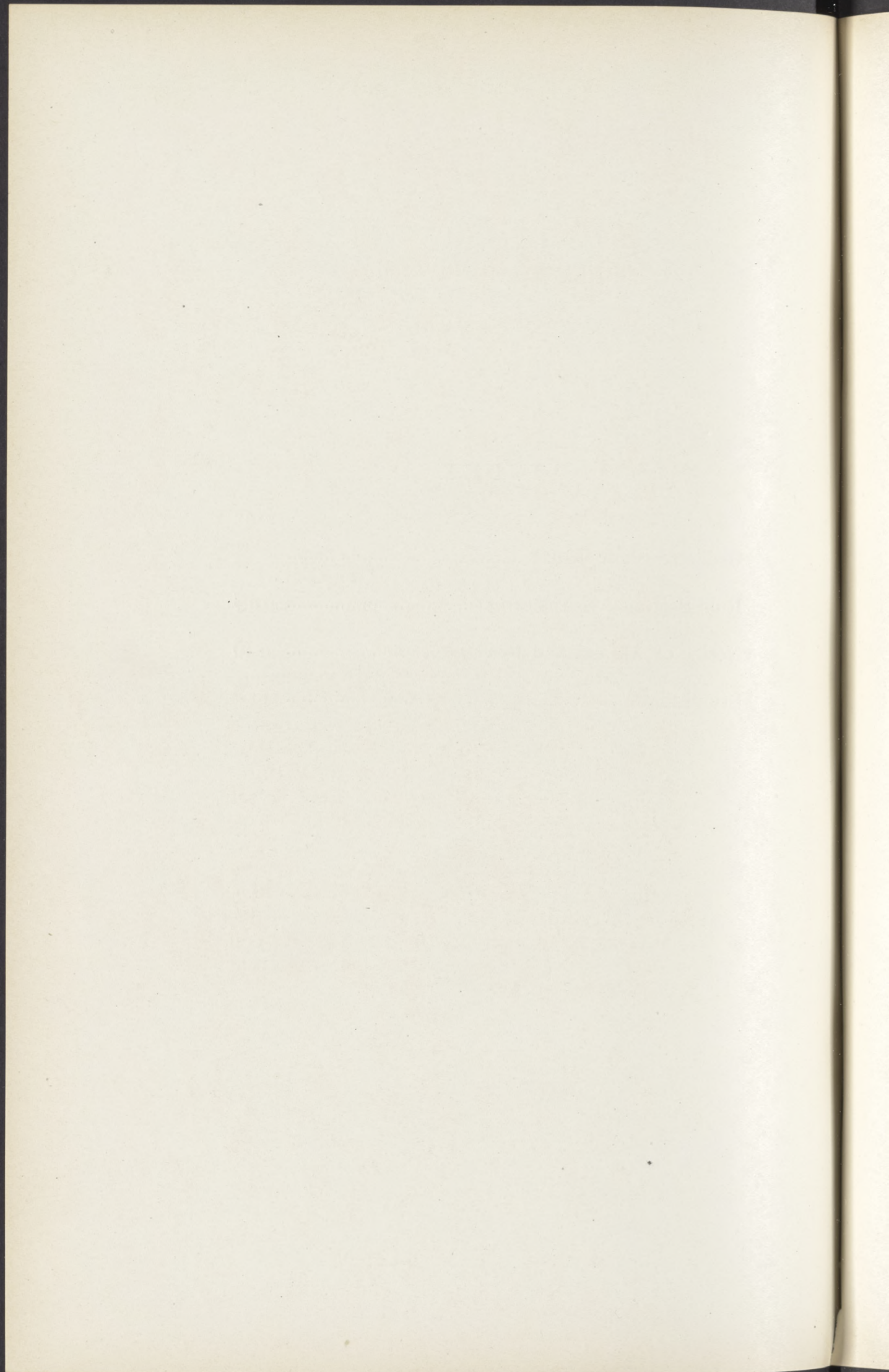


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ORDER TO SHOW CAUSE.

