

**C**

121 Md. 522, 88 A. 267

Court of Appeals of Maryland.  
**SAFE DEPOSIT & TRUST CO. OF  
 BALTIMORE**  
 v.  
**MAYOR AND CITY COUNCIL OF  
 BALTIMORE.**  
 June 26, 1913.

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

Bill for injunction by the Safe Deposit & Trust  
 Company of Baltimore, trustee, against the Mayor  
 and City Council of Baltimore. From an order in  
 defendant's favor, plaintiff appeals. Affirmed.

West Headnotes

**Appeal and Error 30** ↪ **100(1)**

[30k100\(1\) Most Cited Cases](#)

Code Pub.Civ.Laws, art. 5, § 31, permits of an  
 appeal from an order refusing a preliminary  
 injunction on an ex parte hearing.

**Municipal Corporations 268** ↪ **293(1)**

[268k293\(1\) Most Cited Cases](#)

An ordinance of estimate held not an election that  
 the highway over Jones' Falls in the city of  
 Baltimore authorized by Acts 1910, c. 110, should  
 be performed by the Commission on City Plan.

**Municipal Corporations 268** ↪ **294(2)**

[268k294\(2\) Most Cited Cases](#)

The provisions of Baltimore City Charter, § 828,  
 Acts 1898, c. 123, requiring published notice of  
 any ordinance under section 6 for opening  
 highways, did not apply to the "Fallsway"  
 improvement made in pursuance of Acts 1910, c.  
 110, especially providing therefor.

**Municipal Corporations 268** ↪ **513(1)**

[268k513\(1\) Most Cited Cases](#)

An objection that proceedings of Commissioners

for Opening Streets are void because the  
 assessments include elements not recognized by  
 law is a ground for appeal under Baltimore City  
 Charter, § 179, Acts 1898, c. 123, hence not  
 ground for injunction.

Argued before BOYD, C. J., and BRISCOE,  
 BURKE, PATTISON, URNER,  
 STOCKBRIDGE, and CONSTABLE, JJ.

Joseph S. Goldsmith and German H. H. Emory,  
 both of Baltimore, for appellant. S. S. Field, of  
 Baltimore, for appellee.

URNER, J.

In the case of the [Philadelphia, Baltimore &  
 Washington Railroad Company v. Mayor and City  
 Council of Baltimore, 88 Atl. 263](#), decided at the  
 present term of this court, the validity of benefit  
 assessments made by the Commissioners for  
 Opening Streets in connection with the opening of  
 a highway over Jones' Falls in Baltimore City was  
 sustained as against the objections there under  
 consideration. The present appeal is from an order  
 refusing a preliminary injunction upon the bill of  
 complaint which disputes upon other grounds the  
 right of the commissioners to make such  
 assessments. It was held in the former case that  
 while the Act of 1910, c. 110, providing for the  
 improvement, authorized the city to delegate the  
 duty of opening the new thoroughfare, known as  
 the "Fallsway," to the Commission on City Plan,  
 the Mayor and City Council had full power, under  
 the coexisting provisions of the City Charter, to  
 pass the ordinance then and now under inquiry,  
 directing that this service be performed by the  
 Commissioners for Opening Streets. It was also  
 decided that property beneficially affected by the  
 improvement was not relieved of liability to be  
 assessed for benefits because of the creation of a  
 fund by the act of 1910 for the payment of the  
 costs and expenses \*268 of the project. The bill in  
 the present case charges in effect that the city  
 actually availed itself of the right given by the act  
 to delegate the power and duty of opening the

highway to the Commission on City Plan, which proceeded to exercise the authority thus conferred, and that having made such an election, and the commission having acted upon it, the city was precluded from committing the work to a different agency. The ordinance is alleged to be invalid for the further reason that it was not preceded by the notice prescribed by section 828 of the City Charter (Acts of 1898, c. 123; article 4, Public Local Laws). The objection is raised, also, that the proceedings of the Commissioners for Opening Streets are void because their assessments were made with a view to meeting the cost of construction work not proper to be considered in that connection, and were in excess of the amount for which they were authorized to assess benefits.

