

New Jersey Court of Errors and Appeals.

THE MONTCLAIR RAILWAY COMPANY, }
vs. } *Points for*
SAMUEL BENSON. } *Pltff. in Error.*

1. The question in the cause was the value of certain lands of Samuel Benson, taken by the Montclair Railway for the construction of their road; and in order to prove its value in July, 1870, the time of taking, the Plaintiffs in Error, having proved that lands in that vicinity had increased in value constantly after that time, offered to prove that lands adjoining, equal in quality and value, were offered for sale during the following year and up to the time of the trial at a certain price. This testimony was competent and proper as tending to show that the value of the lands taken could not have been higher in July, 1870, and was improperly overruled by the Court.

2. Proof that adjacent lands of equal value could have been purchased at any time after the taking of the lands in question, in connection with proof that no decrease of value had taken place, was competent in order to show the value of the lands taken at the time of taking, and such testimony was improperly excluded.

PARKER & KEASBEY,

Att'ys of Pltff. in Error.

New Jersey Court of Errors and Appeals

THE MONTGOMERY RAILWAY COMPANY
vs.
SAMUEL WINSTON

1. The position to the question of the value of certain land, owned by Samuel Winston, taken by the Montgomery Railway for its extension, is not in issue; and in order to prove its value on July 1, 1879, the plaintiff in error, a duly qualified witness, in that capacity had introduced in evidence certain maps and plans, which he testified were copies of the original maps and plans, and were offered for sale during the following year, and on the time of the trial at a certain price. This testimony was competent, and proper to be received, and the value of the land in question could not have been higher in July, 1879, and was accordingly established by the Court.

2. Proof that adjacent lands of equal value could have been purchased at any time after the taking of the lands in question, in connection with proof that no decrease of value had taken place, was competent in order to show the value of the land at the time of taking, and such testimony was properly excluded.

PARKER & KEARNEY
Attys at Law

New Jersey Court of Errors and Appeals.

THE MONTCLAIR RAILWAY COM-

PANY, *Appellant*,

vs.

SAMUEL BENSON & AL., *Appellees.*

} *In Error.*

To the Circuit Court of the County of Essex, in the State of New Jersey.

The petition of Samuel Benson and Henry K. Benson respectfully shows that on the eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy, the Honorable David A. Deputie, a Justice of the Supreme Court of the State of New Jersey, did on the application of the Montclair Railway Company, appoint Grant J. Wheeler, Jesse Williams and Hugh Holmes commissioners to examine and appraise certain lands of your petitioners hereinafter described and taken by the said Railroad Company for the construction of their railroad, and the damages sustained by your petitioners by reason of the taking of the same, and that the said commissioners have made and filed their report bearing date on the thirtieth day of July, eighteen hundred and seventy, whereby they assess and appraise the value of said land and the damages sustained by your petitioners at four thousand nine hundred dollars, and your petitioners are dissatisfied with said report and feel aggrieved thereby, and hereby appeal therefrom, and pray the said Court to denote a proper time for the trial of the said controversy between your petitioners and the said The Montclair Railway Company, according to the statute in such case made and provided, in order that the value of said lands and said damages may be assessed by a jury, and your petitioners further show that the land respecting which this appeal is taken is described as follows:

All those tracts or parcels of lands and premises situate in the township of Bloomfield, Essex County, New Jersey.

First Parcel. Beginning at a point in the east side of Ridgewood Avenue, so called, one hundred and twenty-two feet from the intersection of said east side of said street with the north bounds of Benson street, so called.

Thence running south forty-one degrees east, two hundred and eighty-six feet to the west side of the street which forms the west boundary of the land of Jarvis Peloubet.

Thence running south twenty-four degrees and thirty minutes west, forty-eight feet to the north bounds of said Benson street.

Thence running north fifty-three degrees and fifty minutes west, along the north bounds of said Benson street two hundred and fifty five feet to the east bounds of said Ridgewood Avenue.

Thence running north fourteen degrees east, on the east bounds of said Ridgewood Avenue one hundred and twenty-two feet to the place of beginning, containing forty-seven-hundredths of an acre of land.

