

Charles J. Bonaparte,

*vs.*

the Baltimore, Hampden and  
Lake Roland Railroad Com-  
pany, and Others.

IN THE  
Court of Appeals of Maryland.

Appeal from the Circuit Court for  
Baltimore County.--Equity.

WM. REYNOLDS,  
WM. S. KEECH,  
For Appellant.

F. C. SLINGLUFF,  
MESSRS. STEELE, SEMMES AND CAREY,  
For Appellees.

Filed October 19th, 1891.

STATE OF MARYLAND,

Baltimore County, to wit:

Charles J. Bonaparte,

*vs.*

The Baltimore, Hampden and  
Lake Roland Railroad Com-  
pany, William H. Whitridge  
and P. Sanford Ross, Joseph  
B. Sanford and Walter B.  
Brooks, Jr., copartners, trad-  
ing as Ross & Sanford.

In the Circuit Court for Balti-  
more County, in Equity.

This suit was commenced in above Court on the 6th day of October, 1891, the plaintiff, by his attorneys, William Reynolds and William S. Keech, filing a bill of complaint and two exhibits. The said bill of complaint was amended by leave of the Court, and was refiled as amended on the 8th day of October, and is copied in this transcript in its amended form, as follows:

*Bill of Complaint.*

Charles J. Bonaparte, Plaintiff,

*vs.*

The Baltimore, Hampden and  
Lake Roland Railroad Com-  
pany, William H. Whitridge,  
and P. Sanford Ross, Joseph  
B. Sanford and Walter B.  
Brooks, Jr., copartners, trad-  
ing as Ross & Sanford, De-  
fendants.

In the Circuit Court for Balti-  
more County, in Equity.

*To the Honorable, the Judges of said Court:*

Your orator complaining, says:

1. That under the last will and testament of his father, Jerome N. Bonaparte, who died in June, 1870, he became the owner of an undivided moiety in fee-simple of about twenty-two acres, one rood and twenty seven square perches of land, in the ninth election district of Baltimore county, the fourth course of which beginning at a point in the centre of a road known as "Evans' Chapel Road," ran thence north  $11\frac{1}{2}^{\circ}$ , W. 44.8 perches along the centre of said road, and the fifth course ran thence north 25.8 perches still along the centre of said road so as to include one-half of the bed of said road as then laid out, and that subsequently he acquired the other undivided moiety of said land in fee-simple, by a deed from his brother, Jerome N. Bonaparte, and Caroline LeRoy Bonaparte, his wife, dated July first, 1872, and duly recorded in Liber E. H. A., No. 76, fol. 113, and one of the Land Record Books of Baltimore county aforesaid, as from a

certified copy of said deed herewith filed, marked "Plaintiff's Exhibit A," will fully appear; and that your orator has ever since so acquiring title to said land occupied the same as his residence, and has expended more than fifty thousand dollars in fitting up the buildings and putting new improvements thereon.

2. That the said Evans Chapel road had been used as a public road for many years before your orator acquired his title to said property, but he is unable to ascertain whether it was ever formally declared to be a public highway by the county authorities, as no record thereof has so far been found to his knowledge, although search has been made therefor.

3. That on November third, 1870, Hiram Woods and others made application to the County Commissioners of Baltimore county for the opening of a new avenue and for widening the Evans Chapel road, upon which application the road supervisors for said district made a report, bearing date June 8th, 1871, with plats thereto annexed, wherein they recommended the opening of a new road sixty feet wide, as laid out on said plats, according to which the new road, where it bounded on the land of your orator, would cover the entire bed of the said Evans Chapel road, (of which your orator then owned one-half in fee-simple, subject to the easement in the public of a right-of-way thereover,) and also a strip of your orator's land, (of varying width, in some places being as much as fifteen feet wide,) bounding on said Evans Chapel road; and said report further assessed the [the] benefits of the proposed road to the several owners of the lands adjoining the same, but allowed no damages whatsoever; the benefits assessed to the Bonaparte estate being the sum of (\$500) five hundred dollars; and that on March 8th, 1873, an order was passed by the County Commissioners of Baltimore county, ratifying the said report and proceedings of the supervisors, and declaring "that the said road be and the same is hereby condemned as a public road or way, to be kept in order as all public roads in said county are by law required to be kept;" all of which facts will fully appear from a certified copy of the said petition and condemnation proceedings thereunder, which is herewith filed as a part of this bill, marked "Plaintiff's Exhibit B."

4. That your orator paid the sum of five hundred dollars so assessed to the Bonaparte estate, and the proposed road was duly laid out as described in the said plat, and has ever since been and is now used as a public county road, and is known as "Roland Avenue."

5. That by chapter 284 of the Acts of Assembly of 1872, approved April 1st, 1872, Hiram Woods, John A. Dushane, William C. Wilson, William H. Ward, Henry D. Loney, William C. Pennington and Robert Gilmore, Jr., were appointed Commissioners to take subscriptions to the capital stock of the Baltimore, Hampden and Lake Roland Railroad Co., and the subscribers to said stock were thereby constituted a body politic and corporate for the purposes and with the powers therein described, but no other purposes and with no other or greater powers, and that by section 6, of the Act aforesaid, the said corporation was given "power to construct a railway, with one or two tracks and the necessary sidings, for the transportation of travelers or freight by horse power, and have the exclusive use of any streets or county roads, over which they may wish to lay their track between Boundary avenue and Lake Roland; provided said track or tracks are constructed in such a manner as not to interfere

with the travel on such streets or road," and by section 11, it was provided, "that said company shall commence said railway within three years from the passage of this Act, and complete the same in ten years;"—all of which will more fully appear by reference to the Act aforesaid, as published among the Laws of Maryland, of the year aforesaid, on pp. 464 to 469, of the volume printed by authority, and containing the same, whereunto the Court is respectfully referred, and prayed to take the same as part of this bill of complaint; which Act of Assembly your orator charges was in violation of the Constitution of this State, and altogether null and void, and even if constitutionally valid, was never accepted by the subscribers to the said capital stock of the said alleged corporation, until after the time therein limited for the exercise of the powers conferred by sections 6 and 11 above set forth.

6. That your orator has no certain information as to whether the said corporation was ever duly organized under said Act at all; but he charges that if it was so organized, it wholly failed to commence its said railroad within three years from April 1st, 1872, or to complete it within ten years from said date, nor did it ever, to the best of your orator's information and belief, commence any work or do any act whatsoever in pursuance of the purposes of its corporate existence, unless the work commenced and the work done within four days next before the filing of this bill as hereinafter set forth, are to be assumed to be its work and acts, and to have been done in pursuance of the purposes aforesaid, both of which assumptions your orator denies to be well founded; and your orator charges, that the corporate powers aforesaid, have been defeated by neglect, desuetude and delay; and further, that the powers, if any three were conferred by section 6 aforesaid, are qualified by Article 23, sec. 169, and Article 25, sec. 1, of the Code of Public General Laws, which were enacted long after the said periods of three and ten years, as prescribed by section 11 above quoted for the commencement and completion respectively of the railway therein mentioned had expired, and when nothing had been done and no money or labor expended in and about the same.

7. That within the past four days, one William H. Whitridge and other persons unknown to your orator, claiming to be said Baltimore, Hampden and Lake Roland Railroad Company, who are made parties to this suit, under the name so assumed by them, but without any admission that they constitute the corporation organized under and by virtue of the Act aforesaid; and the defendant, Whitridge, personally, (he professing to be the president thereof, but your orator being ignorant whether he is such president or not,) and the defendants, P. Sanford Ross, Joseph B. Sanford and Walter B. Brooks, Jr., who are copartners, trading under the name of Ross and Sanford, and many other persons professing to be the agents or servants of the said pretended corporate body, have torn up a portion of the bed of Roland avenue, as laid out in the plats aforesaid, and have begun to put down iron railway tracks or wooden ties therein, and announce their intention of continuing the said work along the whole line of Roland avenue, from the present city limits to Lake avenue.

8. And your orator believes and so charges, that the laying down of said tracks by the said defendants, is not done in good faith for the purpose of operating thereupon a horse railway, in accordance with powers originally granted under the said charter of the Baltimore, Hampden and Lake Roland Railroad Company,

but with the intent to use the same for the purpose of either themselves running cars thereover propelled by electricity, or of enabling and permitting some other person or persons, or corporation to run cars propelled by electricity thereover, but that no permission from the County Commissioners of Baltimore county to lay said tracks or to operate cars by electricity in Baltimore county, has been granted to or has ever been applied for by the said defendants, nor have they located their route from Boundary avenue to Lake avenue, or sought or attempted to agree with the County Commissioners of Baltimore county, as to the terms and conditions upon which Roland avenue may be used or occupied by them in the continuance of their said route, which location of the route of said road and agreement with the said County Commissioners, (or in case of inability to come to such agreement, condemnation proceedings as provided for in section 167, of said Article 23, of the Code of Public General Laws,) are, as your orator is advised, conditions precedent to the acquisition by any person or persons whatsoever of the right to lay down upon the bed of Roland avenue any railway tracks whatsoever.

9. That your orator being, as above set forth, the owner of the fee-simple of about one-half, more or less, of the bed of that part of Roland avenue, binding upon his said land, subject only to the easement acquired by the public therein, by its condemnation for use as a public county road, and that by such condemnation proceedings your orator acquired a special easement, as well as right of property in the whole bed of said road, for the purpose of a way and access to and from his said land, over the same as a public highway, which said easement and special property he cannot, except in violation of the Constitutions of Maryland and of the United States, be deprived of, or hindered in the enjoyment of, by the use or occupation of any part of said road bed, against his will, for any other purpose than one for which said public road was originally designed, without just compensation for the damage thereby occasioned (as the same shall be agreed to by your orator, or shall be awarded by a jury,) being first paid or tendered to him.

10. That the laying down of iron railway tracks upon said Roland avenue, as begun and threatened by the said defendants, and the tearing up and obstruction of said avenue incident thereto, without any proper authority of law for so doing, is and would be an unlawful obstruction of your orator's right of access to and from his said residence over said avenue, as well as a public nuisance, and therefore is and would be an unlawful appropriation of your orator's property, causing him special damage not common to, but distinct and different from that suffered by the general public from said nuisance.

11. That your orator is informed and believes, and therefore so charges, that the tracks which the defendants have begun laying, will not be constructed in such a manner as not to interfere with the travel over the said Roland avenue, as required by section 6 of said Act of 1872, chapter 284, above referred to; but that on the contrary the said travel has been and will be greatly interfered with thereby. And your orator further charges, on information and belief, that the pecuniary responsibility of the Baltimore, Hampden and Lake Roland Railroad Company, named among the defendants to this bill, is (if it really has any corporate existence at all) extremely doubtful. And your orator further charges on information and belief, that there is no rea-

sonable probability that for the injuries which would be done to his private property by the location upon Roland avenue of the tracks so contemplated to be laid by the defendants, he could recover adequate compensation by proceeding in a civil action against the said corporation, as contemplated by section 169, of Article 23, of the Code of Public General Laws, already cited; and being remediless in the premises in a Court of law, your orator is entitled to invoke the aid of this Court to protect him by the exercise of its equitable jurisdiction in the premises.

Wherefore he prays:

A. That the said defendants, and each of them, their and each of their servants, agents and workmen, and all persons whomsoever claiming to act under and by virtue of any contract or agreement with, or authority derived either directly or indirectly from the said defendants, or any one or more of them, may be restrained by order and injunction of this Honorable Court from laying any iron railway tracks upon the bed of said Roland avenue, or making any excavations in said avenue, or placing any wooden ties or other materials upon said avenue, or in any other manner interfering with or obstructing the same, within the limits of Baltimore county, or hindering the plaintiff in the free and unobstructed use thereof for the purposes of access to and from his land and premises adjacent thereto.

B. And that the plaintiff may have such further and other relief in the premises as the nature of his case may require.

-D. And that subpoenas may issue against the said defendants, the Baltimore, Hampden and Lake Roland Railroad Company, and William H. Whitridge and Walter B. Brooks, Jr., all of Baltimore city, and an order of publication against the said P. Sanford Ross and Joseph B. Sanford, who are non-residents of the State of Maryland, (being as your orator is informed residents of Newark, in the State of New Jersey,) giving them notice of the object and substance of this bill, and warning them to appear in this Court in person or by solicitor, on or before a certain day to be therein named, and to show cause, if any they have, why a decree should not be passed as prayed.

