104 Md. 107, 64 A. 702

Court of Appeals of Maryland.
MAYOR, ETC., OF CITY OF BALTIMORE et al.
v.
FLACK et al.
SAME
v.
AULL.
Oct. 4, 1906.

Appeal from Circuit Court of Baltimore City; Henry Stockbridge, Judge.

Two bills in equity, by Frank M. Flack and others and by Jacob H. Aull, against the mayor and city council of city of Baltimore and others. From a decree for plaintiffs, defendants appeal. Reversed and rendered.

Jones, J., dissenting in part.

West Headnotes

Statutes 361 ⚿109.3
361k109.3 Most Cited Cases
The subject of an act, within Const. art. 3, § 29, declaring that every law shall embrace but one subject, described in the title, does not include the details of the legislation, nor the instrumentalities by which the subject is to be carried into effect.

Municipal Corporations 268 ⚿70
268k70 Most Cited Cases
Acts 1904, c. 274, providing for a commission empowered to open and improve streets in the annex portion of Baltimore City, is within the legislative power of the General Assembly, since the legislative authority is supreme unless restricted by the Constitution.

Municipal Corporations 268 ⚿203
268k203 Most Cited Cases
Acts 1904, c. 274, provides for a commission charged with the authority to improve streets of the annex portion of Baltimore city. Section 2 authorizes the mayor to appoint four persons, who with certain designated officials shall constitute the commission. Section 10 provides that, in lieu of the commission provided for, the mayor and council may by ordinance empower the commissioners for opening streets to perform the functions of the commission. The city adopted an ordinance reciting that, pursuant to the powers conferred on it by the act, the commissioners for opening streets be authorized to perform the functions of the commission. Held, that the commissioners for opening streets became possessed of the authority conferred on the commission.

Municipal Corporations 268 ⚿203
268k203 Most Cited Cases
The mayor and council of the city of Baltimore cannot restrict or qualify by ordinance any of the powers conferred on the Annex Commission by Acts 1904, c. 274, creating an annex improvement commission, with power to open and improve streets in the annex portion of Baltimore city.

Municipal Corporations 268 ⚿266
268k266 Most Cited Cases
Acts 1904, c. 274, providing for a commission empowered to open and improve streets in the annex portion of Baltimore city, provides for a distinct system for the improvement of the streets in such portion of the city.

Municipal Corporations 268 ⚿301
268k301 Most Cited Cases
Acts 1904, c. 274, creating a commission known as the "Annex Improvement Commission," and empowering the same to improve streets in the annex portion of the city of Baltimore, and an ordinance of the city conferring on the commissioners for opening streets the authority conferred by the act on the Annex Improvement Commission, etc., confers on the commissioners full power to pave streets in the annex portion of

the city as they may deem proper, without the adoption of any other ordinance designating the streets to be paved.

Municipal Corporations 268 ⚿301
268k301 Most Cited Cases
The act and the ordinance confer on the commissioners the right to select the kind of materials to be used in paving a street in the annex portion of the city, regardless of the provision of a prior ordinance relating to repaving and macadamizing streets, as distinguished from paving, etc.

Municipal Corporations 268 ⚿331
268k331 Most Cited Cases
Baltimore City Charter (Laws 1898, pp. 274, 275, c. 123) §§ 14, 15, provides for the contracting for public work after advertisement for bids, and that all bids for work shall be awarded to the lowest responsible bidder. Three separate sets of specifications, for a street improvement were prepared, each calling for the laying of a different kind of pavement. Held, that the municipality had power to put the various kinds of pavements in competition with each other, and after the bids had been opened to select one of the three pavements, and to award the contract to the lowest responsible bidder for that kind of pavement, though a bid had been filed for some other material, which was lower.

Statutes 361 ⚿120(4)
361k120(4) Most Cited Cases
The title of Acts 1904, c. 274, entitled "An act to authorize the mayor and city council of Baltimore to issue its certificate of stock * * * to pay the cost * * * of condemning, * * * grading, * * * the streets * * * of the annex portion, * * * and to authorize the appointment of a commission to be known as the 'Annex Improvement Commission,' and to define the duties of said commission," not indicating a particular method of appointment of individuals to compose the commission, is sufficiently broad within Const. art. 3, § 29, requiring every law to embrace but one subject, which shall be expressed in its title, to include a provision authorizing the mayor and council to empower the commissioners for opening streets to perform the functions of the commission in lieu of the commission created by another provision authorizing the mayor to appoint four persons, who with certain designated city officials are to constitute the commission.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

W. Cabell Bruce and Albert C. Ritchie, for appellants mayor, etc., of city of Baltimore, and others.
J. M. Head, for appellants Warren Bros. Co. Isaac Lobe Strauss, for appellees.

McSHERRY, C. J.
In 1904 the General Assembly of Maryland adopted an act, known as "Chapter 274." The title of that act is in the words following: "An act to authorize the mayor and city council of Baltimore to issue its certificate of stock to an amount not exceeding two million dollars for the purpose of providing the money to pay the costs and expenses of condemning, opening, grading, paving and curbing the streets, avenues, lanes and alleys of the annex portion of Baltimore city; and to authorize the appointment of a commission, to be known as the 'Annex Improvement Commission,' and to define the duties of said commission." Section 1 provides for the issue of certificates of city stock to the extent of $2,000,000, out of the proceeds of which are to be defrayed the costs and expenses incurred in "condemning, opening, grading, paving and curbing the streets, avenues, lanes and alleys of the annex portion of Baltimore city." By section 2 the mayor of Baltimore city is authorized to appoint four persons who with certain designated city officials were to constitute a commission to be known as the "Annex Improvement

Commission," and the duties of that commission, in so far as they concern the pending litigation, are defined in sections 3, 5, and 7 of the statute. Section 3 enacts: "That said commission shall have the right and power to condemn, lay out, open, extend, widen, straighten, close, grade and pave any street, avenue, lane, or alley or any part thereof, from curb to curb; and to establish and fix the building line and the width of the sidewalks on any street, avenue, lane or alley now existing or to be laid out, opened, extended, widened, straightened, graded or paved in the annex portion of the city of Baltimore. That said commission shall have all powers necessary and proper in the exercise of said powers; and the mayor and city council of Baltimore are hereby authorized and empowered to grant by ordinance any further powers and duties it shall deem necessary for the proper execution of the improvements intended to be made by this act." Section 5 constitutes the commission the agent of the mayor and city council for the acquisition of property required to open, widen, grade, or pave any street; whilst section 7 authorizes and empowers the commission to contract with any person, company, or corporation for the work of opening, grading, curbing, and paving the streets, avenues, lanes, and alleys of the annex as intended by the act, or to employ the necessary laborers, help, and assistants, skilled and unskilled, and perform the work under their own supervision. Section 10, which is especially assailed in these proceedings, is in these words: "Provided, however, in lieu of said commission hereinbefore provided for in section 2 of this act, the mayor and city council may by ordinance authorize and empower the commissioners for opening streets of Baltimore city to perform the duties and functions in this bill heretofore provided for the said commission." This act gives rise to some of the questions with which we are required to deal, and they will be stated and discussed later on. In execution of the power conferred on the city by the above-mentioned act of assembly, the mayor and city council adopted an ordinance known as "Ordinance No. 216," approved ***704** March 6, 1905. By that ordinance sundry provisions were made, but we are concerned only with those contained in sections 6 and 7. By section 6 it was ordained by the mayor and city council of Baltimore: "Pursuant to the powers conferred upon it by section 10 of chapter 274 of the acts of the General Assembly of Maryland in the year 1904, that the commissioners for opening streets be and they are hereby authorized and empowered and directed, *** to perform the duties and functions in said act provided for the Annex Improvement Commission." Section 7, amongst other things, declares "that in grading, paving and curbing streets, avenues, lanes, alleys, or parts thereof *** the procedure of said commissioners for opening streets shall be that now or hereafter prescribed by law in relation to the respective duties and powers of the same nature with which the city engineer and other officers of the city are now respectively clothed." These two sections of the ordinance are alleged to be invalid; and they give rise to some of the other questions involved. Acting under chapter 274 and Ordinance 216 the commissioners for opening streets advertised in the month of April, 1906, for separate sealed proposals to be addressed to the board of awards, to curb, gutter, and pave with asphalt block, bitulithic, or vitrified brick pavement, Twenty-Fifth street from the York turnpike road to Oak street, in accordance with separate specifications, plans, and profiles drawn for each of the three kinds of pavement, and then on file in the office of the commissioners for opening streets. Twenty-Fifth street is in the annex portion of Baltimore city. Bids were submitted by different parties for doing the work with each of the specified materials. When the bids were opened the bid of the Barber Asphalt Paving Company was rejected because it was not framed in accordance with the prescribed specifications, and thereupon the commissioners for opening streets selected bitulithic as the material with

