

NEW JERSEY
Court of Errors and Appeals

ARVINE H. PHILLIPS,

Prosecutor,

vs.

BOROUGH OF LONGPORT,

Respondent.

ON CERTIORARI.

On Appeal of Max and Sarah Bamberger
Seashore Home. 10

BRIEF OF RESPONDENT.

The Respondent adopts the state of facts set forth in the appellant's brief with the following exception:—

It nowhere appears in the State of Case that the Commissioners appointed by the Court assessed benefits as of the date of their assessment and included the buildings on the land of the home. 20

On the Contrary it is stipulated that the Commissioners took into consideration the improvements made on the land of the appellant, which stipulation is capable of the construction that said buildings were omitted.

I.

The power to order and levy the assessment under review is conferred upon the Supreme Court by an Act of the Legislature of the State of New Jersey, entitled, "A General Act respecting taxes, assessments and Water Rates", approved March 23, 1881 (P. L. 1881 P. 194). 30

"That no tax assessment or water rate imposed or levied in this state shall be set aside or reversed in any court of law or equity in any action, suit

or proceeding for any irregularity or defect in form, or illegality in assessing, laying or levying any such tax, assessment or rate of the person against whom, or the property upon which the tax assessment or rate is assessed or laid is in fact liable to taxation or assessment and the Court in which any action, suit or proceeding is or shall be pending to review any such tax assessment or water rate is required to amend all irregularities, or errors or defects and is empowered, if need be to ascertain and determine for what sum such person or property was legally liable to taxation or assessment and by order or decree to fix the amount thereof; it shall be the duty of the court to make a proper levy, imposition or assessment in all cases in which there may lawfully be an assessment, imposition or levy and such court is hereby given full and ample authority to make a lawful levy, assessment or imposition.”

The authority conferred upon the Court below by this statute has been frequently exercised by that court, and in *Bachelor vs. Borough of Avon-by-the-Sea* (68 Atl. Rep. 124) it was held by Trenchard J.:

20 “This defect and all others which are alleged to exist can be cured by this court setting aside the report and assessing the property as the Commissioners might have done.”

This practice was followed by the Court below in *Brewer vs. City of Elizabeth*, 66 N. J. L. 547, when the Court again proceeded under the Statute of 1881 to set aside the assessment under review and make a reassessment and in this case it is held by Fort J.:

30 “Assessments for public improvement set aside for defects of the character here brought up, but which appear to have been laid on legal principals, and to be just and fair will be reassessed by this court under the act approved March 23rd, 1881.”

This Court has passed upon the Act in question in *Brown vs. Town of Union* (65 N. J. L. 601) and the authority of the Court below to make a reassessment is most clearly and forcefully emphasized in the

opinion of Beasley, C. J., in *City of Elizabeth vs. Meeker*, (45 N. J. L., P. 159), where it was held after quoting the Act of 1881:

“The language here employed appears to leave no doubt as to the purpose of the legislature. It was to assign to the court the province of seeing that its suitors who were liable, or whose property was subject to these assessments for public improvements and who were seeking to vacate any of such assessments, should in every event be made to bear their fair and legal share of the burden. This provision was well timed and most salutary, for while it preserves to the owners of the property the ability to relieve himself from so much of his tax as is unjust, it at the same time and by a summary procedure compels him to do justice to the public by paying such part of his assessment as is justly due. This law is, in the highest sense, remedial, and should be construed with liberality so as to abate the mischief of tax payers avoiding, by litigation their honest dues to the government.”

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II.

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If the authority of the Court below to order and levy a reassessment is settled then that court is certainly also vested with the power and authority to prescribe the method of making the reassessment, make such directions and orders as it may deem necessary in its discretion to govern the levy of its own assessment and if it shall see fit appoint its own commissioners for the purpose of making alterations, corrections or a general revision of the assessment which it has ordered set aside and reassessed.

