

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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Between

WESLEY LIBERTY WIEDMER,  
*Prosecutor-Appellant,*

and

WEST JERSEY AND SEASHORE RAILROAD COMPANY, *et al.*,  
*Defendants-Respondents.*

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ON APPEAL.

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BRIEF OF DEFENDANTS-RESPONDENTS.

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On or about the eighth day of April, 1924, a petition was filed in the clerk's office of the County of Cape May, by the West Jersey and Seashore Railroad Company, praying the appointment of Commissioners to ascertain the compensation to be paid to Wesley Liberty Wiedmer, Florence Liberta Wiedmer and Sallie B. Hammer for property condemned for public use under the Act of April 14th, 1903, entitled: "An act concerning railroads (Revision of 1903)" and the supplements and amendments thereto, and the act concerning the ascertainment and compensation for land taken in condemnation proceedings (Revision of 1900), which land lay

at the intersection of Philadelphia Avenue and Lotus Road, in the Borough of Wildwood Crest, Cape May County, New Jersey, particularly described as follows:

“BEGINNING at a point formed by the intersection of the middle line of Philadelphia Avenue (90 feet wide) with the middle line of Lotus Road (60 feet wide); extending thence along the said middle line of Lotus Road North 35 degrees 20 minutes West 23.7 feet; thence Eastwardly as follows, viz: (1) On a line curving toward the left with a radius of 943.87 feet a distance of 78.4 feet; and (2) North 54 degrees 40 minutes East 19.8 feet; thence South 35 degrees 20 minutes East 15 feet to the said middle line of Philadelphia Avenue and thence along the same, South 54 degrees 40 minutes West 100 feet to the place of beginning.”

The tracks of the West Jersey and Seashore Railroad Company traverse Philadelphia Avenue to a point eighteen (18) feet distant from Lotus Road, and on the opposite side of Lotus Road, fronting upon Philadelphia Avenue, said railroad company owns a large tract of land, and is erecting thereon and on other lands extending toward Cold Spring Harbor a railroad track for freight and passenger purposes. The prosecutor-appellants own a lot at the intersection of Lotus Road and Philadelphia Avenue seventy (70) feet front on Philadelphia Avenue by ninety (90) feet in depth along Lotus Road. It is necessary for the Railroad Company to continue its tracks from the middle of Philadelphia Avenue to the track on the opposite side of Lotus Road built on its own land, as aforesaid. The curve begins one hundred (100) feet northwesterly of the center line of Lotus Road, and extends in

front of prosecutor-appellants' property. It will be noted that the track is to extend from the middle of Philadelphia Avenue across the side thereof.

The matter was brought before the Honorable Luther A. Campbell, one of the Justices of the Supreme Court, on said eighth day of April, 1924, on which day an order was made by said Justice of the Supreme Court, directing that a public hearing would be given in the City of Bridgeton, County of Cumberland, on the 22nd day of April, 1924, at ten o'clock in the forenoon, and, on the 9th day of April, 1924, an order was made, directing the manner in which notice should be served. On said 22nd day of April, 1924, the hearing in said cause was continued until the 13th day of May, 1924, at the Court House, Mays Landing, Atlantic County, New Jersey, at ten o'clock in the forenoon. Upon the date so fixed, the respective parties were heard before said Justice of the Supreme Court, and after consideration, said Court made an order appointing Eugene C. Cole, Esquire, Hon. William H. Bright and Julius Way, M. D., three disinterested freeholders, commissioners.

On the same date, a writ of certiorari was allowed prosecutor to review the legality of said appointment, and the reasons assigned therefor were three:

1. There is no power in the respondent to condemn the land of the prosecutors in the public highway.
2. The order is too limited and restricted in that it makes no provision for damages to the remaining land of the prosecutors as required by law.
3. The pretended ordinance referred to in the petition for the order was without the power of the

City of Wildwood to enact and its enactment was not procured by the method required by law.

This writ came on for hearing at the office of Justice Kalisch in Newark, New Jersey, on the 14th day of June, 1924, before Justices Campbell and Kalisch, and on the 3rd day of October, 1924, an opinion was filed in said cause, dismissing said writ of certiorari, and an order of dismissal entered therein on the 8th day of October, 1924.

From this order of dismissal, the prosecutor-appellants prosecute this appeal.

It is submitted that the reasons assigned in the certiorari proceedings before the Supreme Court for the dismissal of the order appointing said commissioners were each of them without merit, and that the order of the Supreme Court, dismissing said writ of certiorari was correct.

1. THERE IS NO POWER IN THE RESPONDENT TO CONDEMN THE LAND OF THE PROSECUTORS IN THE PUBLIC HIGHWAY.

This reason is decided against the prosecutor-appellants in the case of *Pennsylvania Railroad v. National Docks Co.* (57 L., 86-88) (Affirmed—Court of Errors and Appeals—57 L., 457), in which case the Court held:

“Under the general railroad law, land in a public street may be condemned as against the private owner of the fee.”

At page 88, Justice Dixon, who wrote the opinion, said:

“The next objection to the proceeding (which was a condemnation proceeding) is that the land lies in a public street of Jersey City, and

that the condemning company intends to cross it in such a way as will exclude ordinary travel, and be, as against the public, illegal. The condemning company insists that the street has been lawfully vacated and the land is mere private property. Which is right in this contention need not now be decided, for the object of the present proceeding is merely to render the estate of the prosecutors, whatever it is, subject to the defendant's right to cross the land."

It is contended that the proposed track from the middle of Philadelphia Avenue to the side thereof is a track crossing Philadelphia Avenue, and is within the implied power granted to the Railroad Company by its certificate of incorporation, but, in addition to that fact, is the fact that the municipal authorities of the Borough of Wildwood Crest granted a franchise or right to the railroad company to cross said avenue in precisely the same manner it now proposes to cross it.

In the case of *Thompson v. Ocean City Railroad Co.* (60 N. J. L., 74), it was held:

"A charter authorizing the construction of a railroad between designated points, the exact location of the road between the specified termini being left in the company's discretion, is an implied authority to cross highways, along the route, but confers no right to occupy longitudinally streets or highways lying in the general route of the road. The authority to make such a use of streets or highways must be expressly given, or if conferred by implication, it must be by a necessary implication."

In the case of *Longbranch Commissioners v. West Line R. R. Co.* (29 N. J. Eq., 566), the Court said, pp. 569-570:

“I do not think the matter of fact on which the complainants’ second claim to relief rests, is sufficiently established to justify the allowance of a preliminary injunction. It cannot be doubted that the defendants, in the construction of their road, have a right to occupy the highways to the extent of a reasonable necessity. *Morris and Essex R. R. Co. v. City of Newark* (2 Stock., 352); *Atty. Gen. v. Morris and Essex R. R. Co.* (4 C. E. Gr., 386); *Newark and New York R. R. Co. v. City of Newark* (8 C. E. Gr., 522). Such a right may arise by implication. The complainants allege that the occupation by the defendants’ road of certain streets of Long Branch will exceed this limit, while the defendants say that the location of their road, at the point of contest, has been carefully and judiciously made, and so as to do as little damage to the streets as can be done if the line of their road is made reasonably direct. The main point of the contest is at the crossing of a street called Second Avenue. The defendants say, in order to construct their road skillfully and properly, it must cross this street longitudinally, while the complainants insist it should cross at a right angle, and that the curve necessary to be made to do so will be neither unusual nor objectionable. It will thus be seen, the point in dispute presents simply a question in engineering, which must be decided almost exclusive on the evidence of experts. This was the view expressed by the Chief Justice in the case last referred to. The material now before the Court for the guidance of its judgment on this point, is exceedingly scanty. One expert on each side has expressed an opinion, but neither is supported by sufficient reasons to make it the fit

basis of a judicial determination. It is enough to say, I am not satisfied the defendants' road will occupy or encroach upon any part of the highways under the supervision of the complainants to an unreasonable or unnecessary extent."

2. THE ORDER IS TOO LIMITED AND RESTRICTED IN THAT IT MAKES NO PROVISION FOR DAMAGES TO THE REMAINING LAND OF THE PROSECUTORS, AS REQUIRED BY LAW.