And as in duty bound your orator will ever pray, &c.

CHARLES J. BONAPARTE,

Plff.

WM. REYNOLDS,

WM. S. KEECH,

Sols. for Plff.

STATE OF MARYLAND,

*Baltimore County, Sct.:*

I hereby certify, that on this sixth day of October, A. D. 1891, before me, a Justice of the Peace of the State of Maryland in and for Baltimore county aforesaid, personally appeared Charles J. Bonaparte, the above named plaintiff, and made oath upon the Holy Evangely of Almighty God, that the several matters and things in the foregoing bill of complaint are true as therein stated, to the best of his knowledge and belief.

GIDEON HERBERT, J. P.

October 8, 1891.—Sworn to as amended in open Court.

Test:—JOHN W. SHANKLIN,

Clerk.

Plaintiff's Exhibits "A" and "B," which were filed with the foregoing bill of complaint, are omitted from this transcript in accordance with the requirements of section 33 of Article V, of the Maryland Code of Public General Laws; the purport and substance of said Exhibit A, being fully set forth in paragraph 1, and the substance of said Exhibit B, being fully set forth in paragraphs 3 and 4 of the said bill.

And then the Court passed the following order, viz:

*Order of Court.*

<p>Charles J. Bonaparte,</p> <p style="text-align: center;"><i>vs.</i></p> <p>The Baltimore, Hampden and Lake Roland Railroad Com- pany, William H. Whitridge, P. Sanford Ross, Joseph B. Sanford and Walter B. Brooks, Jr.</p>	}	<p>In the Circuit Court for Balti- more County, in Equity.</p>
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Ordered by the Circuit Court for Baltimore county, that the application of the plaintiff for an injunction in the foregoing case be set for hearing on Thursday, October 8th, A. D. 1891; and that the defendants are hereby enjoined from interfering further in any manner with the bed of Roland avenue within the limits of Baltimore county, until after the hearing of said application and the action of the Court thereupon, upon the plaintiff filing an injunction bond in the penalty of \$5,000, with approved security; provided that a copy of this order be served on the defendants on or before Wednesday, October 7th, 1891.

N. CHARLES BURKE.

*Docket Entries.*

Oct. 6th, 1891.—Approved injunction bond filed; same day, copies of order of Court sent to be served on the defendants.

Oct. 7th, 1891.—Copy of order of Court served on Wm. H. Whitridge, and on Wm. H. Whitridge as President of the Baltimore, Hampden and Lake Roland Railroad Company, Oct. 6th, 1891; Sheriff's return filed; same day, copy of order of Court served on the Baltimore, Hampden and Lake Roland Railroad Company by service on Fielder C. Slingsuff, a director; Sheriff's return filed.

And on October 8th the plaintiff filed the following

*Application.*

<p>Charles J. Bonaparte,</p> <p style="text-align: center;"><i>vs.</i></p> <p>The Baltimore, Hampden and Lake Roland R. R., and Others.</p>	}	<p>In the Circuit Court for Balti- more County, in Equity.</p>
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*To the Honorable, the Judges of said Court:*

The plaintiff respectfully prays the Court to make a personal inspection of the bed of Roland avenue, between the city limits and Lake avenue, where it is proposed by the defendants to lay their railroad tracks before deciding upon the granting or refusal of the injunction applied for.

WM. REYNOLDS,  
W. S. KEECH,  
Sols. for Pltff.

And on the same day the following agreed statement of facts was filed, to wit:

*Statement.*

Charles J. Bonaparte,  
 vs.  
 Baltimore, Hampden and Lake  
 Roland R. R. Co.

It is agreed and admitted for the purposes of this case, that the first subscription for any of the capital stock of the Baltimore, Hampden and Lake Roland R. R. Co., was made at a meeting of the Commissioners held in September, 1891, at which time and place 500 shares of \$50 each were subscribed for, and an instalment of ten per cent. on each of said shares was then paid in cash; and that in the construction of its tracks on Roland avenue in Baltimore county, double tracks are to be laid in the middle of the avenue, with a driveway on either side, and that rails will be of ordinary street railway pattern.

WM. REYNOLDS,  
 W. S. KEECH,  
 For Pltff.

FIELDER C. SLINGLUFF,  
 STEELE, SEMMES & CAREY,  
 For Defts.

And on the same day the plaintiff, by leave of the Court, amended his bill of complaint, and refiled same amended. And thereupon the defendants appeared by Fielder C. Slingluff and Steele, Semmes and Carey, their attorneys, and filed their answer, as follows:

*Answer of Defendants.*

Charles J. Bonaparte, Plaintiff,  
 vs.  
 The Baltimore, Hampden and  
 Lake Roland Railroad Com-  
 pany, et al., Defendants.

In the Circuit Court of Balti-  
 more County, in Equity.

The joint and several answer of the Baltimore, Hampden and Lake Roland Railroad Company, William H. Whitridge, P. Sanford Ross, Joseph B. Sanford and Walter B. Brooks, Jr., to the bill of complaint in this cause in this Court against them exhibited:

These defendants, reserving to themselves all proper exceptions to said bill of complaint, for its manifest errors and irregularities, and for an answer thereto as to such parts and so much thereof as they *is* advised it is material or necessary for them to answer, say:

(1.) That they admit the allegations of the first, second, third and fourth paragraphs of said bill, so far as the same are within their knowledge.

(2.) That in answer to the allegations of the fifth paragraph of said bill, they refer for a full and particular account of the corporate rights of the Baltimore, Hampden and Lake Roland Railroad Company, to the provisions of the said Act of 1872, chapter 284, referred to in said fifth paragraph; and further an-

swering said fifth paragraph, these defendants deny that said Act was in violation of the Constitution of this State.

(3.) That in answer to the allegations of the sixth paragraph of said bill, they show to the Court that the said corporation was duly organized under said Act, and while they admit that the said company did not commence its said railroad within three years from April 1st, 1872, or complete it within ten years from said date, yet it has recently begun the construction of its railroad, and has now a large force of men at work upon the same within the corporate limits of Baltimore city; that it has purchased its rails and cross-ties for the construction of its entire road, and is now engaged in laying them along its proposed route; that it has already laid a large part of its track in Baltimore city, and that it was about to proceed with the construction of its tracks on Roland avenue in Baltimore county, when served with the process of injunction by this Court.

(4.) That in further answer to the allegations of the said sixth paragraph, the defendants deny that its corporate powers have been defeated by neglect, desuetude and delay; that all of the original incorporators named in said Act are still living, with the exception of William C. Wilson and William H. Ward, whose places have been recently filled by the election of two other persons interested in lands on Roland avenue, to wit, Douglas H. Thomas and Charles O'D. Lee; that two of said original incorporators, to wit, Hiram Woods and John A. Dushane, are connected with the Roland Park Company, in whose interest in part, and with whose financial aid said railroad is being constructed, and that William C. Pennington, another of said original incorporators, has recently sold his land adjoining Roland avenue to said Roland Park Company; and the defendants show that the time is only now ripe for the construction of said railroad, and that if now constructed it will serve exactly the purposes of its incorporation, and that the persons at whose instance and for whose benefit said Act was passed, will be active in the control and direction of its progress.

(5.) But further answering said sixth paragraph, these defendants are advised, that the State of Maryland can alone complain of the neglect on the part of the said corporation to exercise its franchises within the period of time prescribed by the said eleventh section, (supposing that there has been in law any such neglect,) and that the same is true of the other charges of non-user and mis-user on the part of said corporation in this and other paragraphs of said bill, which acts of non-user and mis-user, if they could be established, cannot be inquired into collaterally or challenged by the plaintiff in this cause, but can only be made the subject of judicial inquiry at the instance of the Governor of the State of Maryland.

(6.) In answer to the seventh paragraph of said bill the defendant, the Baltimore, Hampden and Lake Roland Railroad Company, says that the acts complained of in said seventh paragraph are the corporate acts of said company; that the said William H. Whitridge is the president of said company, and that the defendants, P. Sanford Ross, Joseph B. Sanford and Walter B. Brooks, Jr., trading as the firm of Ross & Sanford, are railroad contractors employed by said company.

(7.) In answer to the eighth paragraph of said bill, the defendants deny that the said company is not laying down said railroad tracts in good faith, but to the contrary thereof says that it will operate thereupon a horse railway in accordance

with the powers originally granted under said charter, unless it is lawfully authorized to use some other motive power, and they deny that the said company has any design or intention of using electricity in the propulsion of its cars without proper and lawful authority therefor.

(8.) In answer to the ninth paragraph of said bill, the defendants admit that said Roland avenue has been lawfully condemned as a public highway, but they deny that the use of said avenue for the tracks and cars of a passenger railway, (whether said cars are propelled by horses or electricity,) will be such a use of the same as to require condemnation of said avenue for said purpose or the payment of damages to the plaintiff therefor.

(9.) In answer to the tenth paragraph of said bill, the defendants deny that the laying of said tracks will be an unlawful obstruction of the rights of the plaintiff, or that it will be a public nuisance.

(10.) In answer to the eleventh paragraph of said bill, the defendants say that the tracks which the defendants have begun laying will be constructed in such a manner as not to interfere with the travel over the said Roland avenue, as required by section 6 of the said Act of 1872, chapter 284, and they deny that the said travel has been or will be interfered with thereby; that the said corporation is financially able to meet all of its obligations, including any damages which it could possibly do to the plaintiff.

(11.) And further answering said eleventh section, these defendants say that the plaintiff is endeavoring to delay, hinder and embarrass the said railroad, not because the alleged delays and omissions charged against said company in any way affect the rights of the plaintiff in regard thereto, or because he can allege any fair and equitable reason why said rights should now be questioned, but because the said plaintiff is unalterably opposed to the construction and operation of any railway on Roland avenue, whether by the defendant railroad company or any other.

And having fully answered said bill of complaint, these defendants pray to be hence dismissed with their proper costs.

And as in duty bound.

FIELDER C. SLINGLUFF,

STEELE, SEMMES & CAREY,

Solicitors for Defdts.

STATE OF MARYLAND,

*Baltimore County, to wit:*

I hereby certify, that on this 8th day of October, in the year eighteen hundred and ninety-one, before the subscriber, a Justice of the Peace of the State of Maryland in and for Baltimore county aforesaid, personally appeared Fielder C. Slingluff, one of the Board of Directors of the Baltimore, Hampden and Lake Roland Railroad Company, and made oath in due form of law, that the matters and facts set forth in the foregoing answer are true and bona fide as therein set forth.

JOS. B. MITCHELL, J. P.

And thereupon the plaintiff filed the following motion for a preliminary injunction:

*Motion.*

Charles J. Bonaparte, vs. Baltimore, Hampden and Lake Roland R. R. Co.	}	In the Circuit Court for Baltimore County, in Equity.
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*To the Honorable, the Judges of said Court:*

The plaintiff moves the Court to grant the preliminary injunction prayed in the bill in this cause.

WM. REYNOLDS,  
 W. S. KEECH,  
 Sols. for Pltff.

And on October 8th, the following order of Court was filed:

*Order of Court.*

Charles J. Bonaparte, Plaintiff, vs. The Baltimore, Hampden and Lake Roland Railroad Company, and Others, Defendants.	}
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I have carefully considered the bill, answer, affidavit and all the other papers filed in this cause, as well as the arguments of the respective counsel made at the hearing, and having also made "a personal inspection of the bed of Roland avenue between the city limits and Lake avenue, where it is proposed by the defendants to lay their railroad tracks," and am of opinion that the plaintiff is not entitled to the injunction prayed for in his bill of complaint. It is thereupon ordered by the Circuit Court for Baltimore county, this 16th day of Oct., 1891, that the restraining order of this Court, passed in this cause on the 6th day of Oct., 1891, be and the same is hereby rescinded; and it is further ordered, that the injunction prayed for by the plaintiff in his bill of complaint, and moved for in his motion filed in this cause Oct. 8th, 1891, be and the same is hereby refused with costs to the defendants.

N. CHARLES BURKE.

And thereupon the plaintiff filed the following order, viz:

*Order for Appeal.*

Charles J. Bonaparte, vs. The Baltimore, Hamden and Lake Roland Railroad Company, and Others.	}	In the Circuit Court for Baltimore County, in Equity.
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*To the Honorable, the Judges of said Court:*

The complainant and plaintiff, by William Reynolds and William S. Keech, his attorneys, prays an appeal to the Court of Appeals of Maryland, from the order of Court this day passed in the above cause, rescinding the restraining order heretofore passed in the above entitled cause, and refusing the injunction prayed for in the above entitled cause, etc.