Although it is not specifically provided in the statute that Commissioners may be appointed by the Court for the purpose of the Act, it nevertheless is plainly apparent by the terms of the statute that the legislature intended to vest in the court full and ample authority to exercise a broad and liberal discretion in all matters incidental to a reassessment.

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In the case at bar the appointment of commissioners was a necessary and proper exercise of that discretion and the respondent insists that on this ground the assessment made by the Court below is not appealable.

III.

10 There is nothing in the case to show the Commissioners appointed by the Supreme Court assessed the buildings of the appellant. In the list of assessments attached to the report of the Commissioners the assessment against the appellant appears as follows:

Max and Sarah Bamberger Seashore Home
Atlantic and Idaho Avenues.....\$563.32

20 On the contrary it has been stipulated in this case that the Commissioners while making the assessment on the property of the appellant did take into consideration the fact that the improvements on the land of the appellant were made after the completion of the jetties, (Case page 9 Stipulation No. 6), but it has not been stipulated or agreed that the Commissioners assessed said improvements.

The judgment of the Commissioners in fixing the amount of the levy against the property of the appellant cannot be questioned in this appeal unless it clearly appears that some rule of law or some legal principle has been violated, but nothing is before this court which shows a violation of a rule of law or legal principle by the Supreme Court in its reassessment or that the assessments so levied by the Court below are excessive or unreasonable.

IV.

30 The contention of the appellant that the Commissioners assessed benefits as of the time they acted rather than as of the time of the completion of the improvement, cannot be entertained by this court unless something is provided to show this fact, but this appeal fails to reveal such action by the commissioners and for the determination of this ques-

tion the Court is referred to the Report of the Commissioners (Case Page 3.)

“We find that the several properties hereinafter set forth *were* benefited in the amount respectively set forth after each designated property, and that said assessments do not exceed the actual benefits received by said properties.”

Nothing in the report indicates an assessment of the time the commissioners acted. Its phraseology is of the past tense and clearly indicates the properties were assessed as they were benefited at the time of the completion of the improvement. 10

V.

The assessment levied by the Supreme Court against the property of the appellant is authorized by the statute of 1881 and matters incidental to that assessment such as the amount of the assessment levied against the property of the appellant are matters in the discretion of the Supreme Court and are not appealable. It is a well settled principal that matters depending solely upon the discretion of the court below are not to be considered on appeal to this court. 20

Romaine vs. Norris, 8 N. J. L. 80.

Rutherford vs. Fen, 21 N. J. L. 700.

That the property of the appellant is subject to assessment and liable for its proportion of the assessment levied in this case has not and cannot be questioned. If the property is assessable then the court cannot take under consideration any of the questions raised by this appeal and it becomes the duty of this court to dismiss this appeal. 30

The respondent asks that this appeal be dismissed with costs.

HARRY WOOTTON,
Attorney for Respondent.

NEW JERSEY

Court of Errors and Appeals

A. H. PHILLIPS,
Prosecutor, } On Appeal of Max and
vs. } Sarah Bamberger Sea-
BOROUGH OF LONGPORT, } shore Home.
Defendant.

Brief.

FACTS.

The Borough of Longport instituted proceedings for the assessment of benefits on all the property owners within the Borough to pay for alleged improvements in the construction of jetties designed to protect the beach front from the erosions of the sea. Commissioners were appointed, who made their report, and then Arvine H. Phillips prosecuted a writ of certiorari, with the result that the Supreme Court set aside the assessment. A second attempt was made to assess, and that assessment was set aside and the Supreme Court appointed three commissioners to reassess. On the coming in of their report, and after notice, the Supreme Court, notwithstanding the objection of counsel, confirmed the report, and from that this appeal was sued out.

It appears by the stipulation that the commissioners appointed by the Court assessed benefits as of the date of their assessment, and included the buildings on the land of the Home. This building was not on the land at the time the alleged improvements were made, nor at the time of the initiation of the original proceedings; in fact the construction was not begun until December, 1914, whereas the original resolution providing for the original commissioners was adopted in September, 1912.