which the paving was to be done; and then the board of awards awarded the contract to Warren Bros. Company at the price of $2.18 per square yard of bitulithic pavement, that being the lowest price bid on that material, although the lowest price bid on vitrified brick was $2.09 per square yard. The bid on the asphalt block pavement was $2.65 per square yard. A contract was then entered into between the Warren Bros. Company and the city for the laying of a bitulithic pavement on the street named at the price bid by that company. After the work under the contract had been commenced, two bills in equity were filed in the circuit court of Baltimore city by certain tax payers of the city to procure a decree annulling the contract which had been entered into, and to obtain an injunction restraining the city, its officers and agents, and the Warren Bros. Company from proceeding to lay the pavement under the contract. Both of those bills attacked the constitutionality of the act of 1904, and assailed the validity of sections 6 and 7 of Ordinance No. 216. The bills also, by way of an alternative ground of relief, assert that, under sections 14 and 15 of the charter of Baltimore city, which will be fully stated later on (Acts 1898 pp. 274, 275, c. 123), the commissioners had no authority to put different paving materials in competition with each other and no power after the bids on those materials had been opened, to select one of those materials for the paving, unless they selected the one upon which the lowest price of all the prices submitted, was bid. The circuit court upheld the act of 1904 and Ordinance 216, but decided that sections 14 and 15 of the city charter had not been complied with in awarding the contract, and, consequently, decreed that the contract with the Warren Bros. Company was invalid because theirs was not the lowest of all the submitted bids. An injunction restraining the prosecution of the work under the contract was issued; and the work was arrested, and the city and the Warren Bros. Company appealed. Owing to the fact that Twenty-Fifth street had been torn up before the injunctions were granted and was in an almost impassable condition on that account, and to the further fact that a delay in hearing the cases on appeal until the beginning of the October term of this court would most probably have suspended all paving operations in the annex until the spring of 1907, this court assembled in special session at the request of all the litigants on the 8th of August last and heard these and one other paving case. A decree was signed the following day reversing the decree appealed against, the injunctions were dissolved, and the bills of complaint were dismissed. We now proceed to give our reasons in support of the conclusions which were briefly announced on August 9th.

There are three different groups of questions presented by the record; and these are: First, those which relate to the act of 1904; secondly, those which concern Ordinance No. 216; thirdly, those with respect to which sections 14 and 15 of the city charter have been applied by the circuit court. Each of these groups comprehends several distinct inquiries, which will be separately considered and determined, in so far as that is practicable.

First. Let us now turn to Acts 1904, c. 274. (a) Is it invalid because in conflict with section 29 of article 3 of the state Constitution, as contended by the appellees? (b) If not invalid, what is its scope, and what is the extent of the powers which it confers?

(a) The specific proposition advanced by the assailants of the act of 1904 is this: That section 10 of the act is not described ***705** in, but conflicts with, the title of the act, and is therefore void under article 3 of section 29 of the Constitution. By the constitutional provision just mentioned it is declared: “Every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title.” This declaration of the organic law has been before the Court of Appeals in no fewer than 45 cases since its incorporation into the Constitution of 1851; and in

less than one-fourth of those instances has an act of Assembly been stricken down by reason of its being in conflict with that provision. It is only the subject of the act which must be described in the title, and neither the details of the legislation nor the means or instrumentalities by which the subject is to be carried into effect constitute the subject of the act. The title of the act of 1904 describes the subject of the act to be an authority given to the city to raise a sum of money with which to pay the costs of condemning, opening, grading, paving, and curbing the streets, avenues, lanes, and alleys of the annex, including an authority to appoint a commission to be known as the "Annex Improvement Commission," whose duties were to be defined in the act. Neither the details with respect to the method to be followed to raise the $2,000,000 named in the title; nor the details with relation to the appointment, the number, the qualifications, or the personnel of the commissioners, nor the details concerning their duties were stated in the title or were required to be set forth therein. The authority to do the things indicated is the subject of the act, whilst the manner of doing those things is not attempted to be specified in the title, and would have been wholly out of place if it had been, since the manner of doing them is a mere matter of detail concerning, not the subject itself which is the authority to do the things, but the method of exercising that authority. Undoubtedly under the title the appointment of a commission, to be known as the "Annex Improvement Commission," was provided for, but there is not a word in the title to indicate that the act prescribed a particular method of appointment or designated particular individuals to compose the commission to the exclusion of some other method or some other individuals, and, that being so, there is nothing in the title to indicate that the body of the act might not contain alternative methods of appointment, or might not include provisions permitting some existing municipal board to act as such Annex Improvement Commission. The tenth section of the act of 1904, which has been quoted hereinbefore, provides an alternative method differing from that prescribed in the second section. If the second section had been omitted from the act, and if so much of the tenth had been inserted in its place as was required to constitute the commissioners for opening streets the Annex Improvement Commission, can it be pretended that the body of the act would have been in conflict with, or would not have been covered by, the title? And so, if the tenth section had not been incorporated in the act, no one would venture to suggest a doubt as to the act and the title being harmonious. The reason why, in each of the supposed instances, the act would have been free from the objection of being in conflict with section 29 of article 3 of the Constitution is that the title is sufficiently broad and unrestricted to include either the one or the other of the two methods of appointment, and as neither was specified in the title either could have been inserted in the body of the act. It is precisely because either of the two methods could have been validly prescribed in the body of the act under the title, that both-the one as the alternative of the other-would be likewise strictly in consonance with the same title. As there is no restriction in the title as to the method of making the appointments or as to the personnel of the commission to be appointed, the General Assembly was at perfect liberty to prescribe in the body of the act any method it pleased, including alternative methods.

Our predecessors had occasion to interpret this constitutional provision for the first time in Davis v. State, 7 Md. 161, 61 Am. Dec. 331, and in the course of their judgment they used this apposite language. "The object of this constitutional provision is obvious and highly commendable. A practice had crept into our system of legislation of ingrafting upon subjects of great public benefit and importance, for local or selfish purposes, foreign and often pernicious matters, and rather

than endanger the main subject, or for the purpose of securing new strength for it, members were often induced to sanction and actually vote for such provisions, which, if they were offered as independent subjects, would never have received their support. In this way the people of our state have been frequently inflicted with evil and injurious legislation. Besides, foreign matter has often been stealthily incorporated into law, during the haste and confusion always incident upon the close of the sessions of all legislative bodies, and it has not unfrequently happened that in this way the statute books have shown the existence of enactments that few of the members of the Legislature knew any thing of before. To remedy such and similar evils, was this provision inserted into the Constitution and we think wisely inserted." This exposition of the object of the constitutional provision delivered three years after the adoption of that provision, was followed less than five years later by the decision in Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522, wherein the distinction was pointed out between the subject of a penal enactment, which must be stated in the title, and the ***706** means by which the legislative intention was to be accomplished, which need not be described in the title. The case arose on an indictment which charged the traverser with having given to a minor certain fermented liquor in violation of the provisions of Acts 1858, p. 58, c. 55. The title of that act was: "An act to prohibit the sale of intoxicating liquors in the city of Annapolis, or within five miles thereof, to minors and people of color"; and the body of the act made it unlawful for any person "to sell, dispose of, barter or give" any spirituous or fermented liquors to any youth or minor without the written order of the parents and guardians of such minor. The contention was that, as the title was restricted to the sale of liquors, the provision in the body of the statue prohibiting the giving of liquors was not included in the title and was therefore void. But the court held that it was the manifest intention of the legislation to prohibit or restrain minors and people of color from obtaining intoxicating liquors-that was the subject of the law. "Prohibiting the sale of it to them," said the court, "is only one of the means by which the chief intention of the Legislature was to be accomplished. Employing other means, designed to effect the same purpose, cannot be properly considered the introduction of another or different subject, within the meaning of the constitutional restriction. If it were so, no law providing several modes for effecting its main purpose, would be valid in all its provisions."