- 10 Second Parcel. Also that other piece of land situate in said township, bounded eastwardly by the west bounds of said Ridgewood Avenue, westwardly by the east side of the street which runs parallel to and next west from said Ridgewood Avenue, southwardly by a line parallel with and fifty feet distant southward from the located center line of the Montclair Railway, and northwardly and northwestwardly by a line parallel with and fifty feet distant, northwardly from said located center line and the land formerly belonging to E. W. Page, containing one acre and twenty-hundredths of an acre of land.

- 20 Third Parcel. Also all that other tract or parcel of land situate in said township,

Beginning on the west bounds of said parallel street at its intersection with the south line of said Page parcel

Thence running south fourteen degrees and fifty minutes west, along the west bounds of said parallel street forty feet.

Thence running westwardly on a curved line inclining to the northward with a radius of three thousand eight hundred and twenty feet, a distance of seventy-eight feet to said Page parcel.

- 30 Thence running south sixty-seven degrees forty-five minutes east, fifty eight feet to the place of beginning.

Being a triangular piece of land containing three-hundredths of an acre.

Fourth Parcel. And also all that other tract or parcel of land situate in said township, beginning at the northwest corner of the said Page tract.

Thence running southerly along the west line of the said Page tract fifty-four feet.

Thence running north thirty four degrees and fifteen minutes west, sixty-eight feet to the south line of the land of Philip

- 40 Weaver.

Thence running south eighty-three degrees east, along the south line of said Weaver's land forty feet to the place of beginning.

Being a triangular piece of land containing twenty-three-thousandths of an acre.

SAMUEL BENSON,

HENRY K. BENSON.

By McCARTER & KEEN,

Their Att'ys.

Essex Circuit Court.

Wednesday, April 17, 1872.

The Court met, present, Hon. DAVID A. DEPUE, Associate, &c.,
presiding.

ESSEX CIRCUIT COURT.

SAMUEL BENSON and HENRY K. BENSON, }
vs. } *On Appeal.* 10
THE MONTCLAIR RAILWAY COMPANY. }

The Court order on the trial of
this case and that the Sheriff return a panel.

Whereupon the following persons were returned and sworn as
jurors, viz.:

- | | | |
|-------------------------|---------------------------|----|
| 1. Jonathan F. Teed, | 7. Albert D. Traphagen, | |
| 2. Harvey W. Morehouse, | 8. Joseph Kingsland, Jr., | |
| 3. Ebenezer F. Condit, | 9. George C. Webner, | 20 |
| 4. Edgar Farmer, | 10. Stephen W. Tichenor, | |
| 5. Amzi Condit, | 11. Morgan T. Baxter, | |
| 6. John M. Brant, | 12. Richard S. Francisco. | |
| McCarter & Keen, | Parker & Keasbey, | |
| Pltffs' Attys. | Attys. of Defts. | |

Theodore Runyon, of counsel.

Evidence—Samuel Benson, Joseph A. Davis, Augustus T.
Morris, John P. Wakeman, James M. Hewlett, Smith E. Perry.

The Court adjourned until to-morrow morning at ten o'clock.

Thursday, April 18, 1872. 30

The Court met, present, Hon. DAVID A. DEPUE, Associate, &c.,
presiding.

The jury being called, all appeared and the trial progressed.

Evidence of Pltffs.

Evidence of Defts.

James Peck,	William Jacobus,
David K. Oakes,	Esley Elliott,
Elias O. Doremus,	Melancthon W. Smith,
William Parsons.	Mason Loomis.

The Court adjourned until to-morrow morning at ten o'clock. 40

Friday, April 19, 1872.

The Court met, present, Hon. DAVID A. DEPUE, Associate, &c.,
presiding.

The jury being called, all appeared and the trial progressed.

Evidence of Pltffs.

Evidence of Defts.

Warren S. Baldwin,
Mason Loomis,
Philip Weaver,
Henry C. Spalding.