LAW.

FIRST POINT.

The benefits which accrued to the Home, and for which an assessment could be lawfully made, was as of the time of the completion of the improvements. It was not within the power of the commissioners to consider any time anterior to the making of the improvements nor any time subsequent thereto. The work must have been done before September, 1912, while the assessment under review was not made until August 15, 1915. The assessment made prior to that made by the commissioners appointed by the Court ignored improvements upon the land, and for that reason the Supreme Court set it aside and directed that in arriving at the value of the respective properties, for the purpose of determining the benefits, the improvements must be taken into consideration. But this did not mean the improvements at the time of the making of the assessment under review, but as of the time of the completion of the work. Had the original assessment been properly and legally made, the amount of the assessment against the Home, in theory at least, would have been paid nearly two years before the improvements were begun.

See *Johnston v. City of Trenton*, 43 *Law*, at bottom of page 169, where the Court said:

“It appears in the case that the first assess-

ment was made December 22d, 1873. In making the reassessment it was the duty of the commissioners to ascertain what sum should have been assessed to each lot at the date of the first assessment. They were appointed to correct any errors of estimate in the first assessment, and that was the time to which their inquiry was properly directed."

SECOND POINT.

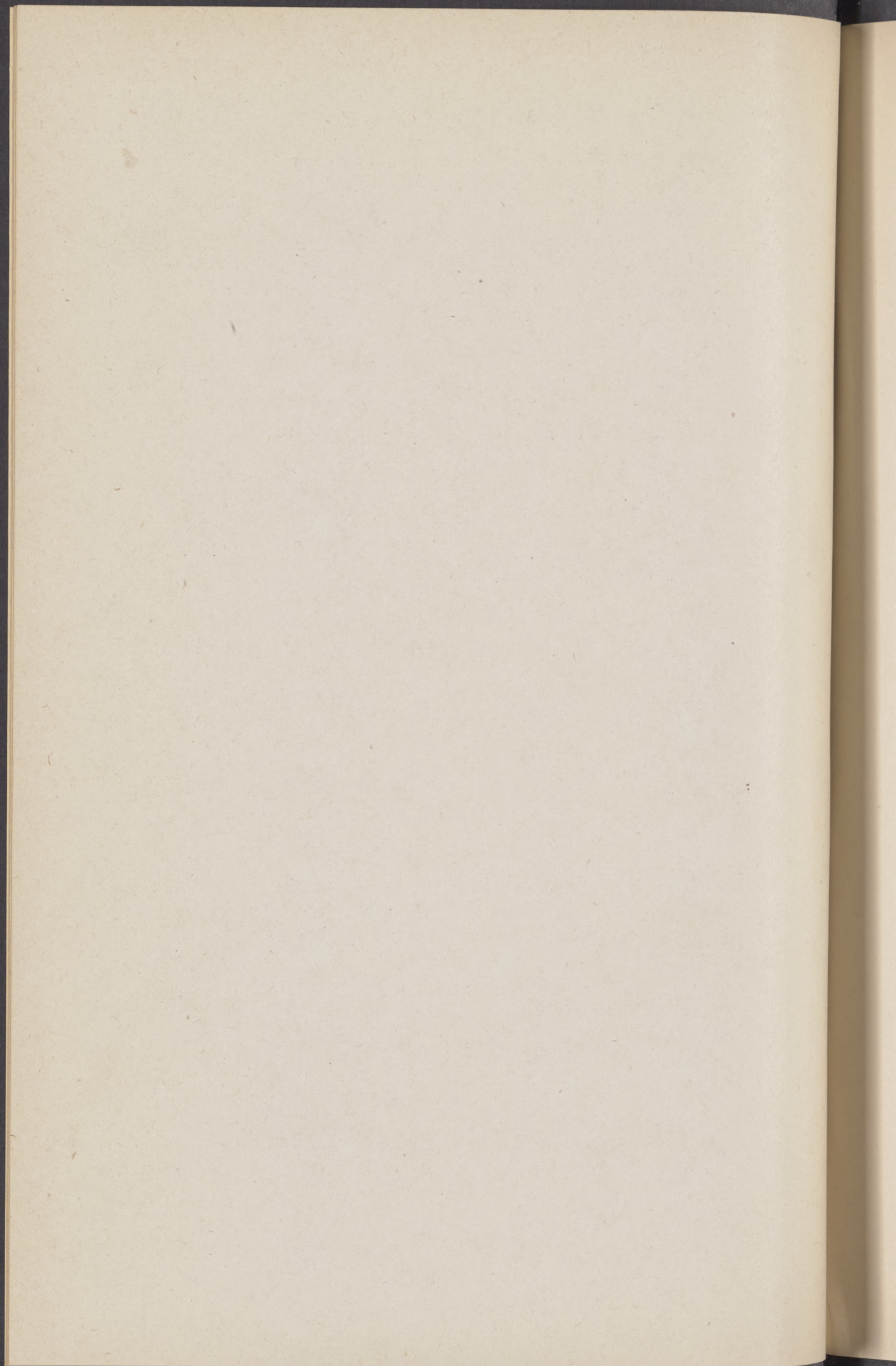
The Supreme Court was without authority to assess benefits through commissioners appointed by it. The Act of 1881, page 194, is without application to the case at hand. That act is intended to meet a case where there is irregularity in the making of the assessment, and not where there is a lack of power, as in this case. The difficulty with the case under consideration is that by reason of the Statute of 1897 (*P. L.*, page 303), which endows the Borough with the power to make the improvements and assess benefits, qualified commissioners cannot be found. The vice is inherent in the act. The Act of 1881 does not authorize the Supreme Court to cure the weakness of the Act of 1897. All the Act of 1881 does is to enable the Supreme Court to cause a reassessment where there has been some irregularity below due, not to a lack of power or inability in the municipality to secure lawful commissioners, but to some inadvertence or mistake.