When the cases in which it has been held that legislation was invalid, because in conflict with section 29 of article 3 of the Constitution , are examined, it will be found, either that something wholly repugnant to the title, or something altogether foreign to the subject described in the title, had been attempted to be incorporated in the body of the act in flagrant disregard of the principle announced in Davis v. State, supra. For example, in Steifel et al. v. Md. Ins., etc., 61 Md. 144, affirmative legislation was attempted under a title which disclosed absolutely nothing except the repeal of a former act. The same condition was presented in State v. Benzinger, 83 Md. 481, 35 Atl. 173. Another instance of the insertion in the body of the act of provisions wholly repugnant to the title is Whitman v. State, 80 Md. 410, 31 Atl. 325, where the title purported to regulate the sale of liquor and the enactment prohibited the sale. There are several cases which illustrate the vice of incorporating in the act something altogether foreign to the subject described in the title. Thus in Scharf v. Tasker, 73 Md. 378, 21 Atl. 56, under a title to provide for the assessment of the unclaimed military lots in Allegany and Garrett counties, a section of the act which exempted Garrett county from the obligation of paying fees to the commissioner of the land office then due for searches previously made, was stricken down. And in State v. Schultz Co. 83 Md. 58, 34 Atl. 243, the title had relation to newly incorporated

companies, whilst the act included existing companies. In Luman v. Hitchins Bros., 90 Md. 15, 44 Atl. 1051, 46 L. R. A. 393, the title prohibited sales to employés whilst the act prohibited sales to anyone. These and all the cases on this subject in our Reports show that this court has never leaned towards a narrow interpretation of section 29 article 3 of the Constitution and we are unwilling now, after the lapse of more than half a century since the decision of Davis v. State, to bring, by a strained construction, under the penalty of its prohibition statutes which are not within the obvious evils and mischiefs that its adoption as a part of the organic law was designed to obviate. Looking, as we must, to the object which the framers of the Constitution and the people who ratified it had in view when the clause in question was adopted, we have no hesitation in holding that section 10 of chapter 274 of the Acts of 1904 is valid and that the attack made upon its constitutionality cannot be permitted to prevail. We have gone much more extensively into a consideration of this branch of the case than ordinarily would be deemed necessary; and we have done so, not because we entertain the faintest doubt as to the correctness of the conclusion which we reached and announced in respect to the constitutionality of section 10 after the close of the argument, but because the learned counsel of the appellees placed such great reliance on this objection to its validity in his admirable, exhaustive, and exceedingly able presentation of the case.

(b) The act of 1904 being free from any constitutional infirmity, what is its scope and what is the extent of the powers which it confers? It must be remembered that it relates to condemning, opening, grading, paving, and curbing of the streets, avenues, lanes, and alleys situated exclusively in the annex portion of Baltimore city, and it is perfectly obvious that it was designed to establish a radically different system for that locality from the one which was provided in the city charter and the city ordinances for the doing of similar work within the original city limits. The General Assembly had the power to adopt such an enactment, since its legislative authority is supreme, unless restricted by the Constitution, and no restriction can be found in the organic law which would inhibit the passage of that statute. The reasons and the motives which influenced the Legislature to create, for the annex, this independent system are not material. The only inquiries with which the courts are concerned are: Was a separate and distinct system provided? Had the Legislature the power to establish it? What is the scope and what are the details of that system? A mere glance at the title of the act ***707** of 1904 and at such of its provisions as have been hereinbefore alluded to, is all that is needed to furnish an affirmative answer to the first of these three inquiries. If the Legislature had intended that the paving in the annex should be done in accordance with the requirement of the city charter and under the city ordinances relating to paving within the original city limits, there would have been no occasion whatever to establish an annex improvement commission and to clothe it with the powers and to intrust it with the duties which the act of 1904 confers and imposes upon that commission; and nothing further would have been necessary than the adoption of an act authorizing the issue of the city's obligation with which to raise the funds needed to pay for the work. No one, we imagine, would venture to suggest, much less to assert, that the Legislature did not possess the power to adopt the statute in question, and we, therefore, approach the consideration of the scope and the details of the special system created by the act of 1904. Whilst Acts 1904, c. 274, deals with but one subject, which is accurately described in its title, its various sections, all looking to the accomplishment of the single purpose with which the act is concerned, may be classified as follows: First, those which relate to the issue and sale of city stock to procure the funds with which the

work is to be paid for; secondly, those which provide for the formation of the Annex Improvement Commission; and, thirdly, those which define the powers and duties of that commission. The first of those classes is not involved in this controversy. The second, comprising the second and tenth sections, has to some extent been adverted to already, and but a few words more will be needed in disposing of it. Under those sections the mayor and city council was given the power to constitute the Annex Improvement Commission in one or the other of two alternative ways, and the commission itself was to consist of more or less members as the one or the other of the two sections might be followed. By section 2 the commission was to be made up of 10 members-four of whom were to be appointed by the mayor subject to confirmation by the second branch of the council (article 4, § 25, Code Pub. Loc. Laws), and the remaining six were to be the city officials named in the section. In lieu of the commission contemplated by section 2, the mayor and city council were authorized, under section 10, to empower by ordinance the commissioners for opening streets, who are three in number, to perform the duties and functions of the commission provided for in section 2. Section 6 of Ordinance 216 expressly conferred upon the commissioners for opening streets all the duties, powers, and functions provided in the act of 1904 for the commission contemplated by section 2. The mayor and city council by that ordinance exercised the discretion given by the statute and thereupon the commissioners for opening streets became, in virtue of section 10 of the act of 1904 and of section 6 of Ordinance No. 216 the Annex Improvement Commission.