The order provides:

"Do hereby appoint Hon. Eugene C. Cole, Hon. William H. Bright and Julius Way, M. D., three disinterested freeholders, all of whom are residents of the County of Cape May, Commissioners to examine and appraise the lands in petitioner's petition described, and to assess the damages, if any, which the owners claiming to own said lands mentioned in said petition have sustained by reason of the taking of the same by petitioner."

This is the usual form of order appointing commissioners, and it will at once appear that the commissioners are directed to appraise the value of the land taken and to assess the damages which the owners sustained by reason of the taking thereof.

This language is sufficiently broad to include any incidental damage that the property owner may have received by reason of the taking of this land by the railroad company.

In the case of *Pennsylvania Railroad v. National Docks Co.*, *ibid*, the Supreme Court pointed out that the compensation would be fixed with reference to

the character of the title that was taken, and in *Laing v. United Railroads of New Jersey* (54 L., 576-579), which was a question involving evidence of the extent of damages to other land for the taking of a strip of land within the highway, the Court, at page 579, said:

“With regard to the damage resulting to plaintiff’s property from the conversion of this strip into a railroad bed, the witness was equally inexpert.”

This shows that the Court, in that suit, regarded the damage resulting to plaintiff’s adjoining land as within the scope of the commissioners’ power, but held that the value thereof could not be passed upon by an expert. Continuing, the Court said:

“It depended upon circumstances which in a great measure were peculiar to that property, and which when laid before the jury could be appreciated by them as accurately as by the witness, not only the narrowing of the street, but the greater risk of fire and increased noise, dust and smoke occasioned by the nearer approach of the passing trains, were matters to be considered, both in view of the use then made of the property and the probable future use.”

3. THE PRETENDED ORDINANCE REFERRED TO IN THE PETITION FOR THE ORDER WAS WITHOUT THE POWER OF THE CITY OF WILDWOOD TO ENACT AND ITS ENACTMENT WAS NOT PROCURED BY THE METHOD REQUIRED BY LAW.

The above reason is without force:

1. Because the question of the validity of the

ordinance or ordinances is not involved in the certiorari.

In the case of *West Jersey Railroad v. Ocean City Railroad* (61 L., 506), which was the taking of land within a public highway, in which it was held that the commissioners should not be appointed because the land described in the notice was a public highway, and also that the applicant had no municipal authority to occupy longitudinally the said highway, and that no effort had been made to purchase the land or rights of the prosecutor, the Court said:

“This last point was not borne out by the proofs and is not made a contention in the brief of counsel. The other objections rest upon a misconception of the effect of the proceeding and of the extent of the jurisdiction involved. The proceeding, at its completion, simply names a sum of money as the equivalent of what the prosecutor will lose if the applicant takes what is described in his notice. It does not say that he may take it; it affirms nothing; it simply assesses damages for a hypothetical injury.”

2. The 34th Section of the General Railroad Act of 1903 (P. L., p. 663), provides that in any city, except cities of the first class, the municipal authorities may permit any railroad company to lay and construct its track along and upon any street or highway, fixing the terms, &c., provided that no such railroad shall be constructed along any street or highway until the company shall have acquired the rights of the owners abutting thereon.

If municipal authority be necessary for the railroad company to construct its railroad track across this street, then it is submitted that the Borough of Wildwood Crest has such authority under the provision above cited. While that section says

“Cities,” it is respectfully submitted that the section, taken as a whole, indicates that the word was used as a designation for all municipalities, except those specially excepted, and was not intended to be confined to cities in the strict sense of the word.

In the case of *Philadelphia & Camden Ferry Co. v. Inter-City Railroad Co.* (73 L., 86), at p. 89, Mr. Justice Dixon said:

“The tenth and last reason urged is that the City of Camden was not made a party to the proceedings, although a portion of the land to be condemned laid within the limits of Delaware Avenue.

The explanation of this omission is obvious. The petitioner had no power to condemn the public rights in the highway, but under Section 34 of the General Railroad Act might contract with the city for the exercise of certain privileges in the street, provided it had first acquired the rights of the abutting owner therein by agreement or condemnation. The present proceeding seems to be framed to comply with this proviso, and clearly the city was not a necessary party thereto.”

This Section 34 of the General Railroad Act superseded the Act of 1896, which in the case of *Burlington v. Pennsylvania Railroad* (56 Eq., 259), was held to be unconstitutional. That Act of 1896, was applicable only to those cities where there was then present a railroad track laid longitudinally in a street and did not apply to other cities where at that time there was not but in the future might be similarly located railroads. That statute excluded cities of the first class as does Section 34 of the present General Railroad Act, and the Court, in discussing that phase of it, said that that was a reasonable

exclusion because of the increased traffic on the streets of cities of the first class, because of the larger population, over the amount of traffic in other cities, and, continuing this same thought, it at once appears that if the Legislature granted the right for a railroad company to longitudinally occupy a street in the city, there could be and would be no reason why such privilege should not be granted or extended to boroughs, towns and townships, as the traffic upon those highways and the objection to the presence of a railroad thereon would be less than in cities.

It will also be observed that in Section 34 of the General Railroad Act, the Legislature speaks of the granting by the municipal authorities. While the city legislative authorities are municipal authorities, still the words "municipal authorities" are of a broader signification than "city authorities."

In the case of *Broome v. Telephone Company* (49 L. 624), our Supreme Court held that the word "Town" was sufficiently broad to include a township.

While it is true that in the case of *Day v. Morristown* (62 L., 571), our Supreme Court held that an act pertaining to the appropriation of moneys in cities was not sufficiently broad to include the appropriation pursuant to that act in towns, the Court, at page 572, said:

"It is restricted in its title and by its terms to cities and can be extended to incorporated towns only by construction, by imputing to the Legislature an intention to give it that enlarged scope and purpose."

In the case at hand, in view of the fact that there is no reason why the rights granted by Section 34 should not be enjoyed as well by boroughs, towns

and townships, as cities, and in view of the further fact that if it be not extended to boroughs, towns and townships, the section must be held unconstitutional, because there is no reason why the rights granted could be lawfully granted by the Legislature to cities and withheld from boroughs, towns and townships, which would render it special legislation, and in view of the further fact that the act will be construed so as to maintain its constitutionality, if it may be done, it is respectfully submitted that in view of the language of Section 34 of the General Railroad Act, the word "City," as therein used, is broad enough to include boroughs.

It, of course, will be observed that the land to be condemned is for the purpose of crossing the southerly half of Philadelphia Avenue and the intersecting portion of Lotus Road.

The right of a railroad company to cross a road intersecting its route is too well established to require citation of authorities.

In this case, the railroad company, instead of crossing the entire street, proposes to cross its tracks, lawfully laid in Philadelphia Avenue, to the southerly side of that street. This is within the route filed in the secretary of state's office, and if this proposed crossing is within the purview of the general law pertaining to railroad crossing highways, it is submitted that the legislative right to grant a privilege to lay a track longitudinally in the street is not applicable. Nevertheless, even though a railroad company, after filing its route, has the right to lay its track across an intersecting highway, it does not prevent the municipal authorities from ordaining that such crossing may be made and thereby supplement their statutory right by the municipal right to occupy said street.

The opinion in the Supreme Court in this case is in the following language:

“This writ brings up for review an order of June 21, 1924, made by Mr. Justice Campbell appointing commissioners to fix the compensation and assessed damages for the taking of property of the prosecutor for the purposes of respondents.

The railroad tracks of the respondent are legally in Philadelphia Avenue in Wildwood Crest up to the point where the easterly property line of the prosecutor, if extended, would intersect the center line of said Avenue and the respondent is proposing to continue such tracks from such point in front of the property of prosecutor diagonally through and across Philadelphia Avenue to the northerly side thereof there entering a private right of way westerly of Lotus Road, which will also be crossed at its intersection with Philadelphia Avenue, by such tracks.

Three reasons are urged why this order should be set aside.