WILLIAM REYNOLDS,  
 WILLIAM S. KEECH,  
 Attorneys for Charles J. Bonaparte.

And thereupon, it is ordered by the Court here, that a transcript of the record and proceedings in the cause aforesaid, with all things thereunto relating, be transmitted to the Court of Appeals of Maryland; and the same is transmitted accordingly.

Test:—JOHN W. SHANKLIN,  
Clerk.

STATE OF MARYLAND,

*Baltimore County, to wit:*

I, JOHN W. SHANKLIN, Clerk of the Circuit Court for Baltimore county, do hereby certify, that the foregoing is a true transcript taken from the record and proceedings of said Court in the therein entitled cause, in accordance with the rules of the Court of Appeals relating thereto.

In testimony whereof, I hereunto subscribe  
(Seal's Place.) my name and affix the seal of said Circuit Court, this 17th day of October, A. D. 1891.

JOHN W. SHANKLIN,  
Clerk.

THE BALTIMORE  
HAMPTON AND LAKE  
ROLAND RAILROAD CO.  
General Docket, No. 30.

APPELLANT'S BRIEF

This is an appeal from an order of the Circuit Court for Baltimore county, refusing to grant a preliminary injunction against the appellees, as prayed in a bill filed by the appellant to restrain their trains laying down railroad tracks in the bed of Roland avenue, in Baltimore county, or otherwise obstructing the same, and from hindering the appellant in the free and unobstructed use thereof.

The bill sets forth that the appellant is the owner, in fee simple, of about one-half of that part of the bed of Roland avenue, extending southeast of and to the Baltimore county upon which he resides, and is entitled to the easement acquired by the public thereby by the condemnation of Roland avenue for use as a public way.

Filed November 9, 1891.

CHAS. J. BONAPARTE	}	IN THE
vs.		Court of Appeals
THE BALTIMORE, HAMPDEN AND LAKE ROLAND RAILROAD CO.		OF MARYLAND.
AND OTHERS.		OCTOBER TERM, 1891.
		GENERAL DOCKET, No. 70.

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APPELLANT'S BRIEF.

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STATEMENT.

This is an appeal from an order of the Circuit Court for Baltimore county, refusing to grant a preliminary injunction against the appellees, as prayed in a bill filed by the appellant to restrain them from laying down railroad tracks in the bed of Roland avenue, in Baltimore county, or otherwise obstructing the same, and from hindering the appellant in the free and unobstructed use thereof.

The bill sets forth that the appellant is the owner, in fee simple, of about one-half of that part of the bed of Roland avenue, binding on about 23 acres of land in Baltimore county upon which he resides, subject only to the easement acquired by the public therein by the condemnation of Roland avenue for use as a public county

road, and that by said condemnation he acquired, for value, a special easement as well as right of property in the whole bed of said avenue, for the purpose of a way and access to and from his said land over the same as a public highway; that the defendant, William H. Whitridge, and other persons unknown to the appellant, claiming to be a corporation incorporated under chapter 284 of the Acts of Assembly of 1872, by the name of the Baltimore, Hampden and Lake Roland Railroad Company (which Act the appellant charges to be in violation of the Constitution of this State, and altogether null and void), and the defendants, P. Sanford Ross, Joseph B. Sanford and Walter B. Brooks, Jr., and many other persons professing to be the agents or servants of said pretended body corporate, have torn up a portion of the bed of Roland avenue and have begun to lay down iron railway tracks on wooden ties thereon, and announce their intention of continuing the said work along the whole line of Roland avenue from the present city limits to Lake avenue; that even if the Act referred to had been constitutional, the charter which it purported to grant had not been accepted within a reasonable time, because not until after the purposes for which it was granted had been defeated by neglect and delay; and that, if the pretended corporation was ever organized under the terms of the alleged law at all, (as to which question the plaintiff professed ignorance,) it performed no act of corporate existence whatsoever until more than nineteen years after the approval of the Act of Assembly, (April 1, 1872,) and within four days of the filing of the bill; that no permission from the County Commissioners of Baltimore county to lay said tracks has ever been applied for by or granted to the defendants, nor have they located their proposed route from Boundary avenue to Lake avenue, or sought or attempted to agree with said County Commissioners, as required by law, regarding the terms and conditions upon which Roland avenue may be used by them in the continuance of their said route; that the laying down of said tracks upon Roland avenue, as begun and threatened

by the defendants, and the tearing up and obstruction of said avenue, incident thereto, without lawful authority, would be an illegal obstruction of the appellant's easement in the said public road and right of access to and from his said residence over the same, as well as a trespass upon the portion whereof he owns the fee, and therefore is and would be an unlawful appropriation of his property; and moreover, would constitute a public nuisance, causing him special damage, not common to, but distinct and different from that suffered by the general public from said nuisance; and it prays that the defendants, and all persons claiming to act under their authority, be restrained and enjoined from laying any iron railway tracks on Roland avenue, or making any excavations therein, or placing any wooden ties or other materials thereon, or in any other manner interfering with or obstructing the same within the limits of Baltimore county, or hindering the appellant in the free and unobstructed use thereof, for the purposes of access to and from his land and premises adjacent thereto.

This application for an injunction was set for hearing on October 8th, by the Court, but before the hearing the defendants all appeared by solicitors and filed a joint and several answer, admitting the appellant's ownership of the fee simple of a portion of the bed of Roland avenue, and its condemnation as a public county road as set out in the bill, but asserting that the said chapter 284 of the Act of 1872, was constitutional and valid; that the Baltimore, Hampden and Lake Roland Railroad Company, thereby incorporated, had been duly organized thereunder, and that, while it had not commenced its railroad within three years, nor completed it within ten years after its passage, yet it had recently begun the construction of its road and laid a large portion of its tracks within the limits of Baltimore city, and was about to proceed with the construction of its tracks on Roland avenue in Baltimore county, substantially as alleged in the bill.

The answer further states that the acts complained of in the bill are the corporate acts of the said Baltimore,

Hampden and Lake Roland Railroad Company, of which the said defendant, Whitridge, is the president, and that the defendants, Ross, Sandford and Brooks are railroad contractors, employed by said company, and it admits by silence, the appellant's allegations, that no permission from the County Commissioners of Baltimore county to lay said tracks, has ever been asked by or granted to the defendants, and that they have not sought or attempted to agree with said County Commissioners as to the terms and conditions upon which Roland avenue may be used by them in the continuance of their railroad.

Prior to the hearing of the application an agreed statement of facts was filed (see Record, page 7), by which it was admitted among other things, that the first subscription for any of the capital stock of the Baltimore, Hampden and Lake Roland Railroad Company, was made at a meeting of the commissioners held in September, 1891, at which time and place 500 shares of \$50 each were subscribed for and an instalment of 10 per cent. on each of said shares was then paid in cash.

#### POINTS.

It was *conceded* in the argument below in this case, that unless the acts contemplated by the appellees are authorized by some law, the appellant is entitled to the injunction he asks; it was also *conceded* that they are authorized, if authorized at all, *only* by chapter 284 of the laws of 1872. Consequently the only question for the Court is: Does that statute authorize them?

We submit that it does *not*, because:

##### I. *The Act is unconstitutional.*

By article III, section 48, of the Constitution, a special Act of incorporation is *void* if a general law exists providing for the creation of corporations "of the *same general character* as the corporation proposed to be created." The "general character" of the corporation proposed to

be created by the statute in question, was that of a railroad company, empowered to transport for hire both passengers and freight, but restricted to horses as its motive power. Now chapter 476 of the laws of 1870, a general law existing when this Act was approved, (*i. e.*, April 1st, 1872,) certainly provided for the creation of corporations of this general character; and the fact that the proposed corporation was to be a *horse* railway made no difference.

Oler vs. Balto. and Randallstown, &c. Co., 41 Md. 584.

Consequently this special Act of incorporation was unconstitutional and void. There is nothing to controvert this proposition in either the case of Hodges vs. Union Pass., &c., R. R. Co., 58 Md. 603, or the later case of Reed vs. Balto. Trust and Guarantee Co., 72 Md. 531, which were relied upon by the appellees below.

In the latter case, the corporate purposes of the appellee were *inter alia* to act as executor, administrator, guardian, assignee, receiver, committee, depository for public funds, and public arbitrator, and to take the custody of legal documents, and of property or money in the hands of Court officers. The Court of Appeals held that there was no general law in existence providing for the creation of corporations of this general character, (72 Md., page 534,) and consequently that the special Act was valid. This was precisely what the General Assembly had declared in the preamble to the Act repealing so much of the general corporation law as provided for the formation of "Trust" and "Guarantee" Companies, (chapter 272 of laws of 1890, page 296 of the printed volume,) passed more than two months before the case was decided. The decision of this case therefore establishes only that if the *corporate purposes* of the proposed corporation cannot be attained under the general law, that law does not provide for the creation of corporations of the "same general character."

It was suggested, in argument, at the hearing below, that under the general law of 1870, the corporation sought to be created by this statute could not have acquired a *monopoly of roads and streets* as granted by section 6, but to acquire and hold such a monopoly was not one of its *corporate purposes*, one of the ends of its existence; the power thus conferred (if any such was conferred) constituted a mere special privilege—a *means*, (and one of very doubtful public policy,) to attain the end in view. It has also been suggested that section 7 of the special Act differs from the provision as to condemnation of private property, contained in the general railroad Act of 1870, by requiring that the owners of land condemned thereunder “shall have at least ten days’ notice, to be given by the president of said company,” of the day appointed for the meeting of the jury of inquisition on the premises—and intimated on behalf of the appellees that the omission of such a requirement from the general law, would have the effect of invalidating condemnation proceedings thereunder.

Without pausing to consider the merits of the legal proposition thus advanced, it is sufficient for the purposes of this case to point out, that to grant or refuse a railroad company the power of condemning its right of way, does not change its “general character;” it is not essentially a corporation created to condemn land, but a corporation created to build and operate a railroad; the power of condemnation is again merely a means employed to effect its corporate purposes; it would be none the less a corporation “of the same general character” if obliged to first purchase its right of way or obtain this by voluntary concession, before locating its route or constructing its railroad.

So also as to the difference in the maximum rates of fare allowed to be charged for passengers, which, in the special Act is five cents per mile, while the general law limits it to three cents per mile. To claim that this privilege rendered the railroad thus specially favored a cor-

poration of a different "general character" from one permitted to charge only three-fifths as much, would be simply to stultify the constitutional inhibition, and construe it as if it had read, "where general laws exist, providing for the creation of corporations," not "*of the same general character*," but "*identical in every particular with the corporation proposed to be created.*"

It is apprehended that this Court will be reluctant to place upon Article III., section 48 of the Constitution, a construction which would not only defeat its well understood purpose, *i. e.*, to prohibit legislative partiality towards particular corporations and the attendant jobbery and corruption—but would do in fact what one of the appellees' counsel claimed (as we think erroneously,) in the argument below, had been already done by the decisions in Hodges' and Reed's cases, namely: "Reduce that provision of the Constitution to a dead letter."

As a matter of fact all that this Court decided in Hodges vs. Baltimore Union Passenger Railway Company, 58 Md. pages 620, 621, as to Article III., section 48 of the Constitution, was that a corporation formed under the general law, could have its powers enlarged and its charter amended by special act. This decision makes a distinction between special acts which *create* corporations and those which *amend* the charters of corporations already created; pointing out that the latter are nowhere forbidden by the Constitution, and that they are the appropriate means to be resorted to when "one corporation may need to have its powers enlarged while it may not be advisable or necessary to confer such powers on other corporations;" so that there can be no argument *ab inconvenienti* against declaring void, as the Constitution does, such special acts as the one under review, for any unusual powers which the Legislature deemed advisable to confer upon the Baltimore, Hampden and Lake Roland Railroad Company might have been lawfully granted by way of amendment to a charter taken out under the general law of 1870.

In Hodges' case it was also claimed that the special law there assailed was likewise invalid under section 33 of the same article, which prohibits the Legislature from passing a "special law for any case for which provision has been made by an existing general law."