What, then, are the powers of that commission, thus constituted, with respect to the grading and paving of streets in the annex? The charter of the city need not be looked to for an answer to that question, because the act of 1904 is the sole source of those powers. The power derived from the act by the commission as it now exists are not trammeled by, or subordinate to, any provision of the city charter. They are sweeping and unrestricted, and pertain exclusively to a newly created and wholly independent agency of the city, except in so far as sections 14 and 15 of the charter put limits to the exercise of those powers, if they put limits thereto at all. The "said commission shall have the right and power *** to grade and pave any street, lane or alley *** in the annex portion of the city of Baltimore"; and it "shall have all powers necessary and proper in the exercise of said powers." These are the words of section 3. The powers thus given are broad and unqualified. There is no condition annexed, either express or implied, indicating that the power to grade and pave can only be exercised after the city council shall designate which streets are to be paved; nor is there a single imperative duty imposed by the act upon the mayor and city council in respect to the work on the streets in the annex, save that prescribed by section 8. That section enacts "that the mayor and city council shall prescribe by ordinance the methods and proceedings for the sewerage and drainage of said annex." The specific assignment of that duty and no other to the municipality is tantamount to a denial to other officials of any power in the premises, especially in view of the explicit declaration that the commission "shall have all powers necessary and proper in the exercise" of "the right and power" to grade and pave any street in the annex. The power to designate which streets in the annex shall be paved and to select the materials with which the paving shall be done is obviously included in the broader unlimited power to pave any street. If the commission may pave any street in the annex, and if, in addition to that power, it possesses all necessary and proper powers for the exercise of that power, it must undoubtedly be clothed with the further power to decide which of the streets are to be paved, because, until it is determined which streets are to be paved, it would be impossible to pave any

street, since the selection of the street to be paved must necessarily precede the actual paving, and no one else is intrusted with the authority to determine which streets are to be paved. The grant of a power to pave any street in the annex, coupled with the additional grant of all powers necessary ***708** and proper to the exercise of the primary power, is a grant of full power to do the thing specified, as the agency clothed with the power to do it may, in its discretion determine. We do not understand how the commission can possess full power to pave any street in the annex, if it can only pave such streets therein as the mayor and city council shall by ordinance previously designate. Full power does not mean conditional power. Full power to pave any street does not mean power to pave only such streets as the council may name, because, in the event that it did mean that, if the council neglected or refused to select the streets to be paved, the power of the commission to pave any street would be abrogated and the whole scheme of the legislation would be thwarted. If the term "full power" were construed to be synonymous with limited or conditional power, then the plenary power conferred by the statute upon an independent agency would be narrowed down to a restricted power to be exercised in subordination to the judgment of some other agency, though not a word in the statute justifies the implication that such was the legislative intention.

The conclusion that the Annex Improvement Commission is alone intrusted with the power to select the streets to be paved in the annex is strengthened by the provisions of section 7 of the act of 1904; for by those provisions the commission is authorized to contract with any person to do the work of paving the streets of the annex-not the streets which the city council may name, but the streets; that is, all the streets, and of course, therefore, any of them-or the commission may employ laborers to do the work under its supervision. There is no more authority in the mayor and city council to select the streets to be paved than there is in the city government to determine whether the work thereon shall be done by contract or by day labor. As the proceeds of the $2,000,000 loan were to be applied exclusively to defray the cost and expense of condemning, laying out, opening, extending, widening, straightening, closing, grading, and paving the streets, avenues, lanes, and alleys in the annex, and as, by one of the provisos in the first section of the act, not more than $500,000, or one-fourth, of the city stock to be issued for those purposes can be disposed of in any one year, it is apparent that the Legislature contemplated that the commission should do only part of the work of paving each year; and inasmuch as to no other department or agency of the city government was there delegated any authority to determine what part should be paved in any of the four years over which the work was required to extend, it must inevitably follow that to the commission, and to it alone, was committed the authority and the discretion to select, in the exercise of the broad powers intrusted to it, the streets to be paved each year. With the deliberate and honest exercise of that discretion no other tribunal can lawfully interfere. What has been said in regard to the selection of the streets to be paved applies equally to the choice of the material to be used in doing the work and as to the mode and method in which it may be done. McQuillan, Mun. Ord. § 519. Holding as we do, that the commissioners for opening streets, acting as, and in reality constituting, under section 10 of the act of 1904 and under section 6 of Ordinance No. 216, the Annex Improvement Commission, possess the powers which have just been indicated, we come to the second group of questions involved in the case, and they are those which arise under Ordinance No. 216.

Secondly. Sections 6 and 7 of Ordinance No. 216 are alleged, in the bills of complaint, to be "unauthorized, null, and void," and the ground

upon which that allegation is founded is the asserted unconstitutionality of section 10 of the act of 1904. As we have, in an earlier part of this judgment, decided that the act of 1904 is constitutional and valid throughout all of its provisions, nothing more need be said upon that subject. The power to adopt section 6 of the ordinance was expressly conferred on the mayor and city council by section 10 of the act of 1904, and the power has been exercised in almost the exact language in which it was granted. With respect to section 7 of Ordinance No. 216 an alternative contention is presented in the seventh paragraph of the bills of complaint. After charging in the sixth paragraph that both sections 6 and 7 are "unauthorized, null, and void," it is assumed for the purposes of the position taken in paragraph 7 that section 7 of the ordinance is not unauthorized, null, and void; and upon the basis of that assumption the same seventh section of the ordinance is relied on to restrict and curtail the power of the annex improvement commission. Of course, if section 7 of the ordinance is invalid for any reason, it can impose no restriction at all on the Annex Improvement Commission, and if, on the other hand, it is valid, then the question as to whether it circumscribes the authority of the commission depends on the provisions of the section and their meaning. Section 7 of Ordinance No. 216 is not invalid on the ground averred in the bills of complaint, viz., the alleged unconstitutionality of section 10 of the act of 1904, because that section of the act is not void; but there is another and a different reason which, if sustained, might strike down section 7, as we shall presently see. But before touching upon that reason it will be necessary to understand clearly what is the contention of the appellees, and what is the precise meaning of section 7. By that section it is ordained, as has been stated, that, in grading and paving streets under the act of 1904, the procedure of the said commissioners shall be that now or hereafter prescribed by ***709** law in relation to the respective duties and powers of the same nature with which the city engineer and other officers of the city are respectively clothed. Now, Ordinance No. 165, approved February 24, 1899, prescribes a procedure which must be observed by the city commissioner in paving streets, and it is insisted that the procedure there provided is the one which must be followed by the Annex Commission in obedience to section 7 of Ordinance No. 216, since the duties of the city commissioner are now, by the city charter (section 86, c. 123, p. 310, Acts 1898), devolved upon the city engineer. We do not think Ordinance No. 165 has any application to these cases, and the reasons for that conclusion are obvious when the provisions of the ordinance are examined. Without quoting them at length, it suffices to say that the second section relates only to the paving of a "newly opened street, avenue, lane, or alley within the city limits," and as Twenty-Fifth street is not a "newly opened street" the procedure prescribed with respect to a "newly opened street" has manifestly no application. The third section defines the term "improved pavements." Section 4 ordains "that in all cases of repaving, with improved pavement," streets already paved "where an ordinance providing for such repaving does not specify the kind of improved pavement to be used for such repaving *** then the kind of improved pavement to be used for such repaving shall be decided upon by the city commissioner, with the approval of the mayor." This section does not apply, because no ordinance was ever passed directing Twenty-Fifth street to be repaved and the section relates to repaving. Section 6 refers to macadamizing as contradistinguished from paving. This brief analysis of Ordinance No. 165 is quite sufficient to show that its provisions have no application to Twenty-Fifth street, and therefore they cannot limit the powers which the act of 1904 and section 6 of Ordinance No. 216 confer upon the Annex Commission in the premises.

But if this were not so, and if the contion were

sound that Ordinance No. 165 conflicts with the act of 1904 and tended to limit its scope, then it would follow that section 7 of Ordinance No. 216 in so far as it, by its general reference to then existing laws, incorporated Ordinance No. 165, would be invalid. And it would be invalid, not because section 10 of the act of 1904 was unconstitutional, but because the mayor and city council were incompetent to restrict or qualify by ordinance any of the powers conferred on the Annex Commission by the act of 1904. It is an elementary principle that, since all of the powers of a municipal corporation are derived from the law and its charter, no ordinance or by-law can enlarge, diminish, or vary its powers. 1 Dillon, Mun. Cor. § 251; Thompson v. Carroll, 22 How. (U. S.) 422, 16 L. Ed. 387. We do not think that section 7 imports into Ordinance No. 216 any municipal legislation which is hostile to the act of 1904. Hence in both of the alternative contingencies relied on in the bills of complaint to deprive the Annex Commission of the power to act in the way it did proceed in the matter of Twenty-Fifth street, the appellees have failed to sustain their contention, and the authority given to the commission by the act of 1904 may be lawfully exercised by it.