For these reasons we submit the order of confirmation under review, together with the assessment, must be set aside.

Respectfully submitted,

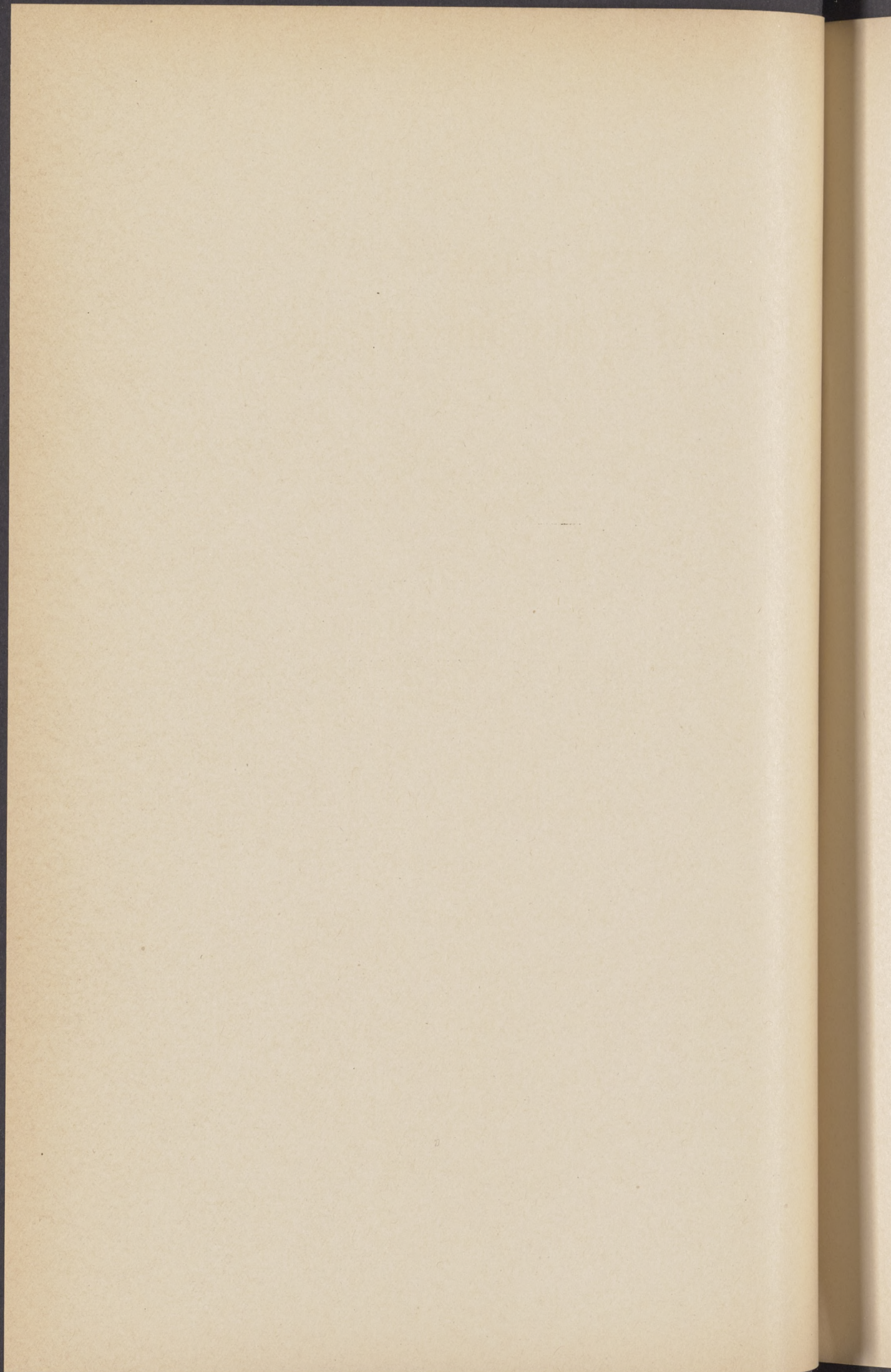
C. L. COLE,

Attorney of Appellant.



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NEW JERSEY Court of Errors and Appeals.

ARVINE H. PHILLIPS,
Prosecutor, } On Appeal of Max and
vs. } Sarah Bamberger Sea-
BOROUGH OF LONGPORT, } shore Home.
Defendant. }

NEW JERSEY SUPREME COURT.

ARVINE H. PHILLIPS,
Prosecutor, }
vs. } On Certiorari. 10
BOROUGH OF LONGPORT, }
Defendant. }

COMMISSIONERS' REPORT.

In pursuance of two certain orders of this Court made in the above-entitled cause, one bearing date the 8th day of September, A. D. 1915, in which it was ordered that there be a reassessment of the benefits conferred upon the owners of property in the Borough of Longport by reason of the construction of jetties and bulkheads along the beach front of said Borough theretofore constructed to protect properties in said Borough from the encroachment of the sea, the cost of which

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construction had theretofore been ascertained, determined and certified by the Commissioners of the said Borough of Longport as being the sum of \$20,400, which said reassessment should be made by the Supreme Court through commissioners to be appointed by it, and that in such reassessment real estate should be assessed with respect to the value imparted to it by permanent improvement; no property be exempted from assessment merely because it is exempt from taxation, and
10 that for that purpose Robert H. Ingersoll, of Atlantic City, New Jersey, and Stewart R. McShea, of the same place, and Walter Cavileer, of the same place, were appointed as Commissioners, the same being freeholders of the County of Atlantic, in this State, and not residents of the said Borough of Longport.