In passing upon this objection to the Act of 1882, chapter 47, the Court decided that neither chapter 252 of the Acts of 1881, nor chapter 242 of the Acts of 1876, were general laws making provision for the Constitution and operation of street railways in the city of Baltimore, and that consequently, chapter 47 of the Acts of 1882, was valid. In fact the reasoning of the Court (on pages 620, 621) strongly suggests that section 6 of chapter 284 of the Acts of 1872 *is unconstitutional* under Art. III, sec. 33, since it is a special law passed for a case (*i. e.*, the use by railroad companies of public streets and lands) for which provision *had been made* by an existing general law (*i. e.*, by section 12 of chapter 476 of the Acts of 1870); but as the invalidity of the whole charter is even more obvious under Art. III, sec. 48, this point need not be pressed.

*II. Even if the Act granting the charter were otherwise valid, this was not accepted in time to vest in the corporation the powers conferred by sec. 6, et seq., or indeed to create a corporation at all.*

A charter is an offer by the State to confer corporate existence and powers on certain persons (named or merely designated) on condition of their undertaking certain functions; this offer must be accepted, to make it operative; and that too upon the terms in which offered.

Lyons vs. Orange, &c. R. R. Co., 32 Md. 18.

Smith vs. Silver Valley Mining Co. 64 Md. 85.

And this acceptance must be signified within a reasonable time, or the offer will be deemed refused.

State vs. Bull, 16 Conn., page 179.

Morowetz on Corporations, p. 22 (second ed.)

See also Parsons on Contracts, page \*483.

Loring vs. Boston, 7 Metc. (Mass.) 409.

Moxley vs. Moxley, 2 Metc. (Ky.) 309.

Chicago & R. R. Co., vs. Dana, 43 N. Y. 240.

Mizzle vs. Burnett, 4 Jones, L. (N. C.) 249.

Ferrier vs. Storer, 63 Iowa, 484.

In this case, the Balto., Hampden and L. R. R. Co. became a corporation (if at all) in September, 1891, when, according to the agreed statement of facts, (Record, page 7,) the first stock was subscribed for.

Franklin F. I. Co. vs. Hart, 31 Md., page 59.

But the time for *finishing* the railroad expired in 1882, and as the offer must be accepted *as made*, (authorities *supra*,) it was not accepted until performance of its condition had become impossible, so that corporate existence was not thereby acquired, and the right to construct the railroad never vested in any one. This was not a case of *forfeiture*, for the right to construct the railroad had *never been acquired*, (unlike the Potomac Company's rights, referred to in 4 G. & J. 1,) although, even if it had been, the delay in its exercise would, under the express terms of the law, have amounted to an abandonment.

Laws of 1890, chapter 220, page 246.

Compare Atchison Street R. W. Co. vs. Nave, 17 Pac. Rep. 587.

Oakland Ry. Co. vs. O. B. & F. V. Ry. Co., 45 Cal. 365.

G. C. R. Ry. Co. vs. 13th and 15th Sts. Ry. Co., 7 Phila. Rep. 620.

Morris & Essex R. Co. vs. Central R. Co., 2 Vroom, 205, 210.

Peavey vs. Calais R. Co., 30 Me. 498.

S. C., 1 Am. Rwy. Cas., page 147, and note on page 150.

Nor is this a case where, as in Hodges' case, the conditions annexed to a grant have been waived. In that case, the ordinance (No. 150, of 1880) required that the work

should be commenced within six months and completed within twelve from the date of its approval. But by the preamble to chapter 47 of the laws of 1882, passed after both periods had expired, the Legislature declared that the railway company had "duly become vested with all the rights and franchises granted by the" ordinance in question; and by section 1 of the same Act, it was authorized to construct and operate its railway on the several streets therein named. Here was an express waiver *by the State* of a condition imposed by the city, (even if the ordinance passed after the appeal was taken, and renewing the company's license was not before the Court,) and, of course, such a waiver was within the competency of the State. In the present case, however, so far from the State's having waived anything, it has expressly declared the contrary.

Laws of 1890, chapter 220, page 246, *supra*.

III. *Even if originally valid and accepted in time, the charter gives no right to the company to lay down its tracks without the consent of the County Commissioners or condemnation proceedings.*

Every law is to be construed with reference to existing laws; and, therefore, section 6 of the Act of 1872 must be made to harmonize with section 12 of chapter 476 of the laws of 1870, and article XXVIII, section 1 of the Code of 1860, unless its terms are absolutely inconsistent therewith. There is, however, no such inconsistency; on the contrary, the exclusive rights in streets and roads granted by this section mean obviously and only, rights to exclude *other railroads*; only this company can locate its road on the streets and roads it selects, but in so locating its road it must proceed as "any railroad" is required to proceed under section 12 of the Act of 1870. This construction is the more reasonable because *public grants* are *always* construed *against* the grantee, because monopolies are odious to the law, and because the settled public policy announced in article XXVIII, section 1 of the

Code of 1860, is not to be *presumed* to have been abandoned.

See Cooley, Constitutional Lim., page 483, 5th Ed.

*Oregon R. R. vs. Oregon R. R.*, 130 U. S. 1, 26.

*Penna. R. R. vs. Canal Comm.*, 21 Pa. St. 9, 22.

But even if a different construction could be reasonably put upon section 6 of the Act of 1872, as originally enacted, *now* its provisions have been qualified by those in section 13 of chapter 242 of the Acts of 1876, which, by its terms, are made applicable to "*any* railroad;" all Acts and parts of Acts inconsistent therewith, being expressly repealed by section 24 of said Act. An inconsistent general law amends the provisions of an amendable charter granted by a previous special Act.

*State vs. Northern Central Rwy. Co.*, 44 Md. 131.

This charter is amendable both by its own twelfth section and by article III, section 48 of the Constitution; and chapter 242 of the Acts of 1876, so amended it as to substitute for the alleged unlimited discretion of its officers in locating their railroad on roads and streets, the provisions of article XXIII, section 169, just as in the "Granger cases" the decision of the Legislature or of boards of commissioners created by it, were substituted by general laws for those of various railroad companies' own officers in determining what were reasonable charges for freight or passage, although the charter had vested this power to fix these in those officers, exclusively.

94 U. S., pages 155 to 187.

It will be noted that chapter 242 of the Acts of 1876 was purposely made to affect railways previously chartered by special Act, as appears from the language of sections 9, 12, 21, 22 and 23, (laws of 1876, pages 387, 390, 394, 395,) and yet more pointedly by the omission from section 16, of the words, "and any existing railroad may accept the provisions of this Act, and after such accept-

ance, all conflicting provisions of their respective charters shall be null and void"—contained in the corresponding section (section 15) of chapter 476 of the Acts of 1870.

Laws of 1870, page 903.

Laws of 1876, pages 392, 393.

It is therefore submitted that the appellees in this cause must accept one or the other horn of a dilemma. Section 6 of their charter is either consistent with section 12 of the Act of 1870 and section 13 of the Act of 1876, or it is not; if it *is*, then they can use or occupy the bed of Roland avenue only after agreeing with the County Commissioners "upon the manner and upon the terms and conditions" of such use and occupancy; or in case of inability to agree, after condemnation proceedings duly had. If section 6 is *inconsistent* with these sections, then it is a part of an Act repealed by the express words of section 24 of the Act of 1876.

Laws of 1876, page 395.

In either case the proposed use of Roland avenue is unlawful, and, as an unauthorized railway of whatever character in a public street or road is *per se* a nuisance, which will be enjoined at the suit of an abutting proprietor owning the fee of the road,

Elliott on Road and Streets, page 562,

Regina vs. Train, 2 B. & S. 640,

1 Redfield on Railways, 6th ed., page 323, note,

W. Md. R. R. Co. vs. Owings, 15 Md. 199,

as is, indeed, conceded in this cause, the injunction prayed for should have been granted, and the order appealed from must be reversed and the cause remanded that such an injunction may now issue.

WM. REYNOLDS,

WM. S. KEECH,

*Counsel for Appellant.*

## APPENDIX.

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### CHAPTER 284.

AN Act to incorporate the Baltimore, Hampden and Lake Roland Railroad Company.

Section 1. Be it enacted by the General Assembly of Maryland, that Hiram Woods, John A. Dushane, William C. Wilson, William H. Ward, Henry D. Loney, William C. Pennington and Robert Gilmore, Jr., be and they are hereby appointed commissioners to take subscriptions to the capital stock of the Baltimore, Hampden and Lake Roland Railroad Company, hereby incorporated, and they or a majority of them, may cause books to be opened at such times and places, and for such period or periods, and with such notice as they may deem expedient, and may reopen the same, from time to time, for the purpose of receiving subscriptions to said capital stock; and if any of the aforesaid commissioners shall die, resign, or refuse to serve, another or others may be appointed in his or their stead by a majority of the remaining commissioners.

Sec. 2. And it be enacted, That the subscribers to said stock, and their successors and assigns, shall be and are hereby declared to be incorporated into a company by the name of the Baltimore, Hampden and Lake Roland Railroad Company, and by that name shall be capable in law of purchasing, holding selling and conveying, encumbering and contracting for any property, real, personal or mixed, that may be necessary for the purposes and objects of said company, as hereinafter mentioned, and no further, and by such corporate name shall have perpetual succession, and may sue and be sued, and may have and use a common seal, and alter and renew the same at their pleasure, and shall have and enjoy, and may exercise all the

rights, powers and privileges incident or necessary to the purposes of said corporation as created by this Act.

Sec. 3. And it be enacted, That the subscription to the capital stock of said company shall be in shares of fifty dollars each, to such amount as the said commissioners aforesaid, or the President and Directors when elected, or a majority of them, may deem necessary, not exceeding two thousand shares, and upon every subscription there shall be paid at the time of subscribing, to the said commissioners or their agent, or to the said President and Directors or their agent, as the case may be, the sum of five dollars on every share subscribed, and the residue thereof shall be paid in such instalments and at such times as may be required by the President and Directors of said company; and if any subscriber shall fail or neglect to pay any instalment, or part of any subscription thus demanded, for the space of sixty days next after the time the same shall be due and payable, and notice thereof given to him, the stock on which such instalment is thus demanded shall be forfeited to the company, and may be held by it or sold for its benefit by the President and Directors, but they may remit any such forfeiture on such terms as they shall deem proper.

Sec. 4. And it be enacted, That as soon as five hundred shares of fifty dollars each shall be subscribed the said commissioners, or a majority of them, shall call a general meeting of the subscribers, at such time and place as they may appoint, giving at least ten days' notice thereof in one or more newspapers published in Baltimore city, and one or more published in Baltimore county, and the subscribers then and there present, or a majority of them, shall elect by ballot, seven directors, to serve until the first Wednesday in September then and next ensuing; and the directors thus chosen, shall select from their own body a President to serve for the same time; and in said election and all subsequent elections of directors, and all other questions submitted to the vote of the stockholders, each

stockholder shall be entitled to one vote for every share of stock held by him to the extent of one hundred shares, and to one vote for every additional ten shares held by him, and may give such votes in person or by proxy; and on the first Wednesday of September in every year after the said first election shall be held for directors as aforesaid, who shall elect as aforesaid a President, of which said election notice as aforesaid shall be given by the directors, but a failure to hold an election at the time prescribed, shall not work a forfeiture, but said election may be lawfully held at any other time after notice as aforesaid, and until such election and qualification of their successors, the President and Directors then in office shall continue to serve; and if the directors in office shall fail or refuse to call a meeting of stockholders for the purpose of electing directors, it shall be competent for any twelve of the stockholders to call such meeting and hold such election, giving notice thereof as aforesaid, and at every election, the stockholders present shall appoint the judges of election, and the President and Directors shall annually make to the stockholders a full statement of the affairs of the company, and a dividend of the profits, if any.

Sec. 5. And it be enacted, That every President and Director before he acts as such shall swear or affirm, as the case may be, before some Justice of Peace that he will faithfully and justly execute the duties of his office.

Sec. 6. And it be enacted, That the company hereby incorporated shall have power to construct a railway with one or two tracks and the necessary sidelings, for the transportation of travelers or freight by horse power, and have the exclusive use of any streets or county roads, over which they may wish to lay their track, between Boundary avenue and lake Roland; *provided* said track or tracks are constructed in such a manner as not to interfere with the travel over said streets or roads.