Thirdly. We now come to the questions which arise under sections 14 and 15 of the city charter, and those questions are several in number-of which the most important concerns the method adopted to secure competitive bidding. Assuming that sections 14 and 15 of the city charter are applicable to the Annex Improvement Commission, as alleged in the bills of complaint, in spite of the provisions of Acts 1904, c. 274, we proceed to inquire whether those sections have been disregarded or complied with. We start now with the above assumption as a postulate, both because the pleadings are framed upon that theory and because, in a case immediately following these-that of Mayor and City Council v. Gahan, 64 Atl. 716 the precise inquiry as to whether those sections prohibit the kind of competitive bidding called for in these cases, is distinctly raised and essentially involved, and the legality of, and the objections to, the system adopted may as well be disposed of at once, and thereby a separate discussion of this subject in Gahan's Case will be avoided. Section 14 provides that “hereafter in contracting for any public work or purchase of any supplies or materials involving an expenditure of five hundred dollars or more for the city, or by any of the city departments *** or special commissions or boards, unless otherwise provided for in this article, proposals for the same shall be first advertised for *** and the contract *** shall be awarded by the board provided for in the next section of this article, and in the mode and manner as therein prescribed.” Section 15. “All bids made to the mayor and city council of Baltimore for supplies or work for any purpose whatsoever, unless otherwise provided in this article,” shall be opened by a board consisting of designated municipal officers and styled the board of award, “which board or a majority of them, shall, after opening said bids, award the contract to the lowest responsible bidder.” The commissioners for opening streets, acting as the Annex Improvement Commission, prepared three separate and distinct sets of specifications, each exact and complete in itself. One set was for an asphalt block pavement, the second was for a vitrified brick pavement, and the third was for a bitulithic pavement. The bitulithic pavement is a patented process. Accompanying and forming part of the specifications for the last-named pavement was an agreement signed by the Warren Bros. Company-***710** the patentee and owner of the process used in laying bitulithic pavements-under and by which agreement the Warren Bros. Company stipulated and undertook to furnish to the city, and to any individual who wished to bid on that kind of pavement, the patented wearing surface, the bituminous flush coating cement and chips, the bituminous cement for pouring the foundations and to supply an expert to give proper

advice and to allow the use of the patents, all for the price of $1.45 per square yard of pavement. After due advertisement two bids were submitted on vitrified brick, one on asphalt block and three on bitulithic. The bid of the Barber Asphalt Company on bitulithic was rejected by the board of awards, as has already been stated, because it did not even purport to conform to the specifications descriptive of that material, but was based upon different specifications prepared by that bidder, and which called for different materials, both stone and cement, which it was claimed by the bidder would produce a pavement equally as good as the patented bitulithic. The board had the undoubted right to reject that bid. People v. Board of Improvement, 43 N. Y. 227. It described a pavement not specified at all. The remaining bids were then referred by the board of awards to the commissioners for opening streets for comparison and tabulation. The last-named body at once held a meeting and selected the bitulithic as the material with which they desired Twenty-Fifth street to be paved, and so notified the board of awards. Thereupon the board of awards reconvened and awarded the contract to the Warren Bros. Company, that company being the lowest responsible bidder for the construction of a bitulithic pavement in accordance with the prescribed specifications for such a pavement, though one of the bids on a vitrified brick pavement was lower than the bid of the Warren Bros. Company on bitulithic. As concisely stated in the city solicitor's brief: "Therefore, according to the method adopted for inviting bids and awarding the contract, three different kinds of pavement were put in competition with each other, and after all the bids were opened, the commissioners selected the one of these pavements to be used, and the board of awards then awarded the contract to the lowest responsible bidder on the pavement so selected."

Thus competition was invited and secured both as to materials and as to price, and the contract was awarded to the lowest responsible bidder on the material selected, though there was another bidder whose price was lower on a different material. Was this method of procedure and this action in violation of sections 14 and 15 of the charter? There are two kinds of competition-the one, competition between different things which will equally answer the same general purpose; and the other, competition between the prices bid respectively upon each of those distinct things. When this general proposition is reduced to a concrete one and applied to the subject of paving a public street, it is perfectly obvious that there must be a selection by some one, at some time, of some material, before any paving can be done. Now, the choice of the paving material for a particular street, when the question is open as to what material ought to be used, of necessity involves an investigation into the qualities and adaptabilities of each of the suggested materials, and the city officials who are charged with the duty of making the selection, if they act honestly and are not bound by the preferences of property holders or by some positive enactment, must determine, by the exercise of their judgment founded on comparison or observation, which of the materials is the more suitable for the locality; and one of the means by which that is accomplished is by putting the materials in competition with each other either publicly or privately. This may be done before bids are asked; and when it is thus done, it is done privately and nothing remains for competition except the price for which the work can be done with the selected materials. But it does not follow that a selection of the kind of pavement must be made in advance of the time when the bids are called for. The statute has lodged a wide discretion in the commission in this and in other particulars, and when, in selecting material, that body has acted in good faith, and its conduct is untainted with fraud or venality, no judicial tribunal is clothed with jurisdiction to rejudge its conclusions. It cannot be successfully asserted, in view of the

comprehensive powers given by the act of 1904, that the Annex Commission is without authority to select the kind of pavement to be laid, or to select it before any bids are asked upon the specifications describing that kind of pavement. What difference is there, or can there be-looking solely to the extent of that authority-between selecting the kind of pavement before bids are asked for, and selecting the kind of pavement after the bids have been received and opened, upon distinct sets of specifications descriptive of wholly different kinds of pavements, but all of which are suited to the same general purpose? Manifestly, none whatever; though in some particulars, not touching the power itself but affecting the ultimate result in other ways, there may be a difference between the two methods. Thus by the selection of the materials, or the kind of pavement, after the bids have been received, combinations between bidders to inflate prices may be in a great measure avoided, since it is altogether improbable that parties who compete for the adoption of their respective materials will all ask exorbitant prices, as each party will, most likely, strive by depressing prices, to secure the contract. As in such an instance no bidder knows in advance which kind of ***711** pavement will be selected each is in reality, stimulated to propose terms which in order to secure him the contract, will produce the best results so far as the public are concerned. It is a matter of common knowledge that individuals and private corporations, in developing and expanding their various business enterprises, constantly resort to this system of duplex competition with most beneficial results, and it can scarcely be presumed that the Legislature, in adopting sections 14 and 15 of the charter, designed to deny to the city the facilities which individuals and private corporations avail themselves of in prosecuting their divers activities. With the competition which relates exclusively to the kind of pavement the provisions of sections 14 and 15 have nothing to do, since they apply only to competition in price. They apply to the lowest responsible bidder, and not to the lowest priced and least suitable material. If this were not so there could be no selection of a material prior to the bids being called for, unless public competition as to the kind of material to be used were first invited and then the cheapest and perhaps most indifferent would have to be selected. The conclusion that sections 14 and 15 do not concern the selection of the kind of pavement is not only sound a priori, but is sustained by the best-considered cases, as will be seen in a moment. That such a method as that pursued in this instance may be open to the charge of being dominated by favoritism, or of being corruptly manipulated, may be true, but it is equally true, and much more likely, that both favoritism and fraud will control if the material is secretly selected and the bids are confined to that one material, since, by inviting proposals for one particular thing or process, the public officials necessarily exclude everything else which might have been substituted for the thing called for, and there is no clearer field for corruption and favoritism than in secretly shaping proposals, if in fact the city is in corrupt hands. There is no pretense that fraud or corruption influenced the action of the Annex Commission, and the single question involved is one of power to do what was done and to do it in the manner in which it was done. The act of 1904 does not deny to the commission that power, but, on the contrary, as we have seen, confers it, and sections 14 and 15 of the charter do not limit or circumscribe it. Let us now turn to a few of the many cases on this subject.