1. That there is no power in the respondent to condemn the lands in the public highway.

This is upon the theory that the tracks, when extended, will run longitudinally in Philadelphia Avenue. We think that this is not so but that it will be simply a crossing of Philadelphia Avenue from the center thereof to the northerly line.

2. The order is too limited and restricted in that it makes no provision for damages to the remaining land of the prosecutor as required by law.

We find that this reason is not well founded and that the order does not make proper pro-

vision for fixing compensation and assessing damages as required by the statute.

3. The pretended ordinance referred to in the petition for the order was without the power of the City of Wildwood to enact and its enactment was not procured and by the method required by law.

In view of our finding that the proposed extension of the tracks is not a longitudinal use of Philadelphia Avenue, this reason is without application, but if it does apply to the situation before us, then this Court has said in *Philadelphia and Comden Ferry Company v. Inter-City Link Railroad Company* (73 N. J. L., 86), at p. 89, under quite similar circumstances that such a reason is without merit because the proceedings in condemnation were framed to comply with the provisions of Section 34 of the General Railroad Act.

We conclude, therefore, that the writ of certiorari should be dismissed with costs."

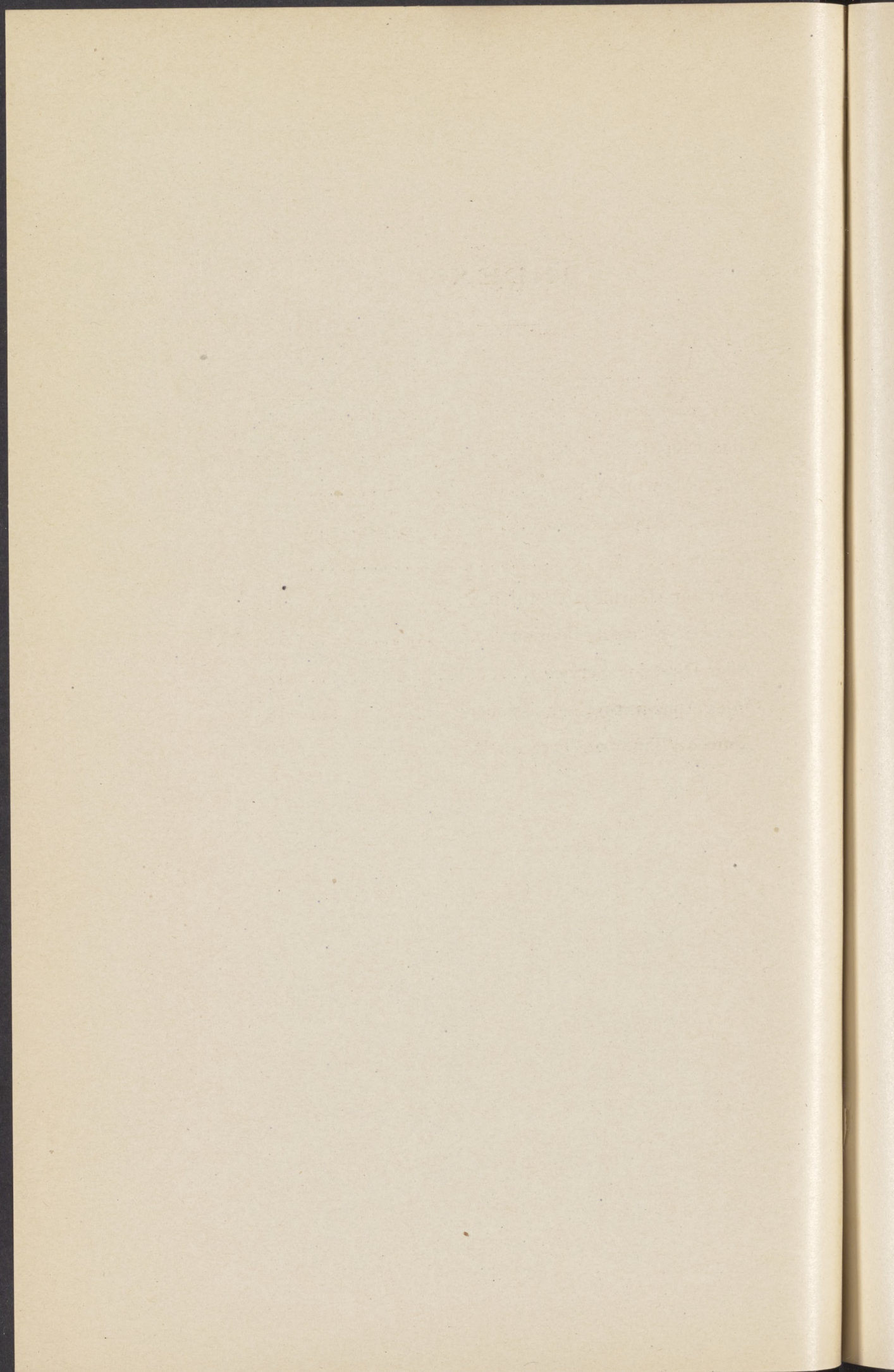
It is respectfully submitted that there was no error in the judgment of the Supreme Court, and that the order dismissing the writ should be affirmed.

BOURGEOIS & COULOMB,  
*Attorneys for Defendants-Respondents.*

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## NEW JERSEY Court of Errors and Appeals.

WESLEY L. WIEDMER,  
*Prosecutor-Appellant,*  
*vs.*  
WEST JERSEY AND SEASHORE  
R. R. Co. et al.  
*Respondents.*

} Appeal from Supreme Court.

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### NEW JERSEY SUPREME COURT.

WESLEY LIBERTY WIEDMER,  
*Prosecutor,*  
*vs.*  
WEST JERSEY AND SEASHORE RAIL-  
ROAD COMPANY,  
*Respondent.*

} Certiorari.

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### WRIT.

(Returnable May 23d, 1924.)

STATE OF NEW JERSEY,

To the Clerk of the County of Cape May, GREETING:

We being willing, for certain reasons, to be certified of a certain order dated May thirteenth, nineteen hundred and twenty-four, made by his Honor Justice Luther Campbell, appointing commissioners to assess

damages, etc., in the matter of the condemnation and taking of lands of Wesley L. Wiedmer, and others, together with the petition praying for such an order do command you, that you certify and send, to our Justices of our Supreme Court, at Trenton, on the twenty-third day of May, 1924, as well the said order and petition with all things touching and concerning the same, as fully and entirely as they remain before you together with this, our writ, that we may cause to be done there-  
 10 upon what of right and according to law and justice ought to be done.

Witness, Hon. William S. Gummere, Chief Justice of our said Supreme Court, this thirteenth day of May, in the year of our Lord one thousand nine hundred and twenty-four.

EDWARD J. KELLEHER,  
*Clerk.*

Cole & Cole,  
*Attorneys.*

20 Let this writ be sealed.

*Justice of the Supreme Court.*

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NEW JERSEY SUPREME COURT.

WESLEY LIBERTY WIEDMER, <i>Prosecutor,</i>	}	On Certiorari.
<i>vs.</i>		
WEST JERSEY & SEASHORE RAIL- ROAD Co. et al., <i>Respondents.</i>		

30 REASONS.

Prosecutors assign the following reasons why the order under review should be vacated and set aside:

1. There is no power in the respondent to condemn the land of the prosecutors in the public highway.

2. The order is too limited and restricted in that it makes no provisions for damages to the remaining land of the prosecutors as required by law.

3. The pretended ordinance referred to in the petition for the order was without the power of the City of Wildwood to enact and its enactment was not procured and by the method required by law.

COLE & COLE,  
*Attorneys for Prosecutors.*

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NEW JERSEY SUPREME COURT.

WESLEY LIBERTY WIEDMER,

*Prosecutor,*

*vs.*

WEST JERSEY & SEASHORE RAIL-  
ROAD Co. et al.,

*Respondents.*

On Certiorari.