Sec. 7. And it be enacted, That in case the said company shall not be able to agree with the owner or owners of any land required for said railway, or for the purchase of

stone, gravel or earth required in the construction thereof, or where such owner may be an infant, *feme covert* or *non compos mentis*, on application to a Justice of the Peace of Baltimore county, he shall issue his warrant under his hand and seal, directed to the Sheriff of said county, requiring him to summons a jury of twenty inhabitants of said county, not in any wise interested in the question, to meet on the land or premises to be valued on a day named in said warrant, not less than ten nor more than twenty days from the date thereof, of which day so appointed the owner or owners of said land shall have at least ten days' notice, to be given by the President of said company, and on the day at the place so appointed the said Sheriff shall attend; and if any of the jurors so summoned by him shall fail to attend he shall immediately summon as many others as, with those in attendance, may furnish a panel of twenty jurors, and from the panel thus completed each party or his agent may strike the names of four persons, and the remaining twelve jurors shall *from* a panel to assess the value of such lands or materials. In case either party fails or refuses to strike the names of the said jurors, so that there may remain more than the twelve jurors required, the Sheriff shall strike from said panel of twenty, such names as he may think proper, and as may be necessary to reduce the panel to twelve jurors. The Sheriff shall qualify each of said twelve jurors so selected, by an oath which he shall administer to them, or their affirmation, as the case may be, justly, truly and impartially to value the damages which may be sustained by the owner or owners of the land or materials required as aforesaid; and the said jury, in estimating the damages aforesaid, shall take into account and estimate the benefits and advantages accruing to said owners from the construction of said railway, but only in lessening or extinguishing his or their claim for damages as aforesaid; and the said jury, besides viewing the premises, may receive the testimony of witnesses which either may produce, upon oath to be administered by said Sheriff, and they shall reduce their verdict to

writing, in the shape of an inquisition, and sign and seal the same and deliver it to said Sheriff, who shall return the same to the Clerk of the Circuit Court of Baltimore county; and unless good and sufficient cause shall be shown against such inquisition, it shall be confirmed by said court at the term next succeeding the time of return of said inquisition, but if it shall be set aside by said court it shall direct another jury to be summoned, and another inquisition to be taken in the manner before described; and when any inquisition is confirmed by the court aforesaid, and the amount of damages therein awarded is paid or tendered to the owner or owners of such land or materials, or paid into court aforesaid, the company shall be entitled to the estate and interest of such owner in said lands and materials, so far as may be necessary to vest in said company the right of way over said land for the purpose of said company, or to the use of the material required.

Sec. 8. And it be enacted, That the rate of fare for passengers over said railway shall not exceed five cents a mile for any full mile, but the same fare may be charged for a fraction of a mile as for a full mile.

Sec. 9. And it be enacted, That the President and Directors of said company may borrow from time to time, for the corporate purposes of said company, such amount of money as they may deem proper, not exceeding the sum of twenty-five thousand dollars, and provide for the payment of the same and the interest thereon by mortgage or otherwise; and may issue bonds for the same and provide for the payment of principal and interest thereof, as they may deem proper; the said President and Directors may also issue certificates of stock in said company, and make all necessary provisions for the payments of dividends thereon.

Sec. 10. And be it enacted, That the stockholders of said company, or a majority of them, voting as herein-before provided, shall have power to make or adopt such by-laws, rules and regulations for the management of said company as they may deem proper, not inconsistent with

the terms of this charter, or the Constitution and laws of this State; and the President and Directors of said company, or a majority of them, shall constitute, appoint and employ such officers, agents and servants, for the construction, repairs and preservation of said railway, the running of cars thereon, the transportation of passengers, and other business of said company, as in their judgment may be necessary.

Sec. 11. And be it enacted, That said company shall commence said railway within three years from the passage of this Act, and complete the same in ten years.

Sec. 12. And be it enacted, That this Act shall take effect from the date of its passage. The Legislature reserves to itself the right to alter, amend or repeal this Act at pleasure.

Approved April 1, 1872.

Filed November 10, 1891.

CHAS. J. BONAPARTE

vs.

THE BALTIMORE,  
HAMPDEN AND LAKE  
ROLAND RAILROAD CO.  
AND OTHERS.

IN THE

Court of Appeals

OF MARYLAND.

OCTOBER TERM, 1891.

GENERAL DOCKET, No. 70.

BRIEF FOR APPELLEES.

This is an appeal from an order of the Circuit Court for Baltimore County, (in Equity,) dissolving an injunction granted against the Baltimore, Hampden and Lake Roland Railroad Company, at the suit of Charles J. Bonaparte, and overruling a special motion for a second preliminary injunction.

STATEMENT OF THE CASE.

The Charter for the Baltimore, Hampden and Lake Roland Railroad Company, (which will hereafter be referred to as the Lake Roland Railroad Company,) was obtained from the General Assembly of 1872, (Acts of 1872, Chapter 284,) by persons owning real estate on Roland avenue, in Baltimore county; and the incorporators (or commissioners) named in the Act were Hiram Woods, John A. Dushane, William C. Pennington, William H. Ward, Henry D. Loney, William C. Wilson and

Robert Gilmore, Jr. The first section of the Act provides that in the event of the death of any of the incorporators, others may be appointed in their stead by a majority of the remaining incorporators. All of the original incorporators are still living, with the exception of William C. Wilson and William H. Ward, whose places were duly filled by the election of Douglas H. Thomas and Charles O'Donnell Lee, both of whom are also largely interested in lands on Roland avenue.

As will appear from the Record, the corporation was fully organized in September, 1891. All the Commissioners met in conformity with the Charter, and after notice, received subscriptions to the capital stock of the company to the amount of \$25,000, and the required ten per cent. was paid in cash. A meeting of stockholders was called by publication as required by the Charter, and a Board of Directors elected, who duly took the required oath of office and elected a President who has also qualified, and in all other particulars, the provisions for the organization of the corporation have been strictly and literally complied with. The grant of the Charter followed immediately upon the steps taken to condemn and open Roland avenue. As will appear from the Record, the proceedings to condemn and open Roland avenue were not formally consummated until March 8, 1873; and even then the avenue was only condemned and opened to Lake avenue. The avenue was not actually opened to travel until about 1875. The panic of 1876 then followed and the organization of the new company was necessarily delayed by it. In addition to this fact it was practically impossible to reach Lake Roland by the route designed for the new road, and it has only been within the past year, since the opening of Cedar avenue and the movement for the continuation of Roland avenue to Lake Roland, that it has been really feasible to construct the road.

A great impetus has recently been given to property on Rolaud avenue by the organization of the Roland Park

Company, which is spending over a million of dollars in the purchase and development of land on or near the avenue. Hiram Woods, Douglas H. Thomas and Charles O'Donnell Lee, are directors in this company. William C. Pennington and Robert Gilmore, Jr., have sold their lands to it, and John A. Dushane still resides at his country place on the avenue. The organization of this great land syndicate has made possible and desirable what would have been before a commercial experiment of very doubtful expediency and still more doubtful success.

The Court will therefore see, as is alleged in the answer of the appellees, that the time is only now ripe for the organization of the company and the construction of the new road; that the Charter remains in the hands of the persons originally entrusted by the Legislature with its execution; that the purposes contemplated by the Legislature in granting the Charter will be now literally and in good faith promoted, and that no bona fide reason can be asserted for the forfeiture of the franchises of the company.

The company has already paid out large sums of money in building a first class double track railway, of the most modern and expensive character, for a large part of its route, and has expended, or is engaged in expending, over one hundred thousand dollars in its enterprise. Only some commanding legal necessity could now justify a claim which would bring disaster upon a creditable and promising public improvement and deprive the people of the northern annex of long-needed railway facilities.

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Charles J. Bonaparte is a property owner and resident on Roland avenue, which is condemned and opened as a public highway for a width of sixty feet past his property. The Lake Roland Railroad Company being about to construct double iron railway tracks on Roland avenue "of the ordinary street railway pattern, laid in the middle of the avenue, with a driveway in either side,"

Mr. Bonaparte applied to the Circuit Court for Baltimore county for an injunction. On October 6, 1891, the Court passed an order (Record, page 6,) by which the defendants were "enjoined from interfering with the bed of Roland avenue within the limits of Baltimore county, until after the hearing of said application, and the action of the Court thereupon, *upon the plaintiff filing an injunction bond* in the penalty of \$5,000, with approved security." On the same day an approved bond was filed, and on the following day, copies of the order were served on the Lake Roland Railroad Company, and the work in progress was stopped. The case was argued at length before Judge Burke for two days, and on October 16, 1891, (ten days after the granting of the preliminary injunction) the Court dissolved the preliminary injunction, and refused the plaintiff's special motion for a second preliminary injunction.

The appeal is from this order of October 16, 1891.

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#### MOTION TO DISMISS APPEAL.

The appellees move the Court to dismiss the appeal in this case because the provisions of article 5, section 29, of the Code of 1888, do not apply to cases where an injunction has been actually granted and subsequently dissolved, but only to cases where the Court "shall refuse to grant an injunction," and because, in the case now before the Court, an injunction was actually issued and bond given, which injunction was thereafter dissolved; therefore the appellees say that the appeal should properly have been taken to the January term of the Court of Appeals and is not now lawfully before the Court. A "restraining order," as distinct from an injunction, is foreign to the equity practice of this State.

#### THE ATTACK UPON THE CHARTER OF THE COMPANY.

Mr. Bonaparte rests his case entirely upon alleged defects in the formation and organization of the Lake Roland Railroad Company, and claims:

I. That the special Act of 1872, chapter 284, creating the corporation, was in conflict with Article III, section 48 of the Constitution of the State, because, at the time of the passage of the special Act, there existed a general law "providing for the creation of corporations of the same general character."

II. That inasmuch as the eleventh section of the Charter provides "that said company shall commence said railway within three years from the passage of this Act and complete the same in ten years," and the company did not in fact "commence said railway" until the present year, it was therefore too late in September, 1891, for the company to organize or to exercise its corporate franchises.

III. That the road is being constructed without the special authority of the County Commissioners, which must, under the law, be obtained before the public highways of Baltimore county can be used, even under the authority of the Legislature.

We will consider these claims in their order:

#### I. IS THE CHARTER UNCONSTITUTIONAL?

Article III, section 48, provides that "corporations may be formed under general laws, but shall not be created by special Act, \* \* \* except in cases where no general laws exist providing for the creation of corporations of the same general character."

In answer to the claim that the special Act is unconstitutional and void because a corporation of the same general character could have been created under the general incorporation law, the appellees contend:

(1.) That a corporation of the same general character could not have been created under the general incorporation law.

(2.) That even if a general law did exist providing for the creation of corporations nominally of the same general character as the Lake Roland Railroad Company, all

the objects of the company could not have been attained under it, and that the General Assembly, from the adoption of the constitution to the present time, has exercised the power of creating corporations by special Acts under such circumstances.

Before discussing these propositions in detail, the Court's attention is called to the fact that Maryland is believed to be the only State where this subject is thrown into such confusion, so that it is practically impossible for precedents to be obtained out of the State. All other States either (a) give to the Legislature full power to form private corporations, or (b) distinctly deny to it the right either to create private corporations or amend their charters. In Maryland, the General Assembly is given power to create private corporations in the absence of general laws providing for them. No definite rule has been established to define the powers of the Legislature, and as will be hereafter shown, the Legislature has interpreted the prohibition to mean that it (the Legislature) shall judge in each case whether the special Act is proper.

(1.) COULD A CORPORATION OF THE SAME GENERAL CHARACTER HAVE BEEN FORMED UNDER THE GENERAL LAW?

This inquiry will be discussed under the following heads:

1. An examination of the general character of the Lake Roland Railroad Company, with a review of its powers.
2. An examination of the general laws relating to the formation of street railway, and powers to be obtained under them.
3. A comparison of the general character of the Lake Roland Railroad Company, with corporations capable of being formed under the general laws, and the application of the decisions of the Court of Appeals thereto.

1. *The General Character of the Lake Roland Railroad Company.*

(a.) Its existence is made perpetual by the express terms of its charter. (Sec. 2.)

(b.) It is given the "*exclusive* use of any streets or county roads over which it may wish to lay its tracks, between Boundary avenue and Lake Roland." (Sec. 6.)

(c.) It is given the right to condemn land *after ten days' notice to the owner of the land.* (Sec. 7.)

(d.) It is authorized to charge *five cents* a mile or fraction of a mile. (Sec. 8.)

(e.) It is authorized to build its tracks on streets and roads selected by it, without the prior consent of the County Commissioners or the Mayor and City Council.

(f.) It is required to issue its stock in a specific way, and elaborate provision is made for the protection of the stockholder; the issue of bonds is limited; the corporate powers cannot be exercised until a certain amount of stock is subscribed and a certain amount of cash paid in, and in a great number of other particulars, the Legislature has chosen to provide forms and methods for the organization and internal conduct of the corporation entirely unknown to the general incorporation laws.