In reference to the first of the points thus submitted, the averment of the bill is that after the approval of the project by the voters of the city, as provided by the act of 1910, an ordinance was passed by the Mayor and City Council, known as the "Ordinance of Estimates for the year 1911," in which appeared the following allowance among the estimates for new improvements: "Commission on City Plan, to be taken from the Jones' Falls 1961 Loan: To opening, constructing, and establishing a public highway over along and near Jones' Falls, five hundred thousand dollars (\$500,000.00)"—and that the commission thus specified proceeded to exercise the powers vested in it by the act of 1910 and the ordinance just mentioned, and expended the sum of \$6,108.25 out of the funds thus appropriated. Upon this allegation of facts the bill advanced the theory of a conclusive and irrevocable election by the city to delegate the duty and power of opening the Fallsway to the Commission on City Plan.

[1] The Ordinance of Estimates to which the bill refers was passed in pursuance of section 36 of the City Charter, which provides that the Board of Estimates shall annually make out three lists of moneys to be approved by the City Council for

the ensuing fiscal year, and that these lists, which include one relating to new improvements, shall be embodied in an ordinance, prepared by the board, making the necessary appropriations, which, after the publication of a prescribed notice, shall be submitted to the City Council for passage. It is evident that an ordinance of this character, whose only function is to set apart the funds estimated for the specified municipal purposes, is not such a measure as the act of 1910 designed to be the medium for the delegation of the powers it conferred. The act provides, by section 2, that "before proceeding to open and construct said highway, including the acquiring of property adjacent thereto, the Mayor and City Council of Baltimore shall by ordinance provide therefor, and there shall be designated upon a proper plat the property, landed or other, that is to be acquired in, along or adjacent to said highway," and by section 3, that "the Mayor and City Council of Baltimore is hereby authorized and empowered to delegate to the commission known as the 'Commission on City Plan' the duty and power of opening, constructing and establishing said highway, and to confer by ordinance on said commission the power to condemn and acquire by purchase or condemnation the lands and property mentioned in the last preceding section of this act, and such other powers possessed by said Mayor and City Council of Baltimore, relating to the laying out, opening and construction of highways and acquiring property, landed or other, adjacent thereto, as it may deem proper." These provisions undoubtedly contemplated that, if the city should determine to commit the opening of the Fallsway to the Commission on City Plan, there should be an *express* delegation of authority for that purpose.

The power to *assess for benefits* was not granted by the statute relating to the Fallsway, but was one of the "other powers possessed" by the city under its charter which it was permitted to "confer by ordinance" upon the commission. The

Ordinance of Estimates does not refer to the act of 1910, or purport to delegate or define any duties to be performed or powers to be exercised in connection with the improvement. It appears from the allegations of the bill that the ordinance required by section 2 of the Act of 1910 to be passed preliminary to any proceedings for the opening and construction of the highway was approved February 9, 1912, more than a year subsequent to the Ordinance of Estimates for 1912. In the meantime, as the bill shows, an Ordinance of Estimates for 1912 had been enacted in which an allowance of \$500,000 was made to the Commissioners for Opening Streets to be used "for opening, constructing and establishing a public highway over, along and near Jones' Falls." The first of these Ordinances of Estimates doubtless referred to the Commission on City Plan in the expectation that the authority to open the Fallsway would be given to that body. But it manifestly did not undertake by its own terms to invest the commission with the necessary powers. To accomplish such a result further and specific action by the city was required. No such action was taken in relation to the Commission on City Plan, but by the ordinance of February 9, 1912, provision was made for the highway, as intended by the act of 1910, and express direction was given that it be opened by the Commission for Opening Streets in accordance with the act and the City Charter. If, therefore, it be assumed that an authorization to perform this service would be final and irrevocable if once made to the \*269 agency named in the statute, we are of the opinion that such a delegation was not effected by the Ordinance of Estimates in which that agency was mentioned. There is no principle of election, applicable to the case made by the bill, which would bind the municipality to confer upon the Commission on City Plan the power to open the Fallsway merely because the selection of that body for the work had been anticipated in an ordinance whose sole object was to make appropriations, and because part of the fund thus

made available had been expended by the commission. No prejudice to the complainant or the public has been alleged as a consequence of the course pursued by the city in the exercise of the powers granted by the act of 1910 and by the general provisions of its charter with respect to this improvement. The objection to the assessments on the ground we have thus considered is clearly not sustainable.