And further ordering that said Commissioners do forthwith qualify and make said assessment and report their assessment to this Court on the 8th day of November then next for confirmation or upon such other
20 date as the Court might consent upon application; the second of said orders, made on the 28th day of September, 1915, naming and appointing Samuel P. Morris, of Atlantic City, he being a freeholder of the County of Atlantic and not a resident of said Borough of Longport, as a Commissioner in lieu and in place of the said Stewart R. McShea, who declined the said appointment, and also a further order of this Court made on the day of , in which the
said Court, upon application, fixed the 8th of Decem-
30 ber, 1915, as the time for the said Commissioners to report their assessment.

We, the said Robert H. Ingersoll, Walter K. Cavileer and Samuel P. Morris, the said Commissioners, do hereby respectively report that we did qualify as in and by the oaths hereto attached and marked Exhibits 1, 2 and 3 fully set forth, and that we did, pursuant to law, appoint the 23d day of October, 1915, at 2 o'clock in the afternoon, at the Borough Hall in the Borough

of Longport, as the time and place of a meeting for the purpose of hearing all parties interested in said improvements, of which meeting due notice was given, a copy of which notice is hereto attached and marked Exhibit 4, which notice was duly posted as required by law in five public places in said Borough at least two weeks before said meeting, to wit: Borough Hall, Post Office, 17th Street and Atlantic Avenue, Railroad Station and 24th Street and Atlantic Avenue; which said notices and the affidavit of the posting thereof are hereto attached and marked Exhibits 4 and 5, and that at said meeting, and at other meetings to which the said Commissioners adjourned, the said Commissioners did give all parties interested in or affected by said improvement ample opportunity to be heard upon the subject of said assessment, and that, among others, the prosecutor in this cause appeared at two of said meetings and was heard by the said Commissioners. 10

We report further that we caused a map of the said Borough of Longport to be prepared, which is attached hereto and marked Exhibit 6, and that we find that all property in the said Borough had been benefited by reason of said improvement, and that we made our percentages of assessment highest at the location of the jetties and adjacent thereto and diminished the same gradually to the Borough limits. We reached our valuation of said lands and real estate and buildings from an examination of the land and from expert testimony under oath, and based our assessment upon these values at varying rates of percentages, starting at the point of land (the location of the main jetty) as the highest and gradually diminished. 20 30

And we do hereby make and file our report of assessment made against property benefited by said improvements and do report that we find that the several properties hereinafter set forth were benefited in the amount respectively set forth after each designated property, and that said assessments do not exceed the actual benefits received by said properties. That, in our judg-

ment, said assessment is a just and equitable assessment of the benefits conferred upon the owners of real estate in said Borough of Longport designated in this report, having due regard to the rights and interest of all persons concerned as well as to the value of the land and real estate benefited.

Dated December 6th, 1915.

ROBERT H. INGERSOLL,
WALTER K. CAVILEER,
SAMUEL P. MORRIS,
Commissioners.

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The attached report, which was on the 8th day of December, A. D. 1915, filed in this Court, and by an order made on the 6th day of January, A. D. 1916, was returned to said Commissioners for reconsideration and correction, we, Robert H. Ingersoll, Walter K. Cavileer and Samuel P. Morris, the said Commissioners, do certify that after having given notice to all freeholders of the Borough of Longport we met on the 15th day of
20 January, A. D. 1916, at the Borough Hall, in the Borough of Longport, State of New Jersey, and that we did at that time give opportunity to all persons interested to be heard upon the matter, and that, after a reconsideration of the said report, we do hereby return the same without correction or alteration, and that we do make our report in words and figures as set forth in the said report filed December 8th, A. D. 1915.

ROBERT H. INGERSOLL,
WALTER K. CAVILEER,
SAMUEL P. MORRIS,
*Commissioners of Assessment
of the Borough of Longport.*

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Block No. 4.

Max and Sarah Bamberger Seashore Home,
Minn. and Idaho Aves., \$565.32

NEW JERSEY SUPREME COURT.