The Court adjourned until Monday morning next at ten o'clock. 50

Monday, April 22, 1872.

The Court met, present, Hon. DAVID A. DEPUE, Associate, &c., presiding.

The jury being called, all appeared and the trial proceeded.

The evidence being closed, the jury retired to consider their verdict, a constable being sworn to attend them, when having returned into Court say they have agreed upon their verdict and by their foreman say they find for the plaintiffs, and assess their damages against the defendants at the sum of seven thousand and
10 seven dollars and eleven cents, and so they say all.

20 New Jersey Court of Errors and Appeals.

THE MONTCLAIR RAILWAY COMPANY, }

vs. }

SAMUEL BENSON and HENRY K. BENSON. }

New Jersey, Essex County, ss.

Be it remembered that on the first day of June, one thousand eight hundred and seventy-two, Julius H. Pratt and Henry C.
30 Spalding, of the said county of Essex, personally appeared before me, a commissioner to take bail and affidavits in the Supreme Court of this State, and severally acknowledged themselves to owe unto the said Samuel and Henry K. Benson the sum of fifteen thousand dollars each, to be levied upon their several goods and chattels, lands, tenements, hereditaments and real estate to the use of the said Samuel and Henry K. Benson.

The condition of this present recognizance is such that whereas the said Samuel and Henry K. Benson lately in the Circuit Court of Essex County before the Honorable David A. Depue, a
40 judge of the said court, by the consideration and judgment of the said court recovered against the said The Montclair Railway Company, defendants, the sum of seventy hundred and seven dollars and eleven cents, on an appeal from an award of commissioners, under an act entitled "An act to incorporate The Montclair Railway Company," approved March 18, 1867, in the matter of the taking of the lands of the said Samuel and Henry K. Benson for the value of the said lands and damages sustained by the said Samuel and Henry K. Benson, owners, by reason of the taking of the same by the said Company, whereof the said The
50 Montclair Railway Company were convicted.

And whereas the said The Montclair Railway Company have sued out of the Court of Errors and Appeals of this State in the last resort in all cases, on the said judgment a certain writ of error of this State, tested the twenty-fifth day of May, in the year aforesaid, directed to the said Circuit Court of Essex County.

Now, therefore, if the The Montclair Railway Company do by this or other sufficient surety prosecute the said writ of error with effect, and also do satisfy and pay unto the said Samuel and Henry K Benson if the said judgment be affirmed, all the said amount, damages and costs adjudged on the said judgment, and all costs and damages to be awarded for the delay of execution, then this recognizance to be void and of undue effect, or else to be and remain in full force and virtue.

Taken and acknowledged the day and year }
above written, before me, June 1, 1872, and }
by me approved and allowed.

JOHN W. TAYLOR,

Supreme Court Commissioner of N. J.

New Jersey, to wit.

[L. s.]

The State of New Jersey to
the Essex County Circuit
Court, Greeting:

Because in the record and proceedings and also in the giving of judgment, in a plaint which was before you on a certain appeal from an award of Commissioners, appointed under the act entitled "An Act to incorporate The Montclair Railway Company," approved March 18, 1867, in the matter of taking of the lands of Samuel and Henry K. Benson, in which suit the said Samuel and Henry K. Benson, appellants, were plaintiffs, and the said The Montclair Railway Company were defendants as it is said, manifest error hath intervened to the great damage of the said The Montclair Railway Company as by their plaint we are informed. We, being willing that the error, if any there be, should in due manner be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then you distinctly and openly send to us, under your seal, the record of the proceedings aforesaid, with all things touching the same, together with this writ so that we may have them on the third Tuesday of June next before our Court of Errors and Appeals in the last resort in all cases, at Trenton, that the record and proceedings aforesaid being inspected, we may cause further to be done thereupon what of right ought to be done.

Witness the Honorable ABRAHAM O. ZABRISKIE, our Chancellor at Trenton, the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and seventy-two.

Parker & Keasbey,

Attorneys.

H. S. LITTLE,

Clerk.