[2] The question next to be decided is whether the notice prescribed by section 828 of the City Charter was an essential preliminary to the ordinance under which the Commissioners for Opening Streets controverted assessments. That section provided that before the Mayor and City Council "shall pass any ordinance under section 6 of this article, paragraph, 'Streets, Bridges and Highways,' relating to the laying out, opening, extending, widening, straightening or closing up, in whole or in part, of any street, square, lane or alley within Baltimore City, notice shall be given by advertisement published once a week for six consecutive weeks in two of the daily newspapers in the said city, that application shall be made for the passage of such ordinance. \*\*\*\*" If the ordinance providing for the Fallsway is to be regarded as having been passed under section 6 of the Charter, the notice prescribed by section 828 was unquestionably a prerequisite. By the paragraph of section 6 to which section 828 refers power is given to the Mayor and City Council "to provide for laying out, opening, extending, widening, straightening or closing up, in whole or in part, any street, square, lane or alley within the bounds of said city, which in its opinion the public welfare or convenience may require. To provide for ascertaining whether any, and what amount in value, of damage will be caused thereby, and what amount of benefit will thereby accrue to the owner or possessor of any ground or improvements within or adjacent to said city, for which said owner or possessor ought to be compensated, or ought to pay a compensation, and

to provide for assessing or levying either generally on the whole assessable property of said city, or specially on the property of persons benefited, the whole or any part of the damages and expenses which it shall ascertain will be incurred in locating, opening, extending, widening, straightening or closing up the whole or any part of any street, square, lane or alley in said city." There are other provisions in this subdivision of the Charter, but they need not be quoted.

The ordinance of February 9, 1912, under which the Fallsway was opened, is entitled "An ordinance to condemn and open in pursuance of chapter 110 of the Act of 1910 of the General Assembly of Maryland a highway over and along Jones' Falls," etc. It authorized and directed the Commissioners for Opening Streets to condemn and open the thoroughfare in pursuance of that act, and provided that their proceedings should be in accordance with the act of 1910 and all such provisions of the City Charter as were applicable. By section 172 of the charter the Commissioners for Opening Streets were "charged with the duty of opening, extending, widening, straightening or closing any street, lane, alley, or part thereof, situated in Baltimore City, whenever the same shall have been directed by ordinance to be done, and shall perform such other duties as the Mayor and City Council of Baltimore may by ordinance prescribe." Section 175 provided that: "Whenever the Mayor and City Council of Baltimore shall hereafter be ordinance direct the Commissioners for Opening Streets to lay out, open, extend, widen, straighten or close up, in whole or in part, any street, square, lane or alley, within the bounds of this city, the said commissioners, having given the notice required by law of their first meeting to execute the same, shall meet at the time and place mentioned in said notice, and from time to time thereafter, as may be necessary, to exercise the powers and perform the duties required of them by said ordinance, and shall ascertain whether any

and what amount of value in damages will thereby be caused to the owner of any right or interest in any ground or improvements within or adjacent to the city of Baltimore, for which, taking into consideration all advantages and disadvantages, such owner ought to be compensated; and the said commissioners having ascertained the whole amount of damages for which compensation ought to be awarded, as aforesaid, and having added thereto an estimate of the probable amount of expenses which will be incurred by them in the performance of the duties required of them, as aforesaid, and also of the expenses incurred by the city register by reason of said proceedings, shall proceed to assess all the ground and improvements within and adjacent to the city, the owners of which, as such, the said commissioners shall decide and deem to be directly benefited by accomplishing the object authorized in the ordinance aforesaid."

It thus appears that the assessments of which the bill complains were not imposed in pursuance of an ordinance passed under section 6 of the Charter. The authority of the city to open the Fallsway and the powers of the Commissioners for Opening Streets to assess the benefits in question existed independently\*270 of that section under separate and specific provisions. The ordinance providing for this improvement not only omitted any allusion to section 6, but referred expressly to the act of 1910 as the source of the power which the city was proposing to exercise through one of its established agencies. There was no attempt in the ordinance to provide within the purview of section 6, for the ascertainment of either damages or benefits, but the Commissioners for Opening Streets were simply directed to perform the duties enjoined upon them by existing provisions of the City Charter. The conditions, therefore, under which the notice mentioned in section 828 is requisite, are not present in this proceeding. There was no legal necessity apart from that section for any notice preliminary to the

passage of the ordinance, and the act of 1910, in pursuance of which the city acted, contained no such requirement.