IN THE MATTER OF THE ASSESS-
 MENT OF BENEFITS FOR JETTY } Appeal of Max and
 IMPROVEMENTS IN THE BOR- } Sarah Bamberger
 OUGH OF LONGPORT BY COM- } Seashore Home.
 MISSIONERS, &C.

NOTICE OF APPEAL.

To Harry Wootton, Esquire,

Attorney for Borough of Longport:

Take notice that the Max and Sarah Bamberger
 Seashore Home appeals to the Court of Errors and
 Appeals from the order and rule of the Supreme Court
 dated the fifteenth day of February, 1915, which con-
 firms the assessment made by Robert H. Ingersoll and
 other Commissioners appointed by the Supreme Court
 for the purpose of assessing benefits to property owners
 by reason of alleged jetty improvements, and from so
 much of said report as adjudges that the property of
 said home is benefited to the amount of \$563.32, on
 the following grounds:

1. The Supreme Court was without power to appoint
 the Commissioners who made the assessment.

2. The appointment of the Commissioners was with-
 out authority in law and their assessment was without
 legal basis.

3. The Statute of 1885, to which appeal was made
 for justification of the appointment of Commissioners
 by the Supreme Court, was without application to the
 case.

4. The Commissioners assessed benefits against the
 appellant both as to its land and buildings thereon when
 in fact the buildings were not erected until long after
 the initiation of the proceedings looking to the jetty
 improvements and after such improvements had actually
 been made.

5. The Commissioners assessed benefits as of the time they acted rather than as of the time of the completion of the improvements.

6. The Borough of Longport was not vested with adequate legal authority to make the improvements in question nor to assess benefits therefor.

C. L. COLE,
Attorney of Appellant.

Due and legal service acknowledged this 7th day of
10 August, 1916, by

HARRY WOOTTON,
Attorney for Borough of Longport.

Filed August 9th, 1916.

WM. O. GEBHARDT,
Clerk.

NEW JERSEY SUPREME COURT.

<p>ARVINE H. PHILLIPS, <i>Prosecutor,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>20 BOROUGH OF LONGPORT, <i>Defendant.</i></p>	}	<p>On Certiorari.</p>
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ORDER OF CONFIRMATION.

Upon return of rule in this cause dated January 6th, A. D. 1916, providing that the report filed by the Commissioners of Assessment appointed by this Court in this cause be returned to said Commissioners for reconsideration and correction and be filed with this Court on or before February 1st, A. D. 1916, and that objections to such report so filed be heard Tuesday,
30 February 15th, 1916, at 1:45 P. M., before this Court in the State House, at Trenton, New Jersey, of which hearing notice should be given by posting in five public places in the Borough of Longport at least two weeks

before said hearing and serving a copy of said notice upon the owner or owners named in said report of resident in said Borough or of nonresident by mailing a copy of said notice to such owner or owners. And it further appearing that said Commissioners of Assessment filed said report January 28th, A. D. 1916, without correction, and that notice of said hearing has been given as prescribed by said order hereinbefore referred to; and upon hearing all objections to such report so filed, and no cause being shown to the contrary, it is, 10
on this 15th day of February, A. D. nineteen hundred and sixteen, ordered that the same report so filed and the same and all the matters and things therein contained do stand satisfied, approved and confirmed, and a copy thereof be delivered to the Collector of the Borough of Longport, for the purpose of collecting the sums so assessed.

C. G. GARRISON, *J. S. C.*,
For the Court.

Entered February 15th, 1916, on motion of 20
HARRY WOOTTON,
Attorney for Defendant.

I, William C. Gerhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the Court in the above-stated cause.

In testimony whereof I have set my hand and seal of said Court at Trenton, this tenth day of August, A. D. nineteen hundred and sixteen. 30

WM. C. GEBHARDT,
Clerk.

Filed September 22, 1916.

THOMAS F. MARTIN,
Clerk.

NEW JERSEY SUPREME COURT.