20

*Before Justices Kalisch and Campbell.*

*For the prosecutor, Clarence Cole.*

*For respondents, Bourgeois and Coulomb.*

PER CURIAM:

This writ brings up for review an order of June 21, 1924, made by Mr. Justice Campbell, appointing commissioners to fix the compensation and assessed damages for the taking of property of the Prosecutor for the purposes of respondent.

30

The railroad tracks of the respondent are legally in Philadelphia avenue in Wildwood Crest up to the point where the easterly property line of the Prosecutor, if extended, would intersect the center line of said avenue and the respondent is proposing to continue such tracks from such point in front of the property of Prosecutor diagonally through and across Philadelphia avenue to the northerly side thereof there entering a private right of

way westerly of Lotus road, which will also be crossed at its intersection with Philadelphia avenue by such tracks.

Three reasons are urged why this order should be set aside.

1. That there is no power in the respondent to condemn the lands in the public highway.

This is upon the theory that the tracks, when extended, will run longitudinally in Philadelphia avenue. We **10** think that this is not so but that it will be simply a crossing of Philadelphia avenue from the center thereof to the northerly line.

2. The order is too limited and restricted in that it makes no provision for damages to the remaining land of the prosecutor as required by law.

We find that this reason is not well founded and that the order does not make proper provision for fixing compensation and assessing damages as required by the statute.

**20** 3. The pretended ordinance referred to in the petition for the order was without the power of the City of Wildwood to enact and its enactment was not procured and by the method required by law.

In view of our finding that the proposed extension of the tracks is not a longitudinal use of Philadelphia avenue this reason is without application, but if it does apply to the situation before us then this court has said in Philadelphia and Camden Ferry Company vs. Inter-City Link Railroad Company, 73 N. J. L. 86, at page 89, **30** under quite similar circumstances that such a reason is without merit because the proceeding in condemnation was framed to comply with the provisions of section 34 of the General Railroad Act.

We conclude, therefore, that the writ of certiorari should be dismissed with costs.

## NEW JERSEY SUPREME COURT.

WESLEY LIBERTY WIEDMER, <i>Prosecutor,</i> <i>vs.</i> WEST JERSEY AND SEASHORE RAIL- ROAD COMPANY et al., <i>Respondents.</i>	}	On Writ of Certiorari.
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## ORDER.

Argument upon Writ of Certiorari allowed in the above-stated cause before Justices Kalisch and Campbell, on the fourteenth day of June, 1924, coming on to be heard, and the argument of the respective counsel having been heard and considered. 10

It is on this eighth day of October, 1924, ordered that the Writ of Certiorari allowed in the above-stated cause be and is hereby dismissed, with costs to the respondents.

Actually Entered:

BOURGEOIS & COULOMB,  
*Attorneys of Respondents.* 20

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 NEW JERSEY SUPREME COURT.

FLORENCE LIBERTA WIEDMER, <i>Prosecutor,</i> <i>vs.</i> WEST JERSEY AND SEASHORE RAIL- ROAD COMPANY, <i>Defendant.</i>	}	On Certiorari.
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## NOTICE OF APPEAL.

*To the Within Named Defendant:*

Notice that the prosecutor appeals to the Court of Errors and Appeals from the order entered in this cause

dismissing the writ, upon the ground that the Court erred in not allowing an order vacating and setting aside the proceedings under review for the reasons assigned.

COLE & COLE,  
*Attorneys of Prosecutor.*  
 C. L. COLE,  
*of Counsel.*

10 IN THE OFFICE OF THE COUNTY CLERK  
 OF CAPE MAY COUNTY, NEW JERSEY.

*In the Matter of the Condemnation  
 and Taking of Lands and Every  
 Interest Therein of Wesley Liberty  
 Wiedmer and Florence Liberta  
 Weidmer by the West Jersey and  
 Seashore Railroad Company.*

PETITION.

20 *To the Honorable Luther A. Campbell, Associate Justice of the Supreme Court, of the State of New Jersey:*

The petition of the West Jersey and Seashore Railroad Company, a duly incorporated railroad corporation of the State of New Jersey, respectfully shows:

30 1. That the Borough of Wildwood Crest, prior to the 26th day of March, 1923, by Ordinance No. 55, granted to your petitioner the right to lay down a double track across Philadelphia Avenue and Lotus Road, at the intersection thereof, in front of property of Wesley Liberty Wiedmer and Florence Liberta Wiedmer, a copy of which ordinance is hereto annexed and made a part hereof; and on the 26th day of March, 1923, passed an ordinance, numbered 61, amending the description of the hereinabove mentioned ordinance, a

copy of which is hereto annexed and made a part hereof.

2. That your petitioner, having power to take lands for public use for railroad purposes, pursuant to the Act of April 14th, 1903, entitled "An Act concerning railroads (Revision 1903)" and supplements and amendments thereto, and the Act of March 20th, 1900, entitled "An Act to regulate the ascertainment and payment of compensation for property condemned for public use (Revision 1900)" and supplements and amendments thereto, has determined that certain lands in the streets of Philadelphia Avenue and Lotus Road, in front of property owned by Wesley Liberty Wiedmer and Florence Liberta Wiedmer, in Wildwood Crest, Lower Township, Cape May County, New Jersey, particularly described as follows: 10

Beginning at a point formed by the intersection of the middle line of Philadelphia Avenue (90 feet wide) with the middle line of Lotus Road (60 feet wide); extending thence along the said middle line of Lotus Road North 35 degrees 20 minutes West 23.7 feet; thence Eastwardly as follows, viz: (1) On a line curving toward the left with a radius of 943.87 feet a distance of 78.4 feet; and (2) North 54 degrees 40 minutes East 19.8 feet; thence South 35 degrees 20 minutes East 15 feet to the said middle line of Philadelphia Avenue and thence along the same, South 54 degrees 40 minutes West 100 feet to the place of beginning." 20 30

Containing 0.043 acre, more or less.

and all the estate, right, title and interest therein and thereto of the said Wesley Liberty Wiedmer and Florence Liberta Wiedmer, and Sallie B. Hammer, who claims some interest therein, within Philadelphia Avenue, above mentioned, are necessary for its railroad purposes, and has determined to acquire said lands, and to that end endeavored to purchase said property from

the said Wesley Liberty Wiedmer and Florence Liberta Wiedmer, but was unable to do so, because petitioner could not agree with said owners on a price to be paid for said lands.

3. Your petitioner further shows that your petitioner caused a map or location of the route of its said tracks of said railroad to be duly filed in the Office of the Secretary of State of New Jersey.

10 4. Your petitioner further shows that at a regular meeting of the Board of Directors of the West Jersey and Seashore Railroad Company, held on the 14th day of March, 1924, the following resolution was unanimously adopted:

20 "WHEREAS, The Wildwood Branch of the railroad of this Company, pursuant to an Ordinance (No. 61) of the Borough Council of the Borough of Wildwood Crest, in the County of Cape May, and State of New Jersey, approved 26th March, 1923, is now located in the bed of Philadelphia Avenue, in the said Borough of Wildwood Crest;

AND WHEREAS, Wesley Liberty Wiedmer and Florence Liberta Wiedmer claim that they are the owners of the underlying fee of the portion of the bed of the said Philadelphia Avenue upon which the said railroad is located, between a point in the Middle Line of Lotus Road and a point 100 feet Northeast therefrom, and containing about  $43/1000$  of an acre;

30 AND WHEREAS, This Company has been unable, by negotiations with the said owners, to acquire title to the underlying fee in the said land; therefore

*Resolved*, That it is necessary to acquire title to the underlying fee in the land in the bed of the said Philadelphia Avenue, for a distance of about 100 feet, between a point in the Middle Line of Lotus Road and a point 100 feet North-

east therefrom, and containing about 43/1000 of an acre in the said Borough of Wildwood Crest outlined in yellow color on the plan this day submitted to this Board marked "No. 22166—Wildwood Branch, W. J. & S. R. R.—Property to be acquired at Wildwood Crest, N. J." which plan is hereby approved and adopted; and that the proper officers of this Company are hereby authorized and directed, for and on its behalf, to acquire the said land for the purpose aforesaid **10** by purchase or condemnation."