ATLANTIC COUNTY CIRCUIT COURT.

In the Matter of the Con- demnation of Lands of JOSEPH M. MITCHESON by the CITY OF VENTNOR CITY, NEW JERSEY.	} On Appeal, &c. Order to Show Cause.	10
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Application to this end having been made within the time required by law.

It is on this first day of July, 1925, on motion of Cole & Cole, solicitors of Joseph M. Mitcheson, appellant, ordered that the City of Ventnor City show cause before the Court at Chambers, Guarantee Trust Building, Atlantic City, on Friday, the thirtieth day of October next at 10 o'clock in the forenoon, why the verdict of the jury should not be set aside and a new trial granted on the ground of inadequacy of award. 20

It is further ordered that all exceptions taken by the appellant be, and the same are reserved to him.

It is further ordered that a copy of this order which need not be formally certified be served upon Ventnor City or its solicitors within ten days from the date hereof. 30

THEO. W. SCHIMPF,
Judge.

RULE SETTING ASIDE VERDICT.

ATLANTIC COUNTY CIRCUIT COURT.

10	In the Matter of the Con- demnation and Taking of Lands of JOSEPH M. MITCHESON by VENTNOR CITY, NEW JERSEY.	}	On Rule to Show Cause Why the Verdict of the Jury Should Not Be Set Aside. Rule Setting Aside Verdict.
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20 This matter being argued, on the return of the rule to show cause why the verdict of the jury should not be set aside as inadequate and a new trial granted, in the presence of C. L. Cole, of counsel with Mitcheson, owner, and Hiram Steelman, of counsel with Ventnor City, and the Court having heard and considered the argument and having considered the question of fact and law involved and being of the opinion that the verdict of the jury was inadequate and that the Court has jurisdiction to set aside the verdict for that reason and grant a

30 new trial and being of the opinion that it should be set aside.

It is on this twenty-third day of April, 1926, on motion of Cole & Cole, attorneys for said Mitcheson,

and Appeals of New Jersey, from the rule entered on the 23rd day of April, 1926, setting aside the verdict rendered by the jury in said cause, as inadequate, and granting a new trial.

The appellants hereby assign the following reasons for the reversal of the above named Court of the rule entered against the appellant on the 23rd day of April, 1926:

- 10 1. The said Court erred in ordering said verdict set aside as inadequate.
2. The said Court erred in granting a new trial.
3. The verdict of the jury in said cause was adequate and the Court should have so found.
4. The Judge of the Circuit Court was without jurisdiction to grant a rule to show cause why the
- 20 verdict should not be set aside and a new trial granted.
5. The Judge of the Circuit Court was without jurisdiction to set aside said verdict and grant a new trial.

J. S. WESTCOTT,
Attorney for Ventnor City.
HIRAM STEELMAN,
Of Counsel.

STIPULATION.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

In the Matter of the Con- demnation and Taking of Lands of JOSEPH M. MITCHESON by VENTNOR CITY, NEW JERSEY.	}	Stipulation.	10
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The following facts as pertinent to the issue are hereby made the subject of stipulation between the respective parties. 20

Lands situate in Ventnor City, Atlantic County, New Jersey, belonging to Joseph M. Mitcheson, the respondent herein; were condemned by Ventnor City under the Eminent Domain Act, 2 Compiled Statutes, p. 2182.

The owner filed the statutory appeal to the Circuit Court where the issues were tried before the Judge of the Circuit Court and a jury.

The jury returned their verdict. A rule to show cause why the verdict of the jury should not be set aside as inadequate and a new trial granted was taken by the respondent. On argument duly had the Court made the rule absolute, set aside the verdict and ordered a new trial. 30

The sole question to be raised by this appeal is the jurisdiction of the Judge of the Circuit Court to set aside the jury's verdict and grant a new trial.

HIRAM STEELMAN,
*Attorney for and of Counsel
with Appellant.*

COLE and COLE,
*Attorneys for and of Counsel
with Respondent.*

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

In the Matter of the Condemnation and Taking of
Lands of JOSEPH M. MITCHESON By VENTNOR
CITY, NEW JERSEY.