The leading case is Attorney General ex rel. Cook et al. v. City of Detroit, 26 Mich. 263. The charter of Detroit required contracts to be publicly let to the lowest responsible bidder. The facts, in general outline, “appear to be that the common council, having determined to cause St. Aubin avenue to be paved, instead of determining in advance what particular kind of pavement should

be put down, and confining their invitation for proposals of that kind, caused specifications for each of several kinds of wood and stone pavement to be prepared and filed with the controller, and then advertised that sealed proposals would be received during a time specified for paving said avenue with either wood or stone pavement, according to the specifications thus placed on file." Separate specifications were prepared for the different kinds of pavements advertised for, as was done in the case at bar, and bids were submitted on each kind of pavement, as was also done in the instance now before us. After the bids had been opened the council selected the Ballard pavement as the one to be used, although responsible parties had submitted lower bids upon some of the other kinds of pavements specified. The lowest bid on the Ballard pavement was rejected because the bidder was not responsible, and to the next highest bidder on that character of pavement the contract was awarded. Judge Cooley in delivering the opinion of the court, thus states and discusses the question there presented, which is the identical one here involved. "The first question involved in the merits of the suit is whether the council was justified in proceeding in the manner mentioned to obtain proposals. It is insisted, on behalf of the Attorney General, that the kind of pavement to be put down should first be determined, and that bids should be called for and competition invited for that kind alone. It is denied that wood pavement can be put in competition with stone pavement, or that two kinds of wood pavement, essentially different in construction and cost, can be included in the same notice which calls only for proposals for the paving of one street. The law, it is argued, intends that the bids shall settle the right to a contract on a mere inspection of the prices named; but if the bids are not to be all directed to the same specifications, they settle nothing, and it will always be in the power of the council to reject the lowest bid on the pretense that it is for an inferior pavement, whether such is the truth or not, and to accept the bid of a party they desire to favor, on the claim that, though his bid is higher, yet it is for a better pavement, and consequently such bid is, all things considered, the most for the interest of the city, and therefore, to be deemed the lowest." He then proceeds: "It is not to be denied that there is a great deal of truth in this argument, and, if such a construction of the charter as the complainant contends for, will put it out of the power of the council to practice favoritism in awarding contracts, it ought to be sustained as the one which the legislation must have intended. We are not aware, however, that it has ever been supposed that the provision of the charter now in question could have that highly desirable effect; on the contrary, it has often been observed that the most severe and stringent regulations of this nature may be administered dishonestly, though according to the ***712** strict letter of the law, so as not only to fall to give the proposed protection to the public, but, on the other hand, so as to operate as if purposely devised to enable dishonest persons to plunder the public with impunity. The requirement that contracts shall be let to the lowest bidder is, in many cases, peculiarly susceptible to abuse. Its purpose is to secure competition among contractors for public works and supplies, and to give the public the benefit thereof. In some cases the most ample competition would be invited by presenting to bidders complete and particular specifications which indicate the precise things wanted or which are to be done, and leave nothing to discretion or negotiation afterwards. But this could only be true where the case was such that many persons could bid for the work or materials, and would have a legal right to do one and furnish the other, and where the materials were not monopolized in single hands; but were readily obtainable from several sources. If a patented article were desired, which was owned by a single person who refused to sell the right to territory, or to fix a royalty, or if stone or any other material were required, and a single person owned all within a practical distance

of the place where it was to be used, nothing could be more obvious than that the proposals which confined bids to the particular article or material, would invite no valuable competition, and that the protection of the public must lie in the power of the council to reject unreasonable offers. In such a case nothing is easier than for the council to obey strictly the letter of the law, and yet dishonestly and corruptly award the contract to one who is the lowest bidder for no other reason than because no one can bid against him, and who, having a practical monopoly, is allowed to fix his own terms. Now, if the purpose of the charter is to secure competition in work or supplies for the public, something is necessarily left to the discretion of the council, and they must determine in each case what competition the nature of the case will admit of, and what is the best method to secure it. If they invite proposals for a particular thing or process, they necessarily, in so doing, exclude everything else which might have been substituted for the thing called for. *** The matter of paving affords an apt illustration of this truth. From the proposals before us it would be a reasonable inference that there are several patented wood pavements nearly equal in value and cost; but if the council call for proposals for one only, they necessarily exclude all the others. I am aware of no legislation, and I can conceive of no process, by which they can be compelled always to make the selection from public motives exclusively, if their disposition shall be to do otherwise. It would be worse than idle for the law to mark out, or for the council to follow, any one unvarying course in these cases." And he further said: "When bids are thus called for, all bidders for a particular kind of pavement are bidders against all others in a certain sense, but they are also bidders against each other in a more particular sense. It would be the duty of the council when all bids are in to examine all and to select the kind of pavement for which the bids, all things considered, were relatively the lowest. They might thus perhaps reject the kind they would have preferred in advance, but for which they find all bids exorbitant, and determine upon another, because, in their opinion, the offers made for it are more satisfactory. But when the kind is selected they have no discretion to be exercised in a choice between responsible bidders. The lowest has an absolute right to the contract."

In the same case Chief Judge Christiancy, delivering a separate opinion, said: "When the pavement of a street is in contemplation, there are two different kinds of competition which it is very desirable to create among those who may wish to undertake the work. First. That between the different kinds of pavement, or those prepared to engage in putting them down. Second. That between parties prepared to put down the same kind. The biddings referred to in the provision in question are biddings for the same particular kind to be done according to the same specifications. And no bids for essentially different kinds of work or pavements, and referring to different specifications, could be recognized as coming in competition with each other for the purposes of determining the lowest bid, within the requirements of this section, without opening the door to the same corrupt combinations, and furnishing facilities for the same fraudulent practices, which it was the purpose of this provision to prevent. There is nothing, however, in the charter which prevents the city from availing itself also of the benefit of the other species of competition-that growing out of the different kinds of pavement seeking the public favor and adoption. And as the relative cost and value of the respective kinds would form a legitimate element of consideration with the council in determining which kind to adopt for any particular street, a just regard for the public interest would certainly warrant, if it does not require, some effort to secure this species of competition as well as that for any particular kind; and this would not only enable the council to form a more intelligent judgment in determining which

kind it is best to adopt, but it incidentally tends also to induce fair and reasonable offers for each. It is therefore highly desirable that the council should have the benefit of this before entering upon the particular kind of pavement to be adopted. I see nothing in the chapter to prevent this, or which requires the council to determine upon the kind which shall be adopted before proceeding to advertise for bids; since, if they ***713** thus previously determined and invited the bids only for the particular kind so decided upon, they would not be bound even to accept the lowest bid, but might then change their plan, or even determine not to pave the street. I, therefore, see no difficulty in securing both kinds of competition at the same time by preparing proposals, plans, and specifications for each kind of pavement for which competition is to be invited, and combining the whole in one notice, as was done in this case. The notice by referring to the respective specifications gave an equal opportunity to all persons, not only to enter into competition with those seeking to contract for any other kind, but also, within the letter and spirit of the charter, to compete with all who choose to bid for any one particular kind. But those bids only, which had reference to the same particular kind and to the same specifications, could be considered as competing bids for the purpose of determining who was the lowest bidder within the meaning of the charter."

Judge Christiancy's opinion was approved in Holmes v. Coun. Detroit, 120 Mich. 226, 79 N. W. 200, 45 L. R. A. 121, 77 Am. St. Rep. 587; and in Fones Bros. Hardware Co. v. Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353. In 2 Page on Contracts, § 1048, the rule is thus stated: "If bids have been advertised for on two different specifications, intended as alternative for the same work, a provision requiring the letting of the contract to the lowest bidder does not bind the city to select that specification on which the lowest bid is given"-citing Trapp v. Newport (Ky.) 74 S. W. 1109; Trowbridge v. Hudson, 24 Ohio C. C. 76.