5. Your petitioner further shows that the persons owning and having an interest in said lands, and the addresses of each are as follows:

Wesley Liberty Wiedmer, No. 6212 Philadelphia Avenue, Philadelphia, Pa., during the Winter months, and Wildwood Crest, N. J., during the Summer months.

Florence Liberta Wiedmer, No. 6212 Philadelphia Avenue, Philadelphia, Pa., during the **20** Winter months, and Wildwood Crest, N. J., during the Summer months.

Sallie B. Hammer, Wildwood Crest, N. J.

6. To the end, therefore, that the compensation to be paid to the owners of said land, and to all persons interested therein, may be ascertained and paid for the condemnation and taking for the public use aforesaid the lands and premises hereinabove described, your petitioner prays that your Honor may appoint three disinterested freeholders, residents of the County of Cape **30** May, commissioners to examine and appraise the said lands and premises hereinabove described, and assess the damages for the taking thereof by your petitioner, and that a time and place be fixed by order of your Honor for the hearing of this petition before your

Honor or some other Justice of the Supreme Court,  
pursuant to law.

And your petitioner will ever pray.

BOURGOIS & COULOMB,  
*Attorneys for Petitioner,  
West Jersey and Seashore  
Railroad Company.*

Filed April 8th, 1924.

LUTHER A. CAMPBELL,  
J. S. C.

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STATE OF PENNSYLVANIA, }  
PHILADELPHIA COUNTY, } ss.

John P. Gauff, of full age, being duly sworn, on his  
oath says:

That he is the Real Estate Agent of the West Jersey  
and Seashore Railroad Company, petitioner named in  
the foregoing petition, and its agent for the purpose of  
making this affidavit.

20 That the said West Jersey and Seashore Railroad  
Company by its Board of Directors, resolved to acquire  
the land mentioned in said petition for public uses by  
a certain resolution, a copy of which is set forth in  
said petition and made a part thereof.

That this deponent, through his agent, did negotiate  
for the purchase of said tract of land set forth in said  
petition with the said Wesley Liberty Wiedmer and  
Florence Liberta Wiedmer, his wife, but was unsuccess-  
ful.

30 That deponent knows the contents of said petition,  
and that the statements therein made, as to his own  
acts, are true, and the statements therein made by this  
deponent from information derived from others, and  
the resolution of record in the office of the West Jersey  
and Seashore Railroad Company, he believes to be  
true.

JOHN T. GAUFF.

Sworn and subscribed before me this 3d day of April, 1924.

W. H. ZELINDER,  
*Foreign Commissioner of Deeds  
 for New Jersey in Pennsylvania.*

STATE OF NEW JERSEY,     }  
 ATLANTIC COUNTY,        }ss.

Harry K. Margolf, of full age, being duly sworn according to law, on his oath says: 10

That he is an employee of the Real Estate Department of the West Jersey and Seashore Railroad Company, and that he personally, prior to the 14th day of March, 1924, endeavored to acquire the lands mentioned in the within petition by purchase from Wesley Liberty Wiedmer and Florence Liberta Wiedmer, personally, but that deponent and the said Wesley Liberty Wiedmer and Florence Liberta Wiedmer were unable to agree upon the price therefor.

That deponent, on behalf of petitioner, West Jersey and Seashore Railroad Company, offered to said Wesley Liberty Wiedmer and Florence Liberta Wiedmer, for their right, title and interest in the lands in said petition mentioned, lying within said Philadelphia Avenue, containing 0.043 of an acre, the sum of \$500, which was refused by the said Wesley Liberty Wiedmer and Florence Liberta Wiedmer, who demanded the sum of \$12,000 therefor. 20

HARRY K. MARGOLF.

Sworn and subscribed before me this 3d day of April, 1924. 30

CAROLINE L. JONES (nee Smith),  
*Notary Public of New Jersey.*

## ORDINANCE No. 55.

An Ordinance granting to the West Jersey and Seashore Railroad Company permission to cross certain streets and highways in the Borough of Wildwood Crest with a duplicate track railroad.

Section 1. Be it ordained by the Borough Council of the Borough of Wildwood Crest that the West Jersey and Seashore Railroad Company be and it is hereby granted the right, privilege, consent and franchise to construct, operate and maintain a double track railroad, crossing Philadelphia avenue from the termination of its track as the same are now constructed in Philadelphia avenue, crossing in a general northwesterly direction from the termination of said track to the lands owned by the West Jersey and Seashore Railroad Company.

Section 2. Be it further ordained that the West Jersey and Seashore Railroad Company be and it is hereby granted the right, privilege, consent and franchise to construct, operate and maintain a double track railroad crossing Myrtle road, Primrose road, Park Boulevard and Rambler road, north of the northerly line of Philadelphia avenue.

Section 3. Be it further ordained that the West Jersey and Seashore Railroad Company shall at all times keep and maintain said crossings in suitable and proper condition.

Section 4. Be it further ordained that all the expenses of advertising and printing this ordinance shall be borne by the West Jersey and Seashore Railroad Company.

Section 5. Be it further ordained that this ordinance shall take effect immediately.

RALPH WHITLEY,  
*Mayor.*

Attest:  
HARRY L. NICKERSON,  
*Borough Clerk.*

## ORDINANCE No. 61.

An amendment to section one of an ordinance granting to the West Jersey and Seashore Railroad Company permission to cross certain streets and highways in the Borough of Wildwood Crest with a duplicate track railroad.

Section 1. Be it ordained by the Borough Council of the Borough of Wildwood Crest that the West Jersey and Seashore Railroad Company be, and it is hereby granted the right, privilege, consent and franchise to construct, operate and maintain a double track railroad, crossing Philadelphia avenue, the center line of which shall begin in the center line of Philadelphia avenue, distant 125 feet northeastwardly from the northeasterly line of Lotus road; thence curving to the right to a point distant 51.65 feet Southwestwardly from the Southwesterly line of Lotus road, and distant 15.65 feet southeastwardly from the northwesterly line of Philadelphia avenue, measured at right angles thereto; thence curving to the left to a point in the northwesterly line of Philadelphia avenue, distant 120.89 feet southwestwardly from the southwestery line of Lotus road.

Section 2. Be it Further Ordained that the West Jersey and Seashore Railroad Company shall bear all of the expense of advertising and printing of this ordinance.

Section 3. Be it Further Ordained that this ordinance take effect immediately.

Introduced and passed first and second reading, February 26th, 1923.

