than T + D so that A is negative; when they are made "wholly in benefits" we

have the case in which B = T + D so that A is zero; and when they are made "partially in benefits" we have the case in which B is less than T + D, so that A is positive, as in cases like the present case in which the same result would have been reached either under the 1900 Act or under such other statute as might have been applied under Section 17, had the municipality so elected.

That an award of compensation as ascertained under the Eminent Domain Act for taking part of an entire tract for public use, must include a consideration of the benefit immediately accruing to the residue from the devotion of the part taken to the stated public use, i. e., the special benefits, is indicated by the provisions of Section 17 of that act (2 C. S., page 2188).

By that section, it is provided that:

> "The practice prescribed by this act shall supersede the existing practice in all condemnation cases for the ascertainment of compensation, except in cases of the taking of land for a public improvement where payment of the award for land taken and damages is authorized by statute to be set off against or made wholly or partially in benefits to be assessed for the same improvement, in which cases the procedure prescribed by this act shall not be exclusive of the procedure authorized by such statutes, and the municipal corporation or other public body taking land for a public improvement may elect to proceed under such statute, and on such election the procedure prescribed by this act shall not apply to such taking."

In other words, this section of the 1900 Act provides that when under other statutes the form-

ula A=T+D—B can be applied, the public body taking the land may elect to proceed under such other statute, and that in all other cases the 1900 Act prescribes an exclusive practice.

It is apparent that in cases like the present where the "improvement" is merely the transfer of the ownership of the land in the street from the private owner to the municipality for use as a street; that unless the award to the land owners made as required by the Eminent Domain Act would be substantially equal to what he would receive in a "case" within the exception stated in Section 17 of the Eminent Domain Act, after an "award for lands taken and damages * * * set off against or made wholly or partially in benefits to be assessed for the same improvement, i. e., special benefits, this exception defeats the purpose of the act which is to provide a uniform method for ascertaining compensation in all Eminent Domain proceedings. Such construction is, of course, impossible; and the special benefits resulting from the mere taking of the land for use as a street, must, therefore, be considered in fixing the amount to be received by the owner by either procedure, as otherwise, the amount to be paid to the landowner would depend upon which of these two forms of procedure should have been selected by the municipality, and to permit this would defeat the purpose of the act which is to provide a uniform method for ascertaining compensation.

IT IS RESPECTFULLY SUBMITTED THAT THE SPECIAL BENEFIT RECEIVED BY THESE LANDS BY THE TRANSFER OF THE OWNERSHIP OF THE LAND IN THE STREET FROM THE PRIVATE OWNERS TO THE MUNICIPALITY FOR USE AS A STREET, WAS INCLUDED, AS ONE OF THE NECES-

SARY ELEMENTS OF COMPENSATION IN THE AWARD IN THE EMINENT DOMAIN PROCEEDINGS.

III.

These assessments were rightfully set aside because the special benefit upon which they are based was included as a necessary element of the condemnation award, which cannot be thus reviewed.

It is unnecessary to consider in this matter, whether the condemnation commissioners did in fact, deduct anything for the benefits, because their award cannot be attacked collaterally in this proceeding. In Davis vs. Newark, 54 N. J. L., 595, the Court of Errors and Appeals held that:

> "When, under the charter of the city of Newark, an award has been made to an owner for damages caused to his house and lot by the alteration of a street grade, an assessment cannot be levied against him for benefits supposed to accrue to the same house and lot from the same alteration. The first adjudication, that the premises are damaged by the change, concludes both parties while it stands."

And in Rettinger vs. Passaic, 45 N. J. L., 146, the Supreme Court held that:

> "Land-owners, part of whose land was taken for a public street in the city of Passaic, and to whom damages were paid by the city under an award made pursuant to section 61 of the charter of 1873 (Pamph. L., page 484) in which award the benefit resulting to the land-

owners was considered and allowed, cannot thereafter be assessed for benefits under the original charter or the amendments thereto in 1875 (Pamph. L., page 570) although the commissioners to assess for benefits find that such land owners were more benefited than injured. The first adjudication of benefits cannot be thus reviewed."

The present case, although arising under other statutes than the cases last cited, is governed by the same principles. In this case, the condemnation commissioners decided that the prosecutors-respondents were entitled to receive $1250 from the Village by reason of the transfer or involuntary sale of part of their land to the Village for use as a street. The assessment commissioners, subsequently appointed, decided that they should, by reason of the same transfer, repay the Village $1667.37.

IT IS RESPECTFULLY SUBMITTED THAT THE FIRST ADJUDICATION CANNOT BE THUS REVIEWED, AND THAT THESE ASSESSMENTS WERE RIGHTFULLY SET ASIDE.

IV.

The appellant, having elected to proceed under the Eminent Domain Act, such proceedings are exclusive of any subsequent proceedings under the Village Act, by virtue of which the appellant has attempted to make these assessments.

By a supplement (P. L., 1907, page 581) to the Village Act of 1891, under which the Village of

Ridgefield Park is incorporated, the legislature has enacted (by Section 7) that if the governing body of the Village is unable to agree with the owner of lands taken for the purpose of laying out a street "as to the value thereof and the amount to be paid to such owner" the same shall be ascertained by commissioners to be appointed and to act under P. L., 1878, page 70, and (by Section 6) that the cost, etc., of taking the land, shall be assessed and collected by commissioners to be appointed and to act under the same act. In Morris vs. Newark, 73 N. J. L., 268, at page 270, Mr. Justice Garrison, held a statutory proceeding by the City of Newark, for the appointment of commissioners to make the assessment for damages and for benefits under P. L., 1892, page 255 at 256 (which is similar to the last mentioned provisions of the supplements to the Village Act applicable to the Village of Ridgefield Park), to be such a "case" as defined by the exception in Section 17 of the Eminent Domain Act. We may, therefore, assume that the appellants were, by the express provision of Section 17, empowered to elect whether the respondents' lands should be acquired by proceedings under the Eminent Domain Act or by proceedings under the Village Act. They elected to proceed under the Eminent Domain Act and having thus declined to avail themselves of the exception stated in Section 17, they are bound by the express requirements of Section 17 of that Act that "the practice prescribed by this Act shall supersede the existing practice in all condemnation cases for the ascertainment of compensation."