50

ESSEX COUNTY, ss: I, David A. Depue, presiding judge of the
 [L. S.] Circuit Court of the county of Essex, by virtue of the within writ to me directed do certify to the Judges of the Court of Errors and Appeals of the State of New Jersey the record and proceedings of the judgment whereof mention is made in the within writ and all things touching and concerning the same, as I am within commanded.

BY ORDER OF THE COURT.

Given under the seal of the Court the }
 10 10th day of June, A. D. 1872. }
 H. T. DUSEN BERRY, Clerk.

NEW JERSEY, }
 Essex County. } ss. Be it remembered that in the term of April, in the year of our Lord one thousand eight hundred and seventy, to wit, on the seventh day of September in the said year came Samuel and Henry K. Benson by McCarter and Keen, their attorneys, into our Essex County Circuit Court, and filed
 20 therein their petition of appeal to said Court according to the provisions of the act entitled "An act to incorporate The Montclair Railway Company," approved March 18, 1867, from the award of Grant J. Wheeler, Jesse Williams and Hugh Holmes, commissioners appointed by the Honorable David A. Depue, judge of our Supreme Court, on the application of the said Company to assess the value of the lands hereinafter described and all damage sustained by the said Samuel and Henry K. Benson by reason of the taking of the same, being lands of said appellants, situate in the township of Bloomfield, in the county of Essex and
 30 state of New Jersey, and are bounded and described as follows:

First Parcel. Beginning at a point in the east side of Ridgewood Avenue so called, one hundred and twenty-two feet from the intersection of said east side of said street with the north bounds of Benson street so called.

Thence running south forty-one degrees east, two hundred and eighty-six feet to the west side of the street which forms the west boundary of the land of Jarvis Peloubet.

Thence running south twenty-four degrees and thirty minutes west, forty-eight feet to the north bounds of said Benson street.

40 Thence running north fifty-three degrees and fifty minutes west, along the north bounds of said Benson street two hundred and fifty-five feet to the east bounds of said Ridgewood Avenue.

Thence running north fourteen degrees east, on the east bounds of said Ridgewood Avenue one hundred and twenty-two feet to the place of beginning, containing forty-seven-hundredths of an acre of land.

Second Parcel. Also all that other piece of land situate in said township, bounded eastwardly by the west bounds of said Ridgewood Avenue, westwardly by the east side of the street
 50 which runs parallel to and next west from Ridgewood Avenue,

southwardly by a line parallel with and fifty feet distant southward from the located center line of the Montclair Railway, and northwardly and northwestwardly by a line parallel with and fifty feet distant northwardly from said located center line and the land formerly belonging to E. W. Page, containing one acre and twenty-hundredths of an acre of land.

Third Parcel. Also all that other tract or parcel of land situated in said township, beginning on the west bounds of said parallel street at its intersection with the south line of said Page parcel.

Thence running south fourteen degrees and fifty minutes west, along the west bounds of said parallel street forty feet.

Thence running westwardly on a curved line inclining to the northward with a radius of three thousand eight hundred and twenty feet, a distance of seventy eight feet to said Page parcel.

Thence running south sixty seven degrees forty-five minutes east, fifty-eight feet to the place of beginning.

Being a triangular piece of land containing three hundredths of an acre.

Fourth Parcel. And also all that other tract or parcel of land situate in said township, beginning at the northwest corner of said Page tract.

Thence running southerly along the west line of the said Page tract fifty four feet.

Thence running north thirty-four degrees and fifteen minutes west, sixty-eight feet to the south line of the land of Philip Weaver.

Thence running south eighty-three degrees east, along the south line of said Weaver's land forty feet to the place of beginning.

Being a triangular piece of land containing twenty-three-thousandths of an acre.

Which said award was dated the thirtieth day of July in the said year.