[3] The remaining objection stated in the bill is that the proceedings of the Commissioners for Opening Streets are null and void because their assessments for benefits included elements and estimates not recognized by law. This amounts to a contention that the assessments are irregular and excessive. For such an erroneous exercise of authority the party aggrieved has an adequate remedy by direct appeal from the action of the commissioners. By section 179 of the City Charter it is provided that any party dissatisfied with the assessment of damages or benefits may within 30 days appeal to the Baltimore City Court, which is given full power to hear and determine the question thus presented. The appellant has given the right to have a jury summoned and impaneled “to ascertain and decide on the amount of damages or benefits, under the direction of the court.” It is further provided that the court “shall not reject or set aside the record of the proceedings of the said commissioners for any defect or omission in either form or substance, but shall amend or supply all such defects and omissions, and increase or reduce the amount of damages and benefits assessed, and alter, modify and correct the said return of proceedings, in all or any of its parts, as the said court shall deem just and proper.”

In [Wannenwetsch v. Baltimore City](#), 111 Md. 39, 73 Atl. 703, it is said, in the opinion by Judge Burke, that: “Where a special and limited tribunal acts within its jurisdiction, and an appeal is provided by the statute to another tribunal in which their action may be reviewed, mere errors, mistakes of judgment, or irregularities in their proceedings do not form a foundation for a bill in equity. [Methodist Church v. Mayor and City Council](#), 6 Gill, 391 [48 Am. Dec. 540]; [Hazelhurst v. Baltimore](#), 37 Md. 220; [Page v.](#)

[Baltimore](#), 34 Md. 558.” The objection in the Wannenwetsch Case was that the commissioners published in only one English newspaper certain notices necessary to be given in the course of their proceedings, instead of making the publication in two such newspapers as required by law. It was held that the notices were consequently insufficient, but that as the ordinance was valid, and the commissioners acquired jurisdiction in the premises and acted within its limits, any errors, defects, or irregularities in the exercise of that authority could have been corrected by an appeal to the Baltimore City Court, as provided by the ordinance, and that a court of equity had no power to intervene. The decision thus rendered and those to which it referred are conclusive of the question we have now to determine. The commissioners in this case were fully and validly empowered to conduct the proceedings in the course of which they made the assessments here sought to be annulled, and, if they estimated the benefits upon a misconceived theory of valuation, the error thus committed is subject to correction through the appeal specially provided for that purpose. There is certainly no reason to declare the whole proceeding void because the commissioners may have reached and reported a mistaken conclusion. It being clear upon the averments of the bill that the assessments complained of were made in the exercise of a jurisdiction lawfully acquired, and a specific remedy having been afforded for the alleged grievance by an appeal to another tribunal, a court of equity has no authority to decide the issue.

The case of [Friedenwald v. Shipley](#), 74 Md. 225; 21 Atl. 790, 24 Atl. 156, was cited in support of the appellant's contention. In referring to that case Judge Burke said in [Wannenwetsch v. Baltimore](#), supra: “There is nothing in the decision in the Friedenwald Case in conflict with the principles we have stated. The broad language used in some portions of the opinion in that case must be read in connection with the precise questions which the

court had under consideration. What was actually decided in that case is this: First, that the examiner had *exceeded* his authority in a most material respect, viz., in estimating for the cost of building two bridges across the tracks of the Philadelphia, Wilmington & Baltimore Railroad Company; and, secondly, that the statement of damages, benefits, and expenses filed by him was so framed as to mislead persons interested. The court found as a fact that ‘information was withheld from them which would probably have induced them to appeal; at all events, which was essential to an intelligent determination of the question whether an appeal was necessary for their protection.’” In the present case there is no such combination of prejudicial conditions, and we find no occasion to exempt it from the operation of the general principle so clearly stated in the *Wannenwetsch* and other cases cited.

[4] There was a motion to dismiss the appeal\*271 on the ground that the order from which it is taken was in reality a pro forma ruling. The appeal is from an order refusing a preliminary injunction on an ex parte application. An appeal to this court from such an order is permitted by section 31 of article 5 of the Code (*C. & P. Telephone Co. v. Baltimore City*, 89 Md. 707, 43 Atl. 784, 44 Atl. 1033), and the record discloses no circumstances which can be held to affect the right thus afforded.

Order affirmed, with costs.

Md. 1913.  
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