2. *General Laws relating to the Formation of Street Railways.*

Thus much having been indicated of the general character of the Lake Roland Railroad Company, we may now examine the general laws relating to street railways.

It is significant that Mr. Bonaparte is himself at a loss to decide whether if formed under the general laws, we would properly have framed and filed a certificate at Annapolis, under the General Railway Act of 1870 (now 1876) or, being at the time of the passage of our Act

entirely in Baltimore county, we might (or must) have framed and filed a certificate under the Act of 1868, section 31, (Code of 1888, Art. 33, sec. 31.) It will be necessary, therefore, for us to review the "general character" of corporations formed under either of these Acts.

Under the Act of 1868, sec. 31, it need hardly be said that our rights would have been of the most indefinite and insufficient character.

We would have been wholly without the power to condemn, a right of great importance to a suburban railway which we are now about to utilize under our charter.

We would have no right to use the public highway at all, without permission from the county authorities, and could not indeed have taken a step without their consent and supervision.

We could not have possessed the *exclusive* right to the streets and roads selected by us—a most important protection in building up a suburban traffic.

The term of the corporation's existence would have been but forty years, whereas, under our special act, our existence is made perpetual—an important privilege if the road is to be bonded.

In fact, so far as the knowledge of the counsel for the appellees extends, no attempt has ever been made to form a railway corporation in Baltimore county under the Act of 1863, for the very reason that the provisions of the law are so meagre and vague as to be practically valueless.

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Turning now to the General Railway Act of 1870, which was in force at the time of the passage of the special Act under review, we find in the first place that a serious doubt exists as to whether a railway wholly within the limits of Baltimore county could have been chartered under the Act of 1870, and this view of the law is in fact assumed in the two similar bills filed against the company by

competing railways. But if this view were incorrect a railway formed under the Act of 1870 would differ from the appellee in many respects, thus:

Its existence would be limited to forty years.

It could only charge three cents per mile for its passengers, (a ruinous rate and commercially impracticable for street railways.)

It could not condemn land, because the provisions for condemnation of land under the Act of 1870 do not provide for notice to the owner, and have been held to be void.

It would not have obtained the *exclusive* use of the streets and roads selected for its route.

It could not have selected its route but must have its route defined by the County Commissioners or the Mayor and City Council.

It would not have possessed the peculiar protections to the public and to the stockholders and bondholders which are contained in the special Act.

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The real test of the distinctions noted above is to be found by enquiring whether the Lake Roland Railroad Company could now obtain the peculiar rights possessed by it which are necessary for its purposes under a certificate. It must go without saying that if the rights could be obtained under a certificate, the company would not find it necessary to defend this litigation.

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### 3. *The Decisions of the Court of Appeals upon the Subject.*

We are now ready to apply the decisions of the Court of Appeals to the case at bar.

The case of *Hodges et al. vs. The Baltimore Union Passenger Railway Company*, (58 Md. 603,) presents collaterally the question under discussion.

Mr. Bonaparte was one of the plaintiffs and one of the counsel in that case, which was brought by him and others in an attempt to prevent the construction of a city passenger railway in front of their city residences on Park avenue.

The able brief filed by Mr. Bonaparte in the Hodges' Case (pages 608-610) urges with great force that the special Act of 1882, under review, which purported to *amend* the charter of the company, (formed under the Act of 1876,) was "a mere evasion of this provision" of article III, section 48, of the Constitution, because it resulted practically in the creation of a corporation by special Act of a general character, which was provided for under the general law; and that the fact that certain special powers could not be obtained under the general law, ought to be an evidence that corporations of that general character were not intended to possess those special powers; or, to put the argument in other language, Mr. Bonaparte very earnestly and plausibly contended that if a corporation, formed under the general law, could have special powers given to it by amendment, the whole purpose of the constitutional provision could be evaded and nullified.

Judge Robinson, in delivering his opinion, says on this point, (page 622,) after discussing the Act of 1876:

"There is then *no general law* conferring the rights and prescribing the terms and conditions on which the defendant was to construct and operate its railway on certain streets in the city of Baltimore."

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But the more recent case of Reed vs. The Baltimore Trust and Guarantee Company, (72 Md., page 531,) presented the question in the most direct and explicit way, and is believed to be conclusive of the case at bar.

The general law provided in terms for the creation of "trust companies and guarantee companies." Under the general insurance law, the powers of safe deposit compa-

nies and guarantee companies of all classes, could distinctly have been obtained. But certain special powers, which were derived by the Baltimore Trust and Guarantee Company, could not be obtained under the general law, and a special Act was obtained from the Legislature, incorporating the company, and conferring upon it, in addition to the general powers which could be obtained under the general law, certain special and extraordinary powers. The special Act was attacked upon precisely the same ground, as being in conflict with article III, section 48, of the Constitution.

Judge Briscoe, in upholding the charter, says, (page 534):

"It will at once be seen that there is no general law conferring *such rights*, or under which a company could have been formed *with similar powers* as were granted by the special Act to this company; and it cannot be considered a corporation of the same general character as any corporation which could have been formed under the Act of 1876. There is no general provision for the formation of trust and deposit companies or for a deposit company, under the general incorporation law of this State, *with powers similar to those granted to this company. Hence there was no way by which such corporate powers could have been conferred, except by special Act of the Legislature.*"

## (2) THE QUESTION OF "LEGISLATIVE INTERPRETATION."

But the appellee is not required to defend itself against any such stringent construction of the constitutional provision.

From the adoption of the Constitution of 1867 down to the present time the General Assembly of Maryland has exercised the power of forming corporations by Special Acts even where at the time of the passage of the Acts there existed a general law providing for the creation of

corporations nominally of the same general character, whenever, *in the judgment of the General Assembly* the objects of the corporation, of which it approves, could not be attained under the general law.

Under the decisions of the Court of Appeals, this constant, long and uniform interpretation of the constitutional provision, under which about three hundred corporations have been formed and organized, under which vast rights have been acquired, and through which the titles to many hundreds of millions of dollars of property have become involved, will not be disturbed.

In the appendix of the brief for the appellee, in the case of Reed vs. The Baltimore Trust and Guarantee Company, (*supra*) will be found a partial list of the Maryland corporations which have been formed upon the faith of this legislative interpretation. Among them will be found The Baltimore, Highlandtown and Riverview R. R. Co. (1878), a street railroad in successful operation in Baltimore, whose charter is copied almost verbatim from the charter of the appellee, The Baltimore Trust and Guarantee Company (1882), Mercantile Trust and Deposit Company (1884), The Baltimore Traction Company (1888), The Western Maryland Terminal Company (1882), The Catonsville Water Company (1886), The Annual Conference of the Methodist Episcopal Church (1886), The Citizens Bank of Annapolis (1874), The Drivers and Mechanics Bank of Baltimore City (1874), and a host of other rich and prosperous organizations. It will be observed that about thirty-three such corporations were formed in 1870 at the first legislative session after the passage of the General Incorporation Act of 1868, when the constitutional provision was fresh in the minds of the public, and that seventeen such corporations were formed at the session of 1890 in the face of the recent public agitation of the question. A decision against the appellee in this case would involve all of these companies, and cause almost a financial revolution in the State, with-

out, it may be added, serving any practical purpose whatever.

The Court of Appeals in the case of *Harrison et al. vs. State*, use of Harrison, Chief Justice Bowie delivering the opinion of the Court, uses the following language :

“A power exercised by the General Assembly from the adoption of the Constitution to the present time ought to be deemed almost conclusive evidence of its possession by that body. A contemporaneous construction of the Constitution of such duration, continually practiced under, and through which many rights have been acquired, ought not to be shaken, but upon the ground of manifest error and cogent necessity.”

*Harrison et al. vs. State*, use of Harrison, 22 Md. 469, 491.

*State vs. Mahew*, 2 Gill, 487, 497.

*Mayor, etc., of Baltimore vs. State*, 15 Md. 376, 458.

*Bradford vs. Jones*, 1 Md. 351, 369.

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The somewhat similar provision of Article III, sec. 33, has been several times before the Court of Appeals. It provides that “the General Assembly shall pass no Special Law for which provision has been made by an existing general law.”

A Special Act, authorizing the marriage of man and his niece, passed while a general law existed, fixing the degrees of relationship within which parties might lawfully be married, was upheld in *Harrison et al. vs. State*, use of Harrison (*supra*), on the ground of legislative interpretation.

In the case of *O'Brian & Co. vs. County Commissioners of Baltimore county*, the Court of Appeals, in construing Article III, section 33, held a Special Road Act valid, although at the time of its passage a general road law existed, because “the purposes of the Act could not be

accomplished under any existing law," and because there were "special circumstances in the case of Wilkens avenue requiring special legislation in regard thereto." In this case both the County Commissioners and the Circuit Court for Baltimore county, had held the Special Act to be unconstitutional and void.

O'Brian & Co. vs. County Com., etc., 51 Md. 15, 23.

The Court of Appeals has recently given weight to a legislative interpretation of this character, declaring that "where the Legislature says distinctly, or in effect, that by an antecedent statute a particular right was intended to be conferred, the Courts will ordinarily respect the declaration if the language used in the earlier Act can be so interpreted without doing violence to its obvious and natural meaning." (McSherry, J.)

Trustees, etc., of Catholic Cathedral, vs. Manning, 72 Md. 116, 125.

Courts will even accept the "contemporaneous and continuous" interpretation of "heads of departments" (U. S. vs. Hill, 120 U. S., 169, 182), and "the common opinion of the profession" (15 Md. 376, 458) in construing statutes.

## II. THE DELAY IN THE ORGANIZATION OF THE COMPANY AND THE CONSTRUCTION OF THE RAILROAD.

The eleventh section of the Act of 1872, chapter 284, (approved April 1, 1872,) incorporating the appellee, provides "that said company shall commence said railway within three years from the passage of this Act, and complete the same in ten years." No penalty is attached to a failure to begin and complete the railway within the time specified, nor is there any indication that the provision was intended as a cause of forfeiture if not complied with. On the contrary the second section dis-

tinctly provides that the company "*shall have perpetual succession.*" The first section provides that the subscriptions to the capital stock may be taken by the incorporators "at such times \* \* \* *as they may deem expedient.*" Provision is made in the same section for filling vacancies caused by the death of any one or more of the incorporators.

The twelfth section makes the Act "take effect from the date of its passage."

The second section declares that the stockholders are "*hereby declared to be incorporated,* and the sixth section also refers to "the company *hereby incorporated.*"

It is admitted that the first actual subscriptions to the capital stock of the company were made in September, 1891, and that the actual construction of the road was not begun until September, 1891. It is not admitted, as might be inferred from the position of the appellant, that the incorporators did not meet immediately after the passage of the Act and accept the Charter, or that efforts were not continuously made from the grant of the Charter down to the present time, to devise plans for the construction of the road. On the contrary, it is alleged in the answer and must be taken as true on this appeal, (answer, paragraph 3,) "that the said corporation was duly organized under said Act." The attempt on the part of the appellant to distinguish between "incorporators" and "commissioners" can not avail him anything. It has simply become the custom to call the formal incorporators of a railway company "commissioners." They have precisely the same duties as incorporators of other corporations.

Under the above state of facts the appellant contends that the time has expired for the organization of the company and the construction of the road, and that all rights under the Charter have been forfeited by neglect and delay.

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The case of Hodges vs. The Baltimore Union Passenger Railway Company, (supra,) is believed to be conclusive

against the appellant on this point. It is a fortunate coincidence that the report of this case has preserved the exact facts in the abstract given of Mr. Bonaparte's own brief.

Ordinance No. 150, of the Mayor and City Council of Baltimore, passed in the spring of 1880, under which the right to build a street railway on Park avenue was obtained by the Union Company, provided in its *eleventh* section (the coincidence in the number of the section is interesting) as follows:

"That the said proprietors, their associates, successors and assigns, shall commence the work of laying down and constructing the railway tracks aforesaid, *within six months* from the approval of this ordinance, and shall complete said tracks and commence the regular running of cars *within twelve months* after the approval hereof, *otherwise the rights and privileges herein granted shall be null and void.* \* \* \*"

Mr. Bonaparte's brief for the appellant in the case, (page 606,) contends that whatever rights the ordinance conferred, "were forfeited by the failure of the persons named in it to comply with the express terms of section eleven." And again (page 608): "It is clearly shown by the testimony that nothing was done \* \* \* to commence the work of laying down and constructing the railway track mentioned in section eleven of the ordinance, until the end of February or beginning of March of the present year," (1882.)