Whereupon according to the provisions of the said act and the seventh section thereof, the said matter did come up before the said Circuit Court and a venire facias was awarded according to the provisions of the said act for a jury finally to hear and determine the said appeal, which said appeal

Afterwards, to wit, at the said Court holden at Newark in and for the said county, of the term of April in the year one thousand eight hundred and seventy-two, to wit, on the seventeenth day of April in said last year, came on to be tried before the Honorable David A. Depue, judge of said court, came on to be tried before the said jury of the county of Essex for that purpose duly impanelled, at which day came there as well the said Samuel and Henry K. Benson as the said The Montclair Railway Company by their respective attorneys aforesaid and the jurors of the jury aforesaid impanelled to try the aforesaid issue being called also came, and a view having been had of the said premises under the direction of the Court, according to the statute, by twelve or

more of the said panel, were then and there duly chosen and sworn to try the same appeal, and the value of the said lands and damages sustained by the said appellants according to the said act to incorporate the said Company, and thereupon the trial of the said appeal was held on the said seventeenth day of April and the eighteenth, nineteenth and twenty-second days of said April, and the said appellants called various witnesses and thereupon afterwards witnesses were called, produced and sworn by the said appellees, the said Company and particularly one William
 10 Jacobus was produced and examined upon oath in said action by their counsel in the defence of the said appeal, and being examined by them directly testified in answer to the following questions as follows :

Q. What other property had you for sale ?

A. I had a place about one year ago in my hands for sale, and it is still in my hands; Mr. Elliott placed it in my hands; Mr. Z. B. Crane used to own it; it is on the west end of that farm.

Q. At what price have you that for sale; it is marked Mann?

A. Fifteen hundred dollars an acre.

20 Q. What position does the land occupy ?

A. First rate.

Q. Is it high there ?

A. Yes; all high.

Q. Does it command a fine view ?

A. Very fine.

Witness. The property here on the hill adjoins Bassenger's, I think.

Q. Which property is it ?

A. This marked Mann, West and East Forest Avenue

30 Q. Does it adjoin Bassenger's ?

A. Yes.

Q. You say it is very high and fine ?

A. Yes; when you get up to opposite this house of Peloubet's.

Q. What is the price you want for that ?

And thereupon the appellants' counsel objected to evidence of present value of said land.

Appellants' Counsel. We ask to show that about a year ago—April, eighteen hundred and seventy-one—he had this property
 40 put into his hands for fifteen hundred dollars an acre.

The Court. I don't think I ought to admit the testimony.

And being further examined the said witness said in answer to the following questions :

Q. Has property decreased or advanced in value in that neighborhood since July, eighteen hundred and seventy ?

A. Advanced.

Q. Have you had the adjoining property in your hands for sale ?

A. Yes, sir.

Q. How long ?

50 A. It was some time last summer within a year.

Q. Did you offer the adjoining property for sale since last summer?

A. Yes.

And the counsel of said Company then asked the following question :

Q. At what price have you offered the adjoining property for sale since last Summer ?

Whereupon the said judge did interpose and overrule the said question as unfit and improper to be asked.

Whereupon the said counsel of said Railway Company did except to the ruling of said judge and insist upon the said question as fit material and proper to be asked, and thereupon said examination was continued as follows :

Q. Did you offer it for sale last summer ?

A. I offered it for sale about the time of the Chicago fire; I came pretty near making a sale.

Q. Had you offered it for sale before that time ?

A. Yes, sir.

And thereupon the counsel of said appellees said Company did ask the said witness the following question :

Q. At what price did you offer that property for sale during the summer of eighteen hundred and seventy-one ?

Whereupon the counsel of the said appellants did object to the said last question as unfit and improper to be asked of the said witness, and the said judge did then and there interpose and before the said witness had given any answer to the said question, declared and delivered his opinion that the said question was unfit and improper to be answered, and did not permit the same to be answered.

Whereupon the counsel of the said appellees did then and there except to the ruling of the said judge, and did insist that the said question was fit and proper to be asked.