Passed third and final reading, March 26th, 1923. 30

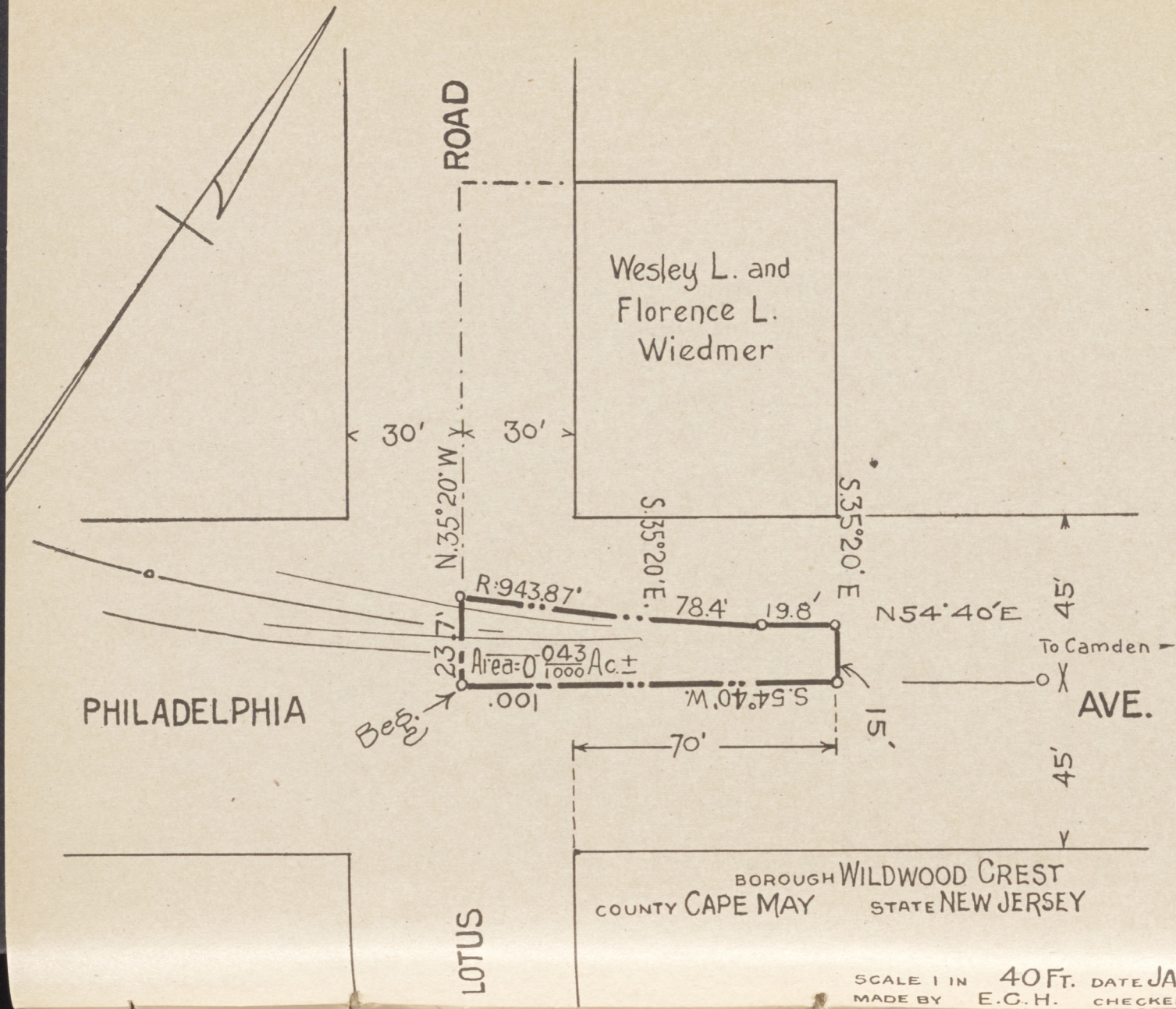
RALPH WHITLEY,  
*Mayor.*

Attest:

HARRY L. NICKERSON,

*Borough Clerk.*

Approved March 26, 1923.



SCALE 1 IN 40 FT. DATE JAN. 16, 1924  
MADE BY E.C.H. CHECKED BY J.W.W.

IN THE OFFICE OF THE COUNTY CLERK  
OF CAPE MAY COUNTY, NEW JERSEY.

*In the Matter of the Condemnation  
and Taking of Lands and Every  
Interest Therein of Wesley Liberty  
Wiedmer and Florence Liberta  
Wiedmer by the West Jersey and  
Seashore Railroad Company.* } On Petition.

ORDER.

Upon reading and filing the petition in the above-  
stated cause, for the condemnation and taking of lands  
of Wesley Liberty Wiedmer and Florence Liberta  
Wiedmer: 10

It is on this 8th day of April, 1924, ordered that a  
hearing of said petition before the subscriber will be  
given said owners, occupants and persons interested, at  
the Court House in the city of Bridgeton, county of  
Cumberland and State of New Jersey, on the 22d day  
of April, inst., at 10 o'clock in the forenoon, or as soon  
thereafter as counsel can be heard, at which three dis- 20  
interested freeholders will be appointed, to examine and  
appraise the lands in petitioner's petition described, and  
to assess the damages, if any, which the owners and per-  
sons claiming an interest in said lands mentioned in said  
petition have sustained by reason of the taking of the  
same by petitioner, at which time and place all persons  
mentioned in said petition will be heard touching and con-  
cerning the sufficiency of said petition, and the appoint-  
ment of appraisers above mentioned.

LUTHER A. CAMPBELL, 30  
*Judge.*

SCALE 1 IN 40 FT. DATE JAN. 16, 1924  
MADE BY E.C.H. CHECKED BY J.W.V.

107

IN THE OFFICE OF THE COUNTY CLERK  
OF CAPE MAY COUNTY, NEW JERSEY.

*In the Matter of the Condemnation  
and Taking of Lands and Every  
Interest Therein of Wesley Liberty  
Wiedmer and Florence Liberta  
Wiedmer by the West Jersey and  
Seashore Railroad Company.* } On Petition.

## NOTICE.

**10** *To Wesley Liberty Wiedmer, Florence Liberta Wiedmer  
and Sallie B. Hammer:*

Take notice that West Jersey and Seashore Railroad Company has filed a petition in the Office of the County Clerk of Cape May County, New Jersey, for the taking of lands lying in Philadelphia avenue and Lotus road, in Wildwood Crest, Lower Township, Cape May County, New Jersey, in front of property owned by Wesley Liberty Wiedmer and Florence Liberta Wiedmer, and that by order of the honorable Luther A. Campbell,

- 20** Justice of the Supreme Court, the court house at Bridgton, in the county of Cumberland and State of New Jersey, has been fixed as the place, and the twenty-second day of April, 1924, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, has been fixed as the time of hearing the owners, occupants and persons interested in said lands upon the sufficiency of the petition filed in this matter, and upon the appointment of three disinterested freeholders to appraise the value of said lands, at which time and place you and each of
- 30** you may be heard.

This notice is given pursuant to an order of the court made in the above-stated matter.

BOURGEOIS & COULOMB,  
*Attorneys of Petitioners, West Jersey and  
Seashore Railroad Company, 28 Law  
Building, Atlantic City, N. J.*

Dated April 10th, 1924.

IN THE OFFICE OF THE COUNTY CLERK  
OF CAPE MAY COUNTY, NEW JERSEY.

*In the Matter of the Condemnation  
and Taking of Lands and Every  
Interest Therein of Wesley Liberty  
Wiedmer and Florence Liberta  
Wiedmer by the West Jersey and  
Seashore Railroad Company.* } On Petition.

## ORDER DIRECTING SERVICE.

An order of this Court, fixing the Court House in the City of Bridgeton, County of Cumberland and State of New Jersey, on the twenty-second day of April, instant, at ten o'clock in the forenoon, as the place and time of hearing the owners, occupants and persons interested in the lands mentioned in the petition, and the appointment of commissioners to appraise said lands, having been fixed by order of the Court on the eighth day of April, 1924: 10

It is on this ninth day of April, 1924, on motion of Bourgois & Coulomb, Ordered that notice of the time and place of said hearing be given to the owners, occupants and persons interested in said lands by serving written notice thereof personally upon the parties residing in this State, or by leaving the same at their residence, if known, at least six days before the date of said hearing, and that notice to the owners, occupants and persons interested, residing out of the State, or whose residence is unknown, be given by publishing said notice in a newspaper published and circulating in Cape May County for not less than one week prior to the date of said hearing, and by mailing to such owners, occupants and persons interested, whose addresses can be ascertained, a copy of said publication, at least six days prior to the date fixed for the hearing in said matter. 20 30

LUTHER A. CAMPBELL,  
*Judge.*

IN THE OFFICE OF THE COUNTY CLERK  
OF CAPE MAY COUNTY, NEW JERSEY.

*In the Matter of the Condemnation  
and Taking of Lands and Every  
Interest Therein of Wesley Liberty  
Wiedmer and Florence Liberta  
Wiedmer by the West Jersey and  
Seashore Railroad Company.* } On Petition.

ORDER APPOINTING COMMISSIONERS.