How far, if at all, is this conclusion affected by the circumstance that one set of specifications includes or calls for the use of a patented article? It must not be forgotten that every person who wished to bid on the specifications relating to a bitulithic pavement was entitled to use the Warren Bros. Company's patents and processes and to have the services of one of its superintendents at a price fixed before the bids were called for, which offer was open to acceptance by any bidder on that kind of pavement. In point of fact a bid was tendered on the basis of that offer and it was only 17 cents per square yard higher than the Warren Bros. Company's own bid. Whilst the courts of some of the states have held, upon grounds which do not seem to us to be satisfactory, that municipalities which are by their charters, required to contract for materials, supplies, and public works with the lowest and best, or the lowest responsible, bidder, are prohibited from purchasing or specifying a patented or monopolistic article or process, there is practically a unaniminity upon the proposition that a contract involving in its execution the use of a patented material or process, is not invalid when the contract for performing the work and furnishing the materials is let to the lowest bidder with the understanding that the patentee would allow the use of his patent and superintend its construction in consideration of a certain specified sum paid him by whoever secured the contract. Accordingly, in Kilvington v. City of Superior, 83 Wis. 222, 53 N. W. 487, 18 L. R. A. 45, where the facts in this particular were identical with those here disclosed, it was found by the court that there was a definite, well-settled price for the patent and specifications, at which it was offered to the city and all contractors, which would limit the recovery of the patentee to that price, "so that in fact there was free competition for the work and material, and all else except the patent." And it was held that the city had the benefit of all the

competition of which the nature of the work admitted; and "in such cases," said the court, "where the entire work is done at the general expense of the city, the statute ought not to be so construed as to exclude the city from availing itself of desirable patented works or improvements, as to which there is but one price, and for which there can, in the nature of the case, be no competition, and when for performing the work and furnishing materials, the advantage of competition is secured. *** Under any other theory a municipal corporation would be obliged to forego the purchase and use of all patented implements, modes, or processes-a result which we cannot think the Legislature contemplated." In the same case a prior decision of the same court-Dean v. Chariton, 23 Wis. 590, 99 Am. Dec. 205-was reviewed and limited.

Dean v. Chariton, strongly relied on by the appellees, was decided by a divided court, and there was a vigorous and able dissenting opinion by Chief Justice Dixon. The Legislature subsequently validated the assessments held void in that case, and the validity of that legislation was sustained. Mills v. Chariton, 29 Wis. 400, 9 Am. Rep. 578. "In view of the legislation which followed Dean v. Chariton, and the fact that it was decided by a divided court, and the general tenor of subsequent decisions, and the further fact that patented methods and processes now enter so largely into various classes and kinds of public work, we are not disposed," said the Wisconsin Supreme Court, "to extend the rule of that case beyond the particular point there decided." Kilvington v. Superior. The precise or particular point involved in Dean v. Chariton was the validity of an assessment against abutting lots for paving a street, whilst in Kilvington v. Superior the cost of the paving was borne by the city at large, and that circumstance seems to be the ground upon which the two lines of decision in Wisconsin were distinguished by the Supreme Court of that state. ***714** Kilvington v. Superior was reaffirmed in Rickston v. City of Milwaukee, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 683. Substantially the same decision was made in Hastings v. Columbus, 42 Ohio St. 585, in which the fact that contractors owned a patent which must be used in executing the contract was held immaterial, where before the contract was let the city had acquired the right to secure at a reasonable cost the right of the patent with respect to the improvement for any successful bidder for the work, so that the bidders were placed in this respect on substantially equal terms. In Michigan and New York the decisions hold that a municipal contract let to the lowest bidder is not invalid because the performance of the contract will require the use of a patent. Hobart v. City of Detroit, 17 Mich. 246, 97 Am. Dec. 185; Re Dugro, 50 N. Y. 513; Baird v. New York, 96 N. Y. 567; Mayor, etc., of Newark v. Bonnel et al., 57 N. J. Law, 424, 31 Atl. 408. There are cases in other jurisdictions holding a contrary view, and Justice Brewer in Yarnold v. Lawrence, 15 Kan. 129, adverts to the diversity of judicial opinion on the subject, but was inclined to favor the views of the courts of Michigan and New York. If the doctrine announced by the earlier Wisconsin, California, and Louisiana cases, and by some of the Illinois decisions, be accepted, municipalities would be excluded from using a patented material or process, no matter how desirable or available it might be, though the only reason suggested in support of the doctrine is that a failure to apply it will encourage monopolies and will open the door for raids to be made upon the public treasury by dishonest officials in collusion with equally dishonest owners of patented articles, when practically as good results could be secured for the public by the use of some other material supposed to be as well adapted to the proposed purpose as the patented one.

Assuming that city officials are honest, no reason can be assigned for prohibiting them from specifying or purchasing a patented article for the

city that does not with as much force apply to an individual or to a private corporation. If they are assumed to be dishonest, their power under the charter is not curtailed by their dishonesty, though perhaps by such a prohibition their opportunities for peculation might be lessened; and so would those opportunities be further decreased by additional restrictions, and the argument carried to its logical limit would require that such officers should be shorn of all power whatever, because, if they had no power in this regard, they could commit no depredations on the public treasury. But confidence must be reposed somewhere, and legal principles cannot be permitted to vary with fluctuation in the moral character of municipal officers. Publicity in the proceedings of boards, next to integrity on the part of officials, is the surest preventive of fraud and corruption; for those vices flourish most in darkness and in secrecy, and if, despite the best devised precautions, crookedness, and jobbery are practiced, the guilty, when detected, should be inexorably pursued and dealt with under the provisions of the Penal Code. The powers and rights of the municipality, however, can never be measured by the mere accident of the honesty or dishonesty of the officials, if logical methods of reasoning are pursued; but the validity of their acts may sometimes depend on the good faith with which they were done. Cities, in the construction of public improvements, ought to have, as have individuals, in the construction of their own private edifices, the right to select for use the article or substance best fitted and adapted to the purpose; and to deprive the public of the right to select and use such superior articles is opposed to public policy, and positively disadvantageous to the community. "The force of this argument must, of course, be admitted," said the court in Fishburn v. Chicago, 171 Ill. 338, 49 N. E. 532, 39 L. R. A. 482, 63 Am. St. Rep. 236, and the answer to it, which is more specious than sound, as given by that court, is as follows: "It is readily seen it is not necessary to foster and create a monopoly, and prevent competition in the letting of public contracts, by providing in ordinances that a certain substance, or article, and no other, shall be used. If it be the judgment of the city council that the most suitable and best material to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance, or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed." In other words, if the city requires a particular thing, and that thing is covered by a patent, or can only be supplied by one dealer, the city must get, not the exact thing it needs, but something else as closely resembling it as can be procured. Thus, if the city is in want of certain repairs for its fire engines, and those repairs are made only by one manufacturer, or are protected by a patent, they cannot be purchased, lest a monopoly would be fostered; but something, not the thing needed, though resembling the thing needed, would have to be substituted for it. But the Supreme Court of Pennsylvania has decided precisely the opposite way in Silsby Manf. Co. v. City of Allentown, 153 Pa. 319, 26 Atl. 646. Under the Illinois doctrine, if a patented article is the very best that can be had, and is the one most perfectly adapted to the use for which it is required, it cannot be contracted for by the city or be included in specifications, merely because it is patented; but an inferior article, not so well suited to the purpose, must be taken in its stead. ***715** The doctrine is self-contradictory. "If it be the judgment of the city council that the most suitable and best material to be used" is a monopolistic one, then it can be availed of only as a standard for comparison, and the city must prescribe that some other material "equal in all respects to it should be employed." But, if the monopolistic article is the most suitable and the best, how can some other article be "equal in all respects to it,"