And afterwards the said counsel of said Company also did call one Volney Elliott, who being produced and sworn (amongst other things) said in answer to the following questions as follows :

Q. Have you had property for sale ?

A. Yes, here ; belonging to George W. Mann.

Q. How does that compare with Mr. Benson's ?

A. This is a little better ; as you get over the hill there is a little depression and then it comes high again.

Q. Along Forest Avenue ; is that fine and high ?

A. Yes.

Q. How long have you had that in your hands for sale ?

A. I have sold it two or three times.

Q. When did you last sell it ?

A. Three or four years ago.

Q. What price did you get for it then ?

A. I could not tell you.

Q. Was it over a thousand dollars an acre or under ?

A. A good deal under : in the neighborhood of five hundred dollars an acre ; that was in the neighborhood of five years ago.

Q. When did you sell it next ?

A. In the neighborhood of eighteen hundred and seventy.

Q. To whom ?

A. To Mr. Mann.

Q. At what price ?

A. Ten thousand five hundred dollars for the 12 acres.

Q. Who conveyed it to him ?

10 A. E. W. Page

Q. Do you personally know of that sale being made from Page to Mann ?

A. Yes, I think so ; I may be mistaken ; it was only last evening I was subpoenaed here and I have never given it a thought.

Q. Since Mann bought it have you had it for sale ?

A. I had it most all the time for sale by Mann.

Q. What did you sell it for in eighteen hundred and seventy ?

A. I recollect it sold at about the time of the award in Mr. Benson's case for ten thousand five hundred dollars.

20 Q. What did you sell it for shortly after that ?

A. I was authorized to sell the whole tract for eighteen thousand dollars, including the streets and what was taken by the Railroad.

Q. How long after the award was that ?

A. I am not positive ; it was but a month or two ; a short time I should think ; within a month or two.

Q. How long had the bargain been made when you made the sale ?

A. I could not say with regard to that.

30 Q. Have you other property for sale in the immediate neighborhood ?

A. I have property that belongs to the Rev. Mr. Crane.

Q. Do you consider the property of Mr. Mann to have increased or diminished in value since he purchased it ?

A. I consider it has increased some.

Q. Have you the property still in your hands for sale, and if so, at what price ?

40 And the counsel for the said appellants did thereupon object to the said last question as unfit and improper to be asked of the said witness, whereupon the said judge did declare and deliver his opinion that the said question was unfit and improper to be asked of the said witness, and did overrule and exclude the same, whereupon the counsel of the said Company did then and there on their behalf except to the said ruling and opinion of the said judge, and did insist that the said question was fit and proper to be asked. And afterwards said last named witness being further examined testified as follows :

Q. What other property have you had for sale ?

50 A. Fifteen acres adjoining Warren Baldwin ; it is Rundle and Beach property ; it formerly belonged to Robert Beach.

Q. How long had you that for sale ?

A. Nearly a year, I should think.

Q. Was it a year ago less valuable than it was in July, 1870 ?

A. Property greatly increased then.

Q. Has there been a diminution in the value of the property since July, eighteen hundred and seventy ?

A. Rather an advance.

Q. You have had the property about one year ?

A. Nearly a year.

Whereupon the counsel for the said Company did propose to 10
said last witness the following question :

Q. At what price had you it for sale about a year ago ?

Whereupon the said judge then and there interposed, and before the said last witness had given any answer, overruled the said last question and did declare that the same was unfit and improper to be asked.

Whereupon the said counsel for the said Company did then and there except to the said ruling of the said judge, and insisted that the said last question was fit and proper to be asked, and 20
after the evidence was closed the said jury did then and there give their verdict in this matter for seven thousand and seven dollars, eleven cents.

And inasmuch as the several matters hereinbefore mentioned do not appear by the record of the said trial and verdict, the said counsel for the said Montclair Railway Company did then and there propose their aforesaid exceptions to the aforesaid rulings and opinions of the said judge, and requested him to put his seal to the aforesaid bill of exceptions containing the aforesaid questions offered to be asked, and overruled by the said judge as 30
aforesaid, according to the form of the statute in such case made and provided.

And thereupon the said judge at the request of the said counsel of the said The Montclair Railway Company, did put his seal to this bill of exceptions pursuant to the said statute in such case made and provided, on the said twenty-second day of April, in the year one thousand eight hundred and seventy-two.