IT IS RESPECTFULLY SUBMITTED THAT AFTER APPELLANTS HAD ONCE ELECTED TO PROCEED UNDER THE EMINENT DOMAIN ACT THE SUBSEQUENT PROCEED-

INGS UNDER THE VILLAGE ACT, BY WHICH IT ATTEMPTED TO MAKE THESE ASSESSMENTS, WERE UNWARRANTED.

V.

Further reply to brief of respondents-appellants.

The appellants say in their brief (page 3, lines 4-16) that

> "The prosecutors make the point that these assessments are the cost of the mere transfer of the ownership of the land from the individual to the municipality, which land is to be used as a public street. This statement is not an accurate one, because there is the added expense which is not at all incidental to the transfer, i. e., making the survey, advertising under the statute, staking out monuments, printing and the like. To get down to the real point at issue the prosecutors vigorously contend that under Section 6 of the Eminent Domain Act above referred to, they have been already assessed for special benefits received by their lands on account of this improvement."

The total amount expended for incidental expenses was only $635.50 (Case, page 9, lines 30-31). It cannot be that appellants seriously contend before this Court that an expenditure of $635.50 could justify these assessments of $830.80 and $836.57, a total of $1667.37 (Case, page 11, lines 1-10). Nor do respondents contend that "they have already been assessed for special benefits" nor that the Eminent Domain Act gives authority

to assess special benefits, as stated in appellants' Point One. The respondents' contention is that these assessments should be set aside because the special benefit upon which they are based was included as a necessary element of the condemnation award, which cannot be thus reviewed.

Appellants say, under Point One of their brief (page 3, lines 22-28) that

> "It must be borne in mind that the charter of the Village of Ridgefield Park contains no provision for the appointment of an assessment commission applicable to the case under consideration, but that these proceedings were conducted by virtue of the Eminent Domain Act because that is the only act under which this appellant could proceed."

and under Point Three (page 6, lines 35-40 and page 7, lines 1-5)

> "The Village of Ridgefield Park was under necessity to proceed under the General Eminent Domain Act, and did so proceed in order to acquire title to lands for the extension, laying out and opening of Overpeck Avenue for the reason that the Supplement of the Village Act of 1891 above alluded to does not provide a definite procedure for acquiring title for lands taken for public use, and for the further reason that it does not provide for the setting off of benefits to be assessed for an improvement against the damages for land taken."

The attention of the court is respectfully directed to a supplement (P. L. 1907, page 581; 4 C. S. N. J. 5735, et seq.) to the Village Act of 1891, under which the Village of Ridgefield Park is in-

corporated, by which the legislature has enacted (by Section 7) that if the governing body of the village is unable to agree with the owner of lands taken for the purpose of laying out a street "as to the value thereof and the amount to be paid to such owner" the same shall be ascertained by commissioners to be appointed and to act under P. L. 1878, page 70. Appellants state, under Point Two (page 5, lines 34-37) that they rely for the validity of these proceedings upon this act, which is Chapter 243 of the Laws of 1907, and is so cited by appellant.

As to the appellant's Point Two, it is respectfully submitted that under the statutes there cited, appellant had, as pointed out under Point III of respondents' brief, an election to proceed under either the Eminent Domain Act or the 1907 Supplement to the Village Act, but could not elect to proceed under the one and then invoke part of the other.

Appellant's Point Three is

> "Compulsory acquisition of property for streets and payment thereof by assessing special benefits involves the exercise of two different high and sovereign powers, namely, that of eminent domain by which property is taken and that of taxation, Dillon on Municipal Corporation, 5th Ed., Section 1053. The Eminent Domain Act of 1900 exists for the former purpose and no intendment in favor of the latter purpose can be gathered from its title or its phraseology."

This very argument was advanced by a property owner in Mangles vs. Chosen Freeholders, 55 N. J. L., 88, from which the following is quoted (at page 93)

"But, say the prosecutors, the right to assess land for benefits arising out of municipal improvements is a branch of the taxing power which is not delegated to the commissioners under this statute, since they are not authorized to levy such an assessment, but are mere agents in the exercise of the power of eminent domain." * * *

"That a right to charge land owners for special benefits conferred by a municipal improvement pertains to the taxing power does not prove that similar right may not belong to the power of eminent domain. Sometimes the same result may be attained by force of different branches of the sovereign prerogative. Thus private property may be taken for public use under the police power, or under the war power, as well as under the power of eminent domain."

Appellants' first statement under this Point Three (page 6, lines 29 and 30) is petitio principii. The fact is that the amount which appellant seeks to collect from respondents by these assessments exceeds the amount paid by appellant to respondent by the Eminent Domain award by more than $400, and appellant assumes that which is the very thing which it seeks to prove, i. e., that the Eminent Domain award did not include, as a necessary element, a deduction of the special benefits.

VI.

It is respectfully submitted that there is no error in the record and proceedings in the Supreme Court nor in the judgment of said court, and that said judgment should be in all things affirmed.

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