since the most suitable and the best can have no equivalents? The necessary result of the doctrine is to exclude the most suitable and the best article, and, as no other article can be equal in all respects to the most suitable and the best, no other article could be chosen, because an impossible one had been prescribed. In Holmes v. Com. Coun. of Detroit, 120 Mich. 226, 79 N. W. 200, 45 L. R. A. 121, 77 Am. St. Rep. 587, the Supreme Court of Michigan, in dissenting from the Illinois doctrine, said: "Municipal improvements afford an opportunity for corruption and jobbery, and the public opinion that it is not uncommon may be justified. This is perhaps unavoidable; but, whether it is or not, we thing the remedy is not that suggested, viz., to deprive the cities of the power to get what is desired, and compel them to take what is not wanted, or nothing. We think the law is complied with, in the absence of actual fraud or corruption, when specifications are submitted to competitive bidding, although some article is specified which, by reason of a patent or circumstance, is in the hands or under the control of a single dealer." In 2 Page on Contracts, § 1050, it is stated that, "where bids must be let to the lowest responsible bidder, the city may, if public interest required it, specify articles covered by patents so that competition is practically impossible," and a large list of cases is given in note 2. We may refer, also, to Swift v. City of St. Louis, 180 Mo. 80, 79 S. W. 172; Barber Asphalt Pav. Co. v. Hunt, 100 Mo. 22, 13 S. W. 98, 8 L. R. A. 110, 18 Am. St. Rep. 530; Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; Knowles v. City, New York, 176 N. Y. 430, 68 N. E. 860; Schuck v. City of Reading, 186 Pa. 248, 40 Atl. 310; Field v. Barber Asp. Co. (C. C.) 117 Fed. 925; People v. Van Nort, 65 Barb. 331; Baird v. New York, 96 N. Y. 567; Hobart v. City of Detroit, 17 Mich. 245, 97 Am. Dec. 185; Mayor, etc., Balto. v. Raymo, 68 Md. 571, 13 Atl. 383; Perine C. & P. Co. v. Quackenbush, 104 Cal. 684, 38 Pac. 533.

We now come to the Maryland cases which have been relied on by the appellees to support their contention on this branch of the case, and a very brief review of them is all that is needed to show that they have no application in any way to the situation presented by the record now before us. We refrain from commenting on other cases cited by the appellees' learned counsel in his exceedingly full and most excellent brief, because we have already protracted this judgment beyond reasonable length, and a separate examination of those cases would merely show in detail what we have said as applicable to some of them generally, viz., that in many of them the reasoning adduced in support of their conclusions does not strike us as being either sound or consistent, whilst others of them depend on statutes or ordinances which are not similar to those involved in these proceedings, as in Nicolson Pav. Co. v. Painter, 35 Cal. 699, and Allen v. Milwaukee (Wis.) 106 N. W. 1099.

In Packard v. Hayes et al., 94 Md. 233, 51 Atl. 32, the questions put in issue and decided were entirely different from those raised in this case, though sections 14 and 15 of the city charter were reviewed and interpreted in their relation to the facts then under consideration. Sealed proposals for the collection and disposal of garbage were called for by advertisement, and notice was given that specifications and proposal blanks could be obtained at the office of the commissioner of street cleaning. The specifications provided that "each bidder must submit with his bid the scheme of garbage deposit which he proposes to establish, *** including such plan, specifications, and other information as may be necessary to enable the said commissioner to determine the feasibility of it." Nothing more definite concerning the scheme or plan to be bid upon was contained in the specifications than the statement that "the contractor must establish and maintain *** such scheme or schemes *** as may be necessary to enable him or them to perform the work specified

in his or their contract." Six bids were received, and, as might have been expected, in consequence of the failure to prescribe any definite scheme in the specifications, each bidder submitted a different plan for the accomplishment of the work. The specifications, such as they were, furnished no standard for a comparison of the several bids, as each bidder based his proposal upon his own system. There was consequently no competitive bidding. It was with reference to this condition of facts that we said: "Necessarily, then, all the essentials that the municipality designs that the contract proposed to be made shall contain are to be determined before proposals are invited, and are to be placed before the bidder as the basis of his bid. *** The object of the provisions of the municipal charter we are considering (sections 14 and 15) is to prevent favoritism and extravagance in the making of municipal contracts. The effect of these provisions to produce the result intended would be greatly impaired, and the purpose of them might be entirely defeated, if the method of awarding contracts under them which was pursued in this case could be sustained. The absence of any definite and precise basis for competition ***716** among the bidders, the allowing of each bidder to submit his own independent proposition as to what would form an important element of the contract, and the reservation of a discretion to be exercised by a municipal authority as to an essential of the contract after bids had been submitted, make the contract here the subject of controversy violative of the intent and purpose of the provisions of the law in question, as well as of the essential character of competitive bidding." But it will be observed that not a word is said nor a suggestion made that alternative specifications, distinctly defining the precise thing to be done under each, could not be employed, with a view of putting several methods of doing a particular thing in competition with each other. No such proposition was presented, and, of course, therefore, no such proposition was decided. All the elements required to enable the bidder to submit intelligently his proposal on the kind of pavement he might offer to lay were plainly and minutely described in the set of specifications relating to that character of pavement "before proposals were invited," and no essential of the contract was reserved for the exercise of any discretion by the municipal authorities after the bids had been submitted. The case of Packard v. Hayes et al. is obviously distinguishable from those now at bar. The case of Madison v. Harbor Board, 76 Md. 395, 25 Atl. 337, has no application at all. It merely determined that the decision of the harbor board in awarding a dredging contract will not be reviewed by the courts on proceedings for a mandamus, unless it can be shown that there was fraud in making the award.

The foregoing discussion and the authorities therein cited establish the following propositions. First. That section 10, c. 274, of the Acts of 1904, is not void under section 29 of article 3 of the state constitution; that under that act the commissioners for opening streets are, by virtue of Ordinance No. 216, approved March 6, 1905, clothed with the powers conferred by the act; and that the said commissioners have, under the statute and the ordinance just named, full power to pave streets in the annex as they may deem proper, without the adoption of any other ordinances designating the streets to be paved. Second. That under the statute and the ordinance just mentioned the commissioners for opening streets have the right to select the kind of material to be used in paving Twenty-Fifth street, regardless of the provisions of Ordinance No. 165 of February, 1899, since that ordinance has no application to the pending cases. Third. That the commissioners for opening streets had the power to put asphalt block, bitulithic, and vitrified brick pavements in competition with each other, and, after the bids had been opened by the board of awards, to select the one of the three pavements to be used, and that the board of awards had the

power to award the contract to the lowest responsible bidder upon the kind or character of the pavement so selected, even though a bid had been filed on some other material which was lower than the lowest responsible bid on the selected material. In many of the cases alluded to above, and in others not referred to in this judgment, the further proposition is decided: That such provisions as sections 14 and 15 of the charter do not apply when the city proposes to purchase a patented article, because competitive bidding for such an article would be an idle and a useless form. Baird v. New York, supra. But as competitive bidding was resorted to, and was under the circumstances stated properly available in this instance, that proposition is not essentially involved in the disposition of these cases, though it was set up in the answer of the city and was upheld by the court below. If the proposition were directly involved, we should have no difficulty in yielding our assent to it, in a case where the patented article could not, in the nature of the thing, be bid on or furnished, except by the owner or licensee of the patent.

We have now stated at large the reasons which induced us on August 9th last to reverse the decree in these cases, and to dissolve the injunctions and to dismiss the bills of complaint.

JONES, J., dissents as to the effect to be given sections 14 and 15 of the city charter.
Md. 1906.
City of Baltimore v. Flack
104 Md. 107, 64 A. 702

END OF DOCUMENT