- 10** On motion of Bourgeois & Coulomb, attorneys for petitioner in the above-stated cause, I, Luther A. Campbell, Justice of the Supreme Court, on this thirteenth day of May, 1924, it being the day fixed by me, the subscriber, by order bearing date the twenty-second day of April, 1924, and on said day continued till today at Mays Landing for the hearing of the petition in this matter; and it appearing that the statute touching and concerning the taking of land by condemnation has been complied with, and upon filing in the office of the
- 20** Clerk of the County of Cape May evidence of the service of notice upon the owners and persons claiming an interest in the land described in the petition, pursuant to the statute and order made in this cause, do hereby appoint Eugene C. Cole, Hon. William H. Bright, and Julius Way, M. D., three disinterested freeholders, all of whom are residents of the County of Cape May, commissioners to examine and appraise the lands in petitioner's petition described, and to assess the damages, if any, which the owners claiming to own said lands
- 30** mentioned in said petition have sustained by reason of the taking of the same by petitioner, and that said commissioners do give to the owners claiming an interest therein, mentioned in said petition, at least six (6) days' notice of the time and place where such owners, claiming an interest in said lands to be taken, may be heard;

said notice to be served upon the owners claiming an interest in said lands to be taken, residing within the State of New Jersey, either personally, or by leaving a copy thereof at his or their residence with a member of the family above the age of fourteen years, and upon the owners claiming an interest in said lands, residing out of this State, either personally, or by publishing a copy of such notice in two newspapers, published and circulated in the County of Cape May, for not less than one week, and by mailing to such owners claiming an interest in such lands, residing out of this State, a copy thereof to their last known address, postage prepaid, at least six days prior to the date of said hearing. 10

I hereby order and direct that the said commissioners file their report with the Clerk of Cape May County on or before the twenty-first day of June, 1924.

LUTHER A. CAMPBELL,  
*Justice of the Supreme Court.*

Filed May 13th, 1924.

LUTHER A. CAMPBELL,  
J. S. C.

20

IN THE OFFICE OF THE COUNTY CLERK  
OF CAPE MAY COUNTY, NEW JERSEY.

*In the Matter of the Condemnation  
and Taking of Lands and Every  
Interest Therein of Wesley Liberty  
Wiedmer and Florence Liberta  
Wiedmer by the West Jersey and  
Seashore Railroad Company.* } On Petition. 30

## NOTICE.

*To Wesley Liberty Wiedmer, Florence Liberta Wiedmer and Sallie B. Hammer:*

Take notice that West Jersey and Seashore Railroad Company has filed a petition in the Office of the County

Clerk of Cape May County, New Jersey, for the taking of lands lying in Philadelphia Avenue and Lotus Road, in Wildwood Crest, Lower Township, Cape May County, New Jersey, in front of property owned by Wesley Liberty Wiedmer and Florence Liberta Wiedmer, and that by order of the Honorable Luther A. Campbell, Justice of the Supreme Court, the court house at Bridgeton, in the county of Cumberland and State of New Jersey, has been fixed as the place, and the **10** twenty-second day of April, 1924, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, has been fixed as the time of hearing the owners, occupants and persons interested in said lands upon the sufficiency of the petition filed in this matter, and upon the appointment of three disinterested freeholders to appraise the value of said lands, at which time and place you and each of you may be heard.

This notice is given pursuant to an order of the Court made in the above-stated matter.

**20**

BOURGEOIS & COULOMB,  
*Attorneys of Petitioners,  
West Jersey and Seashore  
Railroad Company, 28  
Law Building, Atlantic  
City, N. J.*

Dated April 10th, 1924.

# COURT OF ERRORS AND APPEALS

THE STATE  
Defendant in Error

IN ERROR  
INDICTMENT  
FOR RAPE.

THOMAS FLIKK, et als,  
Plaintiffs in Error.

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## BRIEF OF PLAINTIFFS IN ERROR

### HISTORY OF CASE

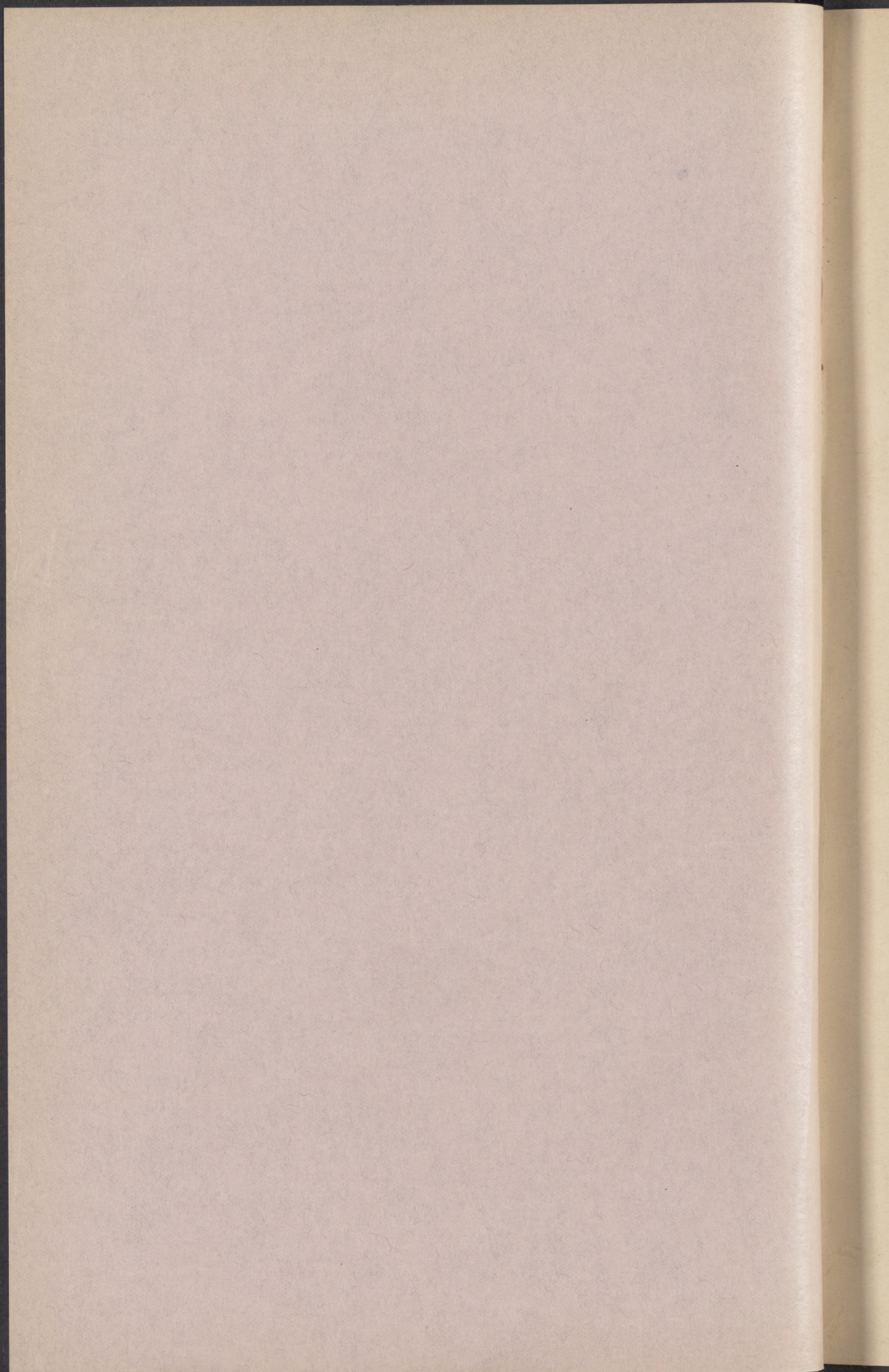
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Plaintiffs in error are charged with rape on Mary Bocvenski on March 5, 1923, at Round Brook, in the County of Somerset.

The complaining witness, Mary Bocvenski together with her husband and three of her friends, Anthony Petoskey, Sam Sarlocke and Paul Guggi had returned from New Brunswick in the neighborhood of 2:45 A. M. They stopped in the lunch wagon opposite the trolley terminal in Round Brook, to get some lunch. They went into a separate compartment called the "ladies' parlor." A number of men were in the other compartment. Some words ensued between one of the friends of the complaining witness and those in the other compartment, which started a fight. The men were all put out of the lunch wagon and continued their fight across the street on Main Street. From that point, some of them continued to fight a little way up East Street, near a sign board and about a half a block away from the

30

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28 MAR.T.1925

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

FLORENCE WIEDMER, et al.,  
Prosecutors-Appell-  
ants.

vs.