That is to say: Although the ordinance was to be null and void by its express terms unless the road was *completed* on Park avenue within twelve months, nothing was done towards even commencing its construction until *two years* after the approval of the ordinance. There was no act of acceptance, and the ordinance laid dormant until long after the time limited for the exercise of the powers granted by it had expired.

But Judge Robinson, in passing upon this contention, says :

"It was further argued that the defendant corporation had forfeited its rights under ordinance No. 150, assuming it to be valid, because the work was not begun within the time prescribed by the ordinance. This is a provision, however, intended for the benefit of the city, and one which its authorities may wave at pleasure. No principle is better settled than that a cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation. Angell & Ames on Corporations, section 777, and cases cited."

An attempt is made by the appellant to escape the force of this direct decision by claiming that the Court had in view the Act of 1882, which had waved the default. The doctrine of the section of Angell & Ames relied upon by the Court forbids any such narrow construction.

But the decision in the Hodges case on this point is in strict harmony with a long line of Maryland decisions.

The leading case is that of the Canal Company vs. The Railroad Company, 4 G. & J. 1. It resembles in so many particulars the case at bar that its main features will be called to the attention of the Court.

The Potomac Company was chartered by the General Assembly in 1784, with power "to cut such canals, erect such locks, and perform such other works on both sides of the Potomac river as it should judge necessary."

By the eighteenth section of its Charter it was enacted "that in case the said company *shall not begin the said work within one year after the company shall be formed,* or if the navigation shall not be made and improved between the Great Falls and Cumberland in the manner hereinbefore mentioned, *within three years after the*

*said company shall be formed, then the said company shall not be entitled to any benefit, privilege or advantage under this Act."*

The rights of the Potomac Company were acquired in 1825, forty-three years after their grant, by the Chesapeake and Ohio Canal Company, by assignment. The Potomac Company had in the interval taken no steps whatever to construct its canal, and had wholly ignored the time limit contained in section 18 above quoted.

The Baltimore and Ohio Railroad Company was chartered by the Legislature in 1826, and in pursuance of rights granted under its Charter, was proceeding to construct its road up the banks of the Potomac river when it was stopped by an injunction obtained at the instance of the Canal Company, which claimed as assignee of the Potomac Company that it possessed the prior and exclusive right to select its route along the Potomac river, and that the General Assembly could not limit its right of selection by the Charter of the Baltimore and Ohio Railroad.

In sustaining the injunction, Chief Justice Buchanan says, (pages 121-122):

"A private corporation aggregate may be dissolved \* \* \* by a forfeiture of its charter through abuse or neglect of its charter as for condition broken. \* \* \* But such forfeiture must be judicially ascertained and declared upon direct proceedings against the corporation for that purpose in order that it might not be condemned, unheard, for an imputed delinquency. \* \* \* Where there is an existing corporation capable of acting, but which has been guilty of an abuse or neglect of its franchises or the powers committed to its trust, amounting to a cause of forfeiture, such cause of forfeiture can only be enforced by *scire facias* or a *quo warranto* issued at the instance of the government creating the corporation, and cannot be taken advantage of incidentally or in any other way, or by an individual, since the government,

with which alone the contract arising out of the charter is made, *may waive the breach of any condition of that contract and cannot be made to enforce the forfeiture whether it will or no, and when it may have sufficient reason for not choosing to do so. Until it does, and that by judicial action and not by legislative, no individual or other corporation can treat it as a forfeited franchise.*"

In another part of the opinion the Chief Justice calls attention to the fact that "the charter was not limited in its duration, but expressly made perpetual by its terms, [as is the fact in the case at bar,] defeasible only [in a proceeding by the State] on failure to accomplish, within the time limited, what was required to be done by the 18th section."

The decision in this case has been followed in a number of important cases in this State, covering all conceivable grounds of forfeiture, and it is, moreover, the leading case upon the subject in the United States.

University of Maryland vs. Williams, 9 G. & J. 365, 426.

Planters Bank vs. Bank of Alexandria, 10 G. & J. 346, 356.

Balto. Turnpike Road vs. State, 19 Md. 239, 290.

Taggart vs. W. M. R. R. Co., 24 Md. 563, 596.

Lord & Robinson vs. Essex Bldg. Asso., 37 Md. 320, 327.

State vs. Consolidation Coal Co., 46 Md. 1, 5.

Hammond vs. Strauss, 53 Md. 1, 5.

Hiss et al. vs. Balto. and Hampden Pass. Ry. Co., 52 Md. 242, 255.

Musgrave vs. Morrison et al., 54 Md. 161, 166.

In the last-mentioned case, (Musgrave vs. Morrison et al.,) the cause of forfeiture was the failure on the part of the corporation to comply with the provision of the general law, "which provides that the capital stock of corporations, chartered under this Act, shall be payable in two years from and after the incorporation of the company, or such corporation shall be dissolved." And the

Court, (Robinson, J.) following the cases cited above, held that "the State creating the corporation can alone institute such a proceeding."

The text books are unanimous upon the subject. Thus we find the law laid down in 2 Morawetz on Corporations, section 1006, as follows:

"A provision in a charter fixing the time within which the corporation shall construct certain works, does not of itself operate as a limitation upon the continuance of its franchise, and a failure on the part of the company to comply with provision would be merely a ground of forfeiture by judicial proceedings." (Relying on Canal Co. vs. Railroad Co., supra.)

To the same effect are the following authorities:

1 Beach, Law of Railways, section 592.

Boone on Corporations, section 1040.

Angell & Ames on Corporations, section 777.

Brooklyn Central R. R. Co. vs. Brooklyn City R. R. Co., 32 Barb. 358, 366.

The effort on the part of the appellant to take the case at bar out of the operation of this salutary and well settled principle at law, by claiming that it is the delay in *accepting* the charter and not the delay in *completing* the road, of which he complains, cannot prevail, for the simple reason that delay in *acceptance* is, itself, only an act of non user, and a cause of forfeiture in the discretion of the State. The support of any such contention would certainly amount to giving the appellant the benefit of a cause of forfeiture, which clearly is within the breast of the State alone, and with which the State alone is concerned.

It is easy to expose the fallacy of the argument. If the plaintiff cannot, after the acceptance of the charter, complain that it was accepted too late, he cannot contend that the corporation was not legally organized in September, 1891. If the company was legally organized, it possessed the powers of a railway corporation subject to the

time limitation. But this time limitation is a matter only for the State! Hence, it will be seen, that the argument of the plaintiff is really an argument which returns in a circle to what is really his design, viz, to enforce a cause of forfeiture in a collateral proceeding.

This answer to the plaintiff's position is predicated upon an admission (for the sake of argument) that the charter was not legally accepted until September, 1891; it being the contention of the appellant that only the *stockholders* could accept the charter. It is clear, however, from the provisions of the charter, that the corporate existence dated from the approval of the Act, and that the *commissioners* were the proper persons to accept the charter, and under the record the Court must assume they did accept it at the proper time.

### III. WAS IT NECESSARY TO OBTAIN THE CONSENT OF THE COUNTY COMMISSIONERS BEFORE CONSTRUCTING THE RAILROAD?

It is not believed by the appellee that this inquiry will command the serious consideration of the Court.

The express intention and one of the main objects of going to the Legislature for the charter was to avoid the necessity of obtaining the consent of the County Commissioners, and to escape their dictation and control.

By the sixth section of the charter it is enacted that "the company hereby incorporated shall have power to construct a railway, \* \* and have the exclusive use of any streets or county roads over which they may wish to lay their track between Boundary avenue and Lake Roland."

Nothing could be more direct and definite than this provision. It distinctly empowers the corporation to select its route over county roads, and directly grants the exclusive use of them to the company for railway purposes.

The argument of the appellant that the consent of the County Commissioners must be obtained would result in a nullification of the right altogether. If the County Commissioners can *consent* they can also *refuse*. The claim that the section presupposed the supervision of the County Commissioners and must be supposed to have had in view the power of the County Commissioners over the public highways, is negated by the concluding clause of the section, which provides that such tracks shall be "constructed in such a manner as not to interfere with the travel over said streets or roads," which makes it certain that the Legislature intended the section to confer directly the rights referred to in it and to prescribe the regulations itself upon which the public highways should be used by the company.

The right of the Legislature to authorize directly the use of streets and roads for railway purposes, notwithstanding the fact that regulating powers have been conferred upon municipal bodies or county authorities of the same character, is too plain to admit of doubt.

Thus, Elliott on Streets and Roads, says (page 531):

"Where, as is ordinarily the case, the Legislature delegates to a municipal corporation the control of its streets and alleys, a railroad track can not be laid in any part of such public ways without the consent of the municipal authorities. *The Legislature may, by virtue of the paramount authority which it has over public ways, directly grant a railroad company the right to lay its tracks in the streets of an incorporated town or city, but it is seldom that the Legislature assumes the right to directly exercise this paramount authority.*"

So in 2 Dillon on Municipal Corporations, section 701, it is said that "reference is elsewhere made to the plenary power of the Legislatures of the States in this country over all public ways, including not only common highways but streets within the limits of municipalities. It

has often been decided and is settled that the Legislature has, unless expressly restricted by the constitution, the power to authorize the building of a railroad in a street or highway without the consent of the municipal authorities and may directly exercise this power. \* \* "

This doctrine has been distinctly recognized in this State. The charter of the Baltimore & Hampden Passenger Railroad Company which was before this Court in the case of *Hiss vs. The Baltimore & Hampden Passenger Railway Company*, is almost identical with the charter of the appellee, and the rights under it were obtained directly from the Legislature, without resorting to the County Commissioners. The same is true of the charter rights of the Baltimore, Highlandtown and Riverview Railroad Company, before referred to, and the rights of the Baltimore Traction Company were granted directly by the Legislature and have been exercised without challenge, without any permission from the Mayor and City Council of Baltimore.

*Hiss et al. vs. Balto. & Hampden Pass. Railway Co.*, 52 Md. 242, 251.

It may be said in concluding this subject that the powers of the County Commissioners referred to by the appellant were all existing at the time of the passage of the Act of 1872, and it is impossible to claim that the re-enactment of them in the Code of 1888, amounted to an amendment of the company's charter.

The Court is also reminded of the fact that Art. 23, section 169, upon which the appellants lay so much stress is distinctly declared in the case of *Hodges vs. The Union Passenger Railway Company*, to be inapplicable to street railways.

As to the powers vested in the County Commissioners by Article XXIII, section 233, it need only be said that these supervisory powers are given in express terms only over railways created under the Act of 1868, and must be wholly inapplicable to a direct grant of charter rights from the Legislature, defining in terms the powers of the company over the public highways.

In conclusion the appellees reiterate the allegations of the concluding paragraph of their answer, viz: "That the plaintiff is endeavoring to delay, hinder and embarrass the said railroad, not because the alleged delays and omissions charged against said company in any way affect the rights of the plaintiff in regard thereto, or because he can allege any fair and equitable reason why said rights should now be questioned, but because the said plaintiff is unalterably opposed to the construction and operation of any railroad on Roland avenue, whether by the defendant railroad company or any other."

After stating in his bill "that the construction of the railroad will cause to him special damage, not common to, but distinct and different from that suffered by the general public," (a necessary allegation to maintain the bill) the appellant makes a special application to the Court (Record, page 6) "to make a personal inspection of the bed of Roland avenue between the city limits and Lake avenue, where it is proposed by the defendants to lay their railroad tracks, before deciding upon the granting or refusal of the injunction applied for."

As will appear from the Court's order of October 16th, (Record, page 10) Judge Burke, before deciding the case, made the personal inspection asked for in the petition. As the appellant chose to submit this question of fact to Judge Burke, this finding ought to be deemed conclusive against the appellant.

FIELDER C. SLINGLUFF,

STEELE, SEMMES & CAREY,

*Solicitors for Appellees.*

The Baltimore and Hampden  
Passenger Railway Company,  
and the Baltimore Union Pas-  
senger Railway Company,

*vs.*

The Baltimore, Hampden and  
Lake Roland Railroad Com-  
pany, and William H. Whit-  
ridge.

JOHN K. COWEN,  
E. J. D. CROSS,  
BERNARD CARTER,  
HUGH L. BOND, JR.,  
For Appellants.