APPELLANT'S BRIEF.

This appeal arises by virtue of the condemnation of certain lands by the City of Ventnor City pursuant to the Eminent Domain Act, revision of 1900 (P. L. 1900, p. 79).

Commissioners duly appointed made their award, from which the owner of the land took an appeal to the Atlantic County Circuit Court. The procedure on appeal requiring the framing of an issue, the striking of a jury, taking of testimony and viewing the premises was followed and resulted in a verdict increasing the Commissioners' award. The owner was not satisfied with the jury's verdict and took a rule to show cause, the outcome of which was the Court's order setting aside the jury's verdict as inadequate and granting a new trial.

It is respectfully submitted that the Court was without jurisdiction in the premises.

The portion of the act that is applicable is as follows:

“The said Circuit Court, or any Judge thereof at the hearing under said notice, and on application of either party, shall fix a day for the trial of the appeal, either in term or vacation, which day shall not be less than twenty nor more than forty days from the date of the order, and shall also, at the same time, by order, frame the issue between the parties and direct a jury to be struck and a view of the premises and prop-

erty to be had, and shall fix a day and place for striking a jury for the trial, which day shall be at least ten days before the day fixed for the trial of the appeal, and filing of the order shall be notice to all parties of the day and place fixed thereby for the striking of the jury and of the trial, and the jury having been struck and the jurors summoned, as required by law, the cause shall be tried upon the day and at the place fixed, unless, for good cause shown, the Court shall adjourn the trial to another day which the Court shall fix, in which case the Court shall, in its discretion, either direct the same jurors to attend or order another jury to be struck and summoned in like manner, and all parties shall take notice of the day and place fixed for the adjourned trial. (P. L. 1900, p. 84.)”

“The issue shall be tried in the same manner as other issues in said Court are tried, and the jury shall assess the value of the said land or other property and the damages sustained; and if they shall find a greater sum than the Commissioners awarded, then judgment, with costs, shall be entered against the petitioner and execution awarded therefor; but if said jury shall be applied for by the owner and shall find a less sum than the Commissioners awarded, then costs shall be paid by said appellant and either deducted out of said sum found by the jury or execution awarded therefor, as the Court shall direct; where payment of the amount found by the Commissioners has been made before the trial of the appeal, to the owner, or into Court, as above provided, and the amount found by the jury shall be a less sum than was awarded by the Commissioners, the petitioner may recover back the amount paid, less the amount found by the jury, and on proof of such payment, judg-

ment may be entered by order of the Court in favor of the petitioner against the owner or owners, or either of them, for the excess recovered by him or either of them respectively, and execution therefor may be issued against any owner to recover the amount received by him; and the petitioner shall have such further remedies in law or equity as may be appropriate for the recovery of the amount paid in excess of the true value as found by the jury. (P. L. 1900, p. 85, as amended by P. L. 1903, p. 342.)”

It is the appellant's contention that the procedure, being statutory, and not being in any sense a common law procedure, is limited strictly to such provisions as are found in the statute.

This contention is borne out by:

1. The provision expressly made for an appeal to the Circuit Court in the act. Under former acts not providing for appeal an appeal could not be taken.

2. Section 12 of the act quoted above makes an express provision for the order of the Court directing that a jury be struck and a view of the premises and property to be had. This view of course refers to a view by the jury, not by the Court, and is for the purpose of enlightening any testimony that may have been given regarding the premises. To permit the Judge of the trial Court to set aside a jury's verdict after that jury has interpreted the testimony in the light of its knowledge of the premises gained from its own observation would be equivalent to saying that that section of the act was meaningless. The jury in a condemnation is the sole and last arbiter and their verdict cannot be disturbed by the Court.

In addition to the right of appeal found in the statute, we also find the right of certiorari conferred.

It is respectfully contended that this is another argument that the act is a self-contained act, excluding therefrom all remedies not found therein.