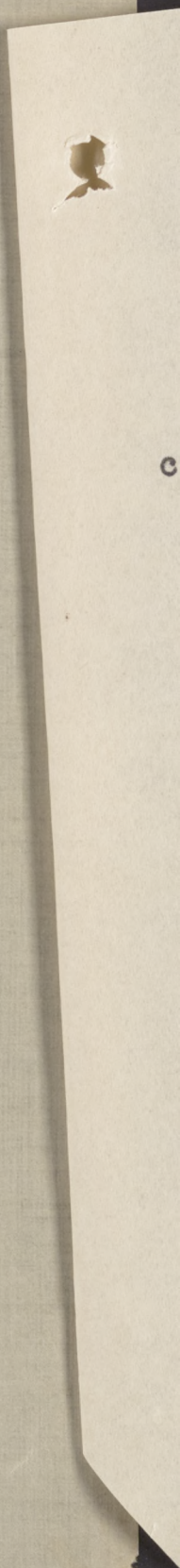
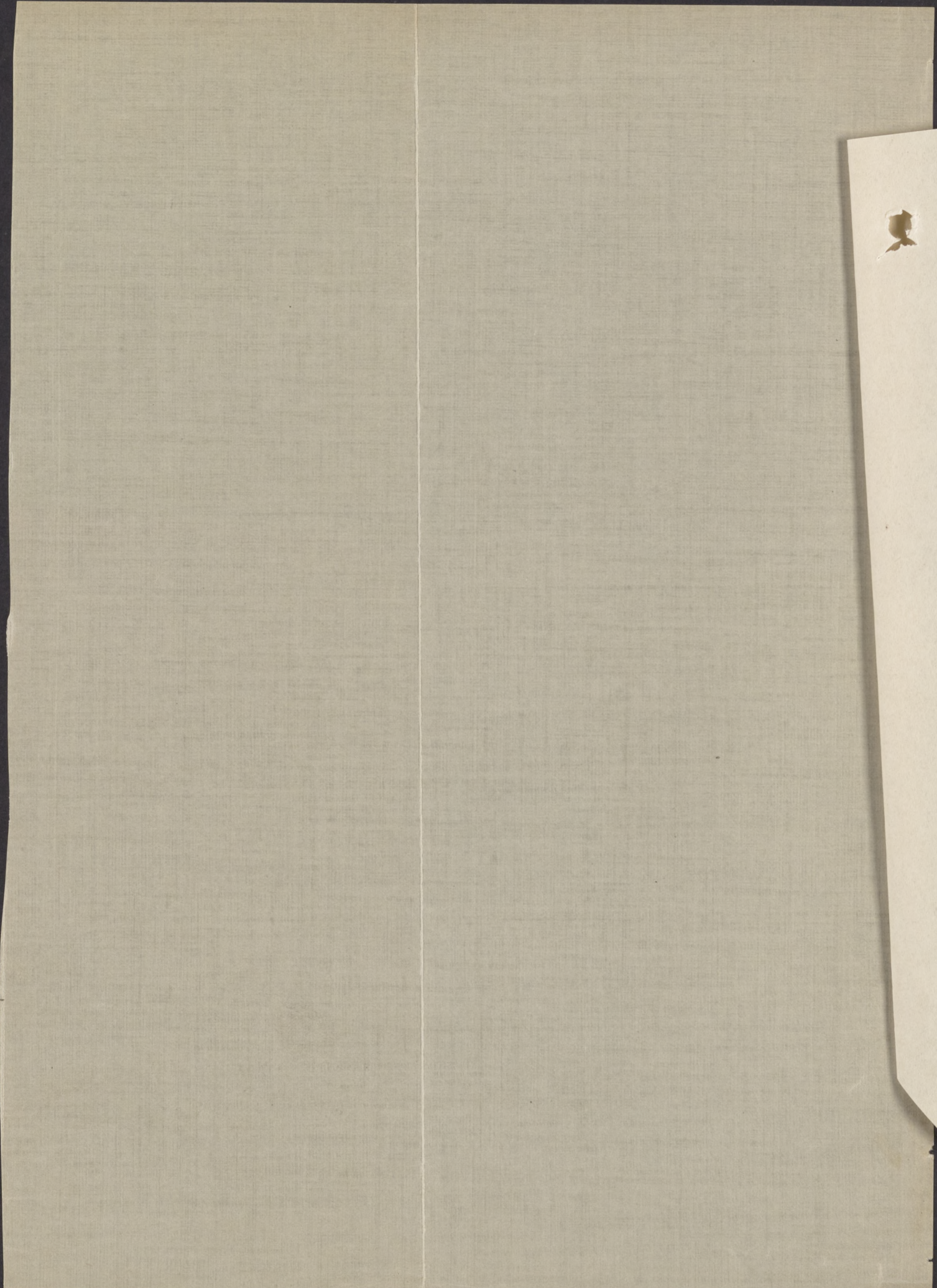
WEST JERSEY & SEASHORE RAIL-  
ROAD CO.,  
Def't-Respondent.

On Appeal from Supreme Court.

POINTS FOR APPELLANT.

COLE AND COLE  
LAW OFFICES  
ATLANTIC CITY, N. J.

GUARANTEE TRUST BUILDING



c

NEW JERSEY COURT OF ERRORS AND APPEALS.

FLORENCE WIEDMER, et al., :  
Prosecutors-Appellants, : On Appeal from Supreme Court.  
vs. :  
WEST JERSEY & SEASHORE RAILROAD CO., : POINTS FOR APPELLANT.  
Defendant-Respondent. :

STATEMENT.

The opinion of the Supreme Court sufficiently states the case.

POINT I.

THE SUPREME COURT ERRED IN FINDING THAT THE TRACKS WHEN EXTENDED WILL NOT RUN LONGITUDINALLY IN PHILADELPHIA AVENUE.

If this finding of fact be correct, there was no occasion for the railroad company to institute condemnation proceedings. The ordinance gave it the right to cross certain avenues and with this there was no necessity for the defendant-respondent to condemn. Evidently the railroad company thought its tracks when extended would run longitudinally. And this is plainly so in fact. The tracks when extended will run longitudinally in front of appellants' property from the point of extension to Lotus Road where they begin to cross not Philadelphia Avenue but Lotus Road to the private property of the company. The map clearly shows this.

POINT II.

THERE IS NO AUTHORITY PERMITTING THE RAILROAD COMPANY TO OCCUPY THE STREET LONGITUDINALLY.

The ordinance did not pretend to give the company the right to occupy the street longitudinally. The right is to cross the street. There is no act empowering Wildwood Crest to grant the right to use the street longitudinally for railroad purposes. If the ordinance

BALTIMORE

OFFICE SUPPLY CO

can be construed to grant such right, then it is void.

TALON v. HOBOKEN, 60 Law 212.

POINT III.

SECTION 34 OF THE RAILROAD ACT CITED IN THE OPINION OF THE SUPREME COURT IS NOT APPLICABLE.

This section is limited to cities. Wildwood Crest is a borough. Pamphlet Laws 1910 page 146.

Since the company invokes the high power of eminent domain it must show its authority. Any doubt must be resolved in favor of the appellant, property owner. It has shown none.

For these reasons the Supreme Court should have vacated the order appointing commissioners and set aside the proceedings and this court should vacate and set aside the order.

Respectfully submitted,

Cole & Cole,  
Attorneys for Appellants,  
C. L. Cole,  
Of Counsel.

can be admitted to stand as a precedent  
ALAN V. BROWN, et al.

SECTION 4 OF THE LABOR RELATIONS ACT  
UNLAWFUL TO ENFORCE  
This section is illegal  
organ. Federal law is supreme.

Since the company knows the law  
it must know its authority  
of the appellant. Property of  
for these reasons  
other applicable common law principles  
this court must apply

Respectfully submitted

ALAN V. BROWN  
et al.