MESSRS. STEELE, SEMMES & CAREY,  
FIELDER C. SLINGLUFF,  
For Appellees.

IN THE  
Court of Appeals of Maryland.

*Appeal from the Circuit Court of  
Baltimore City.*

Filed November 6th, 1891.

**In the Circuit Court of Baltimore City:**

*Bill of Complaint and Order of Court.*

(Fd. 15th October, 1891.)

THE BALTIMORE UNION PAS-  
SENGER RAILWAY COMPANY,  
THE BALTIMORE AND HAMP-  
DEN PASSENGER RAILWAY  
COMPANY, Plaintiffs,

*vs.*

THE BALTIMORE, HAMPDEN AND  
LAKE ROLAND RAILROAD  
COMPANY, AND WILLIAM H.  
WHITRIDGE, Defendants.

In the Circuit Court of Balti-  
more City.

*To the Honorable J. Upshur Dennis, Judge of said Court:*

1. The bill of complaint of the Baltimore and Hampden Passenger Railway Company and the Baltimore Union Passenger Railway Company, lessee thereof, respectfully represents:

That your orator, the said Baltimore and Hampden Passenger Railway Company, is a public corporation duly incorporated under the Act of the General Assembly of Maryland of 1865, chap. 32, by which said Act the said company was authorized and empowered to construct a passenger railway, commencing at the northern boundary of the city of Baltimore, and running to Huntingdon avenue or to Mankin's lane, then to and through the Hampden property and certain other points mentioned therein; that said incorporation of said railway company, within the time limited in said charter, commenced the construction of said railroad, and have placed the tracks thereon on Maryland avenue, at its intersection with Boundary avenue; and thence running northerly to the intersection of Huntingdon avenue and Maryland avenue; and thence on Huntingdon avenue northwesterly to William street, and thence running northwesterly on William street to Remington avenue; and thence running on Remington avenue northwesterly to First avenue; and thence running on First avenue to Chestnut avenue; and thence running westerly on Chestnut avenue to Roland avenue; and thence running northerly on Roland avenue to a point at or near Merryman's lane; the part of said road situate on Third avenue was extended westerly on said Third avenue to Sweet Air avenue, to a point at or near Poole avenue; that at the time said road was begun and constructed, those portions of the streets and avenues occupied by it above recited were in Baltimore county, but by the annexation Act of 1888, chap. 98, the limits of Baltimore city were extended a distance of two miles northerly from the northern boundary thereof, and that said portion of Baltimore county, so brought within the limits of Baltimore city, included

all the streets and avenues upon which the tracks of the Baltimore and Hampden Passenger Railway Company have been laid.

That said Annexation Act was duly ratified, as provided therein, and went into effect on the first day of June, 1888; that by the Act of Assembly of the State of Maryland, 1868, chap. 121, the time limited for the completion of the Baltimore and Hampden Passenger Railroad was extended until the first day of January, 1878, and the said charter of the said Baltimore and Hampden Passenger Railroad Company was modified by the Act of 1890, chap. 510, by the repeal of section 10 thereof.

2. That your orator, the said Baltimore Union Passenger Railway Company, is a corporation duly incorporated under the Acts of Maryland of 1876, chapter 242, now codified as part of Art. 23 of the Code of Public General Laws in this State, for the purpose and with the power to build and operate said passenger railways in Baltimore city and Baltimore county; that by the certain Act of the General Assembly of Maryland, approved Mar. 22, 1882, and published as chap. 4 of the Laws of Maryland of 1882, said Baltimore Union Passenger Railway was specially authorized and empowered "to construct and operate passenger railways upon the streets of the city of Baltimore, named in Ordinance No. 150, approved the 25th day of October, 1880, and upon any of the streets named in any ordinance supplemental to said ordinance." And by the second section of said Act of Assembly, it was further enacted "that said Baltimore Union Passenger Railway Company is authorized to lease for such period as may be agreed upon, the lines of any passenger railway company incorporated under any general law or special Act, and to operate said lines, and any such passenger railway company is authorized to lease its said railway unto the said Union Passenger Railway Company."

That in pursuance of the authority vested in it by the Act of Assembly aforesaid, and its charter, it did on or about the first day of June, 1889, lease the railway of the said Baltimore and Hampden Passenger Railway Company, and has operated said road in connection with its other lines of street railroad situate in the city of Baltimore.

3. That by chap. 284, of the Acts of the Assembly of 1872, approved April first, certain parties, to wit: Hiram Woods, John A. Dushane, William C. Wilson, William H. Ward, Henry D. Loney, William C. Pennington and Robert Gilmore, Jr., were appointed Commissioners to take subscriptions to the capital stock of a certain incorporation, entitled "The Baltimore, Hampden and Lake Roland Railroad Company," and said Commissioners were required to cause books to be opened at such times and with such notice as they may deem expedient for the purpose of receiving subscriptions to the said capital stock.

By the second section of said Act, it was enacted—

"That the subscribers to such stock, and their successors and assigns, shall be and they are hereby declared to be incorporated into a company by the name of the Baltimore Hampden and Lake Roland Railroad Company;" and it was further provided in said second section, "that said company should have perpetual succession, and should enjoy the rights, powers and privileges necessary for its said corporation as created by said Act."

It was further provided by the third section of said Act, that the said shares of said corporation so sought to be created

should be of the sum of \$50 each, and not exceeding two thousand shares, and that when subscription should be made, there should be paid at the time of subscribing the sum of five dollars on each share.

By the fourth section of said Act, it was provided that as soon as five hundred shares of \$50 each should be subscribed, the said Commissioners, or a majority of them, should call a general meeting of the subscribers, at such time and place as they may appoint, giving at least ten days' notice thereof, in one or more newspapers published in Baltimore city, and one or more published in Baltimore county, and said subscribers should elect by ballot a board of seven directors, from whom should be elected a president.

By the sixth section of said Act, the said corporation was given power "to construct a railway with one or two tracks, and the necessary sidelings, for the transportation of travelers or freight by horse power, and have the exclusive use of any streets or county roads over which they may wish to lay their tracks between Boundary avenue and Lake Roland, provided said track or tracks are constructed in such a manner as not to interfere with the travel over said streets or roads."

By the eleventh section of said Act, it was further provided, "That said company shall commence said railway within three years from the passage of this Act, and complete the same in ten years;" reference to said Act and the other Acts hereinbefore recited, is respectfully made, as the same appear in the Statutes of Maryland, published for the years aforesaid.

4. Your orator is informed and so charges, that said alleged corporation, to wit, the said Baltimore, Hampden and Lake Roland Railroad Company, was never duly organized under said Act, and that it wholly failed to commence its said railroad within three years from said first day of April, 1872, when said Act was approved, and to complete it within ten years from said date.

5. And your orator avers and charges, that said Act of Assembly of date April first, 1872, is wholly unconstitutional and null and void, and that said General Assembly of Maryland was without power or authority to incorporate the said Baltimore, Hampden and Lake Roland Railroad Company, and to authorize it to build a passenger railway between Boundary avenue and Lake Roland, mentioned in said charter; that at said period, to wit, from the first day of April, 1872, when said Act was approved, the points between which the said road was authorized to be constructed were in Baltimore county, and did not become a part of the corporate limits of Baltimore city until the annexation under Act of Assembly hereinbefore referred to, to wit, that of 1888, chapter 98.

That by the 48th section of Article 3, of the Constitution of the State of Maryland of 1867, it was provided—

"Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes, and except in cases when no general laws exist providing for the creation of incorporations of the same general character as the corporation proposed to be created, and any Act of Incorporation passed in violation of this section shall be void."

And your orator avers and charges, that at the date of the passage of said law, to wit, April first, 1872, whereby the said Baltimore, Hampden and Lake Roland Railroad Company was

sought to be incorporated, there was a General Incorporation Law duly passed by the General Assembly of the State of Maryland, providing for the creation of corporations of the same general character as the said Act, to wit, the Act known as—

“An Act to provide for the creation and regulation of incorporated companies in the State of Maryland,” by the second and third sections of which, Acts to be done necessary to the formation of railroad companies, were prescribed, and the said Act of 1870, was repealed and re-enacted by the said General Assembly of Maryland, by the Act of 1876, chap. 242, but all the requirements necessary for the formation of railroad companies, were the same in said subsequent Act. The Act of 1870, and the Act of 1876, have been codified in the Code of Public General Laws and a portion of Art. 23.

In addition to the said Act of 1870, chap. 476, there was in existence on the said first day of April, 1872, an Act of Assembly, known as the General Incorporation Law of 1868, chap. 471, by the 107 section whereof, codified in the Code of Public General Laws, Article 23, sec. 233, provisions were made for the incorporation of companies for the construction of turnpikes, plank roads or passenger railways outside of the limits of the city of Baltimore, said passenger railways not to exceed twelve miles in length, with the requirements that such turnpikes, plank roads or passenger railways, when constructed on the bed of any county road or any part thereof, the contract of the County Commissioners of the county for which such roads might lie, should be first given.

And your orators further state, that the distance between said points, to wit, Boundary avenue and Lake Roland, was less than said distance of 12 miles, being to the best of their information and belief a distance of six miles between said points, and at the time of the passage of said Act of 1872, chap. 284, the termini of said road therein mentioned were entirely outside of the city of Baltimore.

And your orators submit that by reason of the inhibition contained in said 48th section of Article 3 of the Constitution of Maryland, that the said Act of Assembly, purporting to provide for the incorporation of said Baltimore, Hampden and Lake Roland Railway Company in the manner aforesaid, was [was] in violation of said Constitution, and that said Act is entirely null and void, and that the said Hiram Woods, and others mentioned therein, and the subscribers to the stock thereof took no rights thereunder.

6. And your orators further avers and charge, that a certain William H. Whitridge, and other persons unknown to your —, claiming to be the Baltimore, Hampden and Lake Roland Railroad Company, and said alleged corporation is made a party to this suit under the name so assumed by it, but without any admission that the said Act of Incorporation is valid, or that if valid, that the provisions thereof have been complied with, said defendant Whitridge professing to be the president of said corporation, but your orators being ignorant whether he is or is not, and that said parties purporting to act as the Baltimore, Hampden and Lake Roland Railroad Company, and the said William H. Whitridge, and certain other parties, purporting to act under authority of the said Whitridge and the said Baltimore, Hampden and Lake Roland Railroad Company, have recently begun to tear up a portion of the bed of Oak street, and have put down iron railway tracks and ties therein, and also have torn up the

bed of First street at or near its intersection with Oak street and having announced their intention of continuing the said work along the whole of Oak street from Boundary avenue unto Huntingdon avenue, and on Huntingdon and Remington avenues to a distance unknown to your orators.

And your orators further aver and charge, that even if the said Act of Assembly, hereinbefore referred to, is not unconstitutional, yet the said Hiram Woods and others mentioned therein, and the parties subscribed to the capital stock thereof in the manner hereinafter mentioned, have lost all power and authority conferred upon them by said Act by reason of the fact that said railway was not commenced within three years from the passage of said Act, and was not completed within ten years from said date, as provided therein.

And your orators further aver and charge, on information and belief, that the said Hiram Woods and others named in said Act of 1872, as Commissioners to receive subscriptions to the capital stock of said Baltimore, Hampden and Lake Roland Railroad Company, never performed any duty under said Act so passed on the said first day of April, 1872, and never asked for or received any subscriptions to the capital stock of said company until on or about the 23rd day of September, 1891, when, to the best of your orators' information and belief, the said Hiram Woods, John A. Dushane, Henry D. Loney and William C. Pennington, met at the office of the said Hiram Woods, and sought certain subscriptions unto the capital stock of said company, and to the best of the information and belief of your orators, an amount thereof to the extent of five hundred shares, were mentioned by certain parties to your orators unknown; but your orators are advised and so charge, that even if said subscriptions were actually received for said stock, yet, by reason of the lapse of time, to wit, from the first day of April, 1872, until said 23rd day of September, 1891, all rights under said alleged charter, even if the same were valid and constitutional, had been lost by the parties named therein, from the fact that the same had not been accepted within a reasonable time from the passage thereof; and further, that the said subscribers unto the stock of said company have never been duly called any meeting of said company, as provided in the fourth section of said charter, by giving at least ten days' notice in one or more newspapers published in Baltimore city, and one or more in Baltimore county, for their meeting to elect the directors and president of said company.

7. And your orator further aver and charge, that before the said Baltimore, Hampden and Lake Roland Railroad Company could