ARVINE H. PHILLIPS, <i>Prosecutor,</i>	}	On Certiorari.
<i>vs.</i>		On Appeal of Max and
BOROUGH OF LONGPORT, <i>Respondent.</i>	}	Sarah Bamberger Sea-
		shore Home.

STIPULATION.

(Filed September 2, 1916.)

10 For the purpose of the argument in the Court of Errors and Appeals on the appeal of the Max and Sarah Bamberger Seashore Home from the assessment made by Robert H. Ingersoll and others, Commissioners appointed by the Supreme Court to reassess benefits for jetty improvements in the Borough of Longport, it is stipulated as follows:

20 1. That at the time of the institution of the original proceedings providing for the building and construction of the jetties and at the time of the completion of the same, pursuant to which improvements the assessment involved in this appeal were made, the property of the appellant was unimproved.

2. That in December, 1914, appellant began the construction of its home upon the land in question and completed the same during the month of March, 1915.

30 3. That the original resolution providing for the appointment of the original Commissioners of Assessment was adopted September 9th, 1912; that they reported their assessment, which assessment was reviewed in the Supreme Court on certiorari and a rule entered on the 18th day of December, 1913, setting aside the report and assessment; that thereafter and pursuant to resolution passed January 12, 1914, and March 21, 1914, respectively, other Commissioners were appointed to assess benefits, who made their report under date of

August 15, 1914, which report and assessment was reviewed by certiorari, which Court ordered a reassessment of benefits and appointed Commissioners to make such reassessment.

4. That a copy of the opinion of the Supreme Court which resulted in the appointment by it of said Commissioners is made a part hereof.

5. That the appellant herein objected before the Supreme Court that it was without power to appoint Commissioners to reassess. 10

6. That said Commissioners so appointed in making a reassessment against the property of appellant took into consideration the improvements upon the land made by the appellant after the completion of the jetties.

7. That on the return day of the notice of the motion to have the Supreme Court confirm such reassessment the appellant appeared and objected that as to it the assessment was illegal because such improvements were taken into consideration.

8. That both objections hereinabove recited were 20
overruled by the Supreme Court.

9. That the attorney for the appellant appeared before his Honor Mr. Justice Garrison at Chambers and applied for a writ of certiorari on behalf of the appellant to review the report and assessment, and that such writ was denied upon the ground that appeal was the proper remedy.

C. L. COLE,
Attorney for Appellant.

HARRY WOOTTON, 30
Attorney for Respondent.

The matters before the Supreme Court and the Court's action thereon are correctly stipulated above.

C. G. GARRISON,
Jus. Sup. Ct., for the Court.

NEW JERSEY SUPREME COURT.

ARVINE H. PHILLIPS,
Prosecutor, }
v. }
 BOROUGH OF LONGPORT,
Defendant. }

Argued June 2, 1915; decided July 15, 1915.

On Certiorari.

Before JUSTICES GARRISON, TRENCHARD and BLACK.

10 For the Prosecutor, *John B. Slack, Clarence L. Cole.*
 For the Defendant, *Harry Wootton.*

PER CURIAM:

We have concluded that a reassessment of benefits should be made by the Court through commissioners to be appointed upon the application of the Borough upon notice to the prosecutor of this writ. Such notice may be given for Thursday, September 16, 1915, at the State House, Trenton, at 1:45 P. M., or if counsel so consent it may be given at the earliest day agreed
 20 upon before Mr. Justice Garrison, at 126 West Taylor Avenue, Holly Beach, New Jersey.

This disposes of the objections to the Borough Commissioners on the ground of their interest and the propriety of their assessment.

In such reassessment real estate must be assessed with respect to the value imparted to it by permanent improvements, and no property be exempted from assessment merely because it is exempt from taxation.

30 Questions arising from payments previously made are not involved in the assessment of benefits; neither the proper adjustment of such payments nor the necessary parties are now before us. The prosecutor is entitled to costs in certiorari.