This contention is not without support in other jurisdictions although the point does not appear to have been raised before in this State. It was held in a case arising under the Eminent Domain Act of the State of Washington that the statute prescribed a special procedure distinct from the practice in civil actions, and the provisions of the Civil Practice Act authorizing courts in which actions are tried to set aside verdicts for error in assessment for damages are not applicable and do not authorize the courts to grant new trials. *U. S. v. Freeman*, 113 Fed. 370; *U. S. v. Tennant*, 93 Fed. 613; *Chicago, etc., R. Co. v. Ader*, 184 Ind. 235; *Pittsburgh, etc., R. Co. v. Crockett*, 182 Ind. 490.

Likewise under our act a special procedure is provided for condemnation of lands which differs from the procedure of the practice act and procedure under the common law. No authority being conferred by the express terms of the act for the setting aside of the verdict, none exists.

The fundamental nature of the right of Eminent Domain must be kept in sight. It is a legislative power and is not judicial in its nature, and even the right to appeal to a jury from an award is statutory. It does not exist as a matter of right and the legislature may provide such means as it may see fit for the taking of lands and payment therefor. *In re Lower Chatham*, 35 L. 497.

It is respectfully submitted that the judgment of Circuit Court should be reversed.

JOHN S. WESCOTT,
Attorney for Appellant.
HIRAM STEELMAN,
Of Counsel.

New Jersey Court of Errors and Appeals

In the matter of the condemnation and taking of
lands of JOSEPH M. MITCHESON.

ON APPEAL OF VENTNOR CITY.

BRIEF FOR RESPONDENT.

STATEMENT.

Ventnor City, by appropriate proceedings, condemned the land of Mitcheson and commissioners made an award. From this award, Mitcheson appealed to the Circuit Court and a jury trial was had pursuant to the terms of the statute. The jury awarded a verdict increasing the amount of the award made by the commissioners but for a sum much less than Mitcheson thought the testimony required the jury to find. The trial Court allowed a rule to show cause why the verdict should not be set aside for inadequacy. Upon the return of the rule, the Court's power to set aside the verdict was challenged; the Court sustained its jurisdiction to set aside the verdict for inadequacy and set it aside because it was inadequate.

It will thus be seen that the single question is, was there power and jurisdiction in the court to do what it did.

ARGUMENT.

Section 26 of the Eminent Domain Act, Compiled Statutes, page 2192, after providing for an appeal, says:

“Which proceeding shall vest in the circuit Court full right and power to hear and adjudge the same and to direct a proper issue for the trial of said controversy to be formed between said parties, and to order a jury to be struck, which, upon demand of either party, shall be a foreign jury and a view of the premises to be had; and the said issue to be tried at such time as the said court shall order upon the like notice and *in the same manner as other issues in the said court are tried.*”

There is no language in the act which deprives the Court of the usual ordinary common law jurisdiction to control verdicts and its own judgments; nor is there any language which impliedly deprives the Court of such power. So far as our investigation discloses, there is no case which directly deals with the subject. The legislature, having vested the Circuit Court with jurisdiction to hear an appeal of a property owner, it must be concluded, in the absence of some limitation to the contrary, that such investment of jurisdiction was general and that the trial was to be treated as any other trial before a jury. It seems almost preposterous to say

that if a jury should award an owner \$100 for the value of his land taken and damages to his remaining land when the minimum amount that the jury could rightly find under the evidence was \$10,000, that the Court would be helpless to sweep such a verdict aside. This illustration seems to suffice. There is nothing before this Court to warrant even the suggestion of an abuse of discretion, assuming that that question could be argued here.

Whether or not the rule setting aside the verdict is such a final judgment as this court has power to review, we feel is unnecessary to discuss. The setting aside of the verdict was proper and the appeal should be dismissed.

Respectfully submitted,

COLE & COLE,
Solicitors for Respondent.
C. L. COLE,
Of Counsel.

Since the above we find *Cadmus vs. C.R.R.*, 31 L. 179, where the verdict was set aside by the Supreme Court.

Index for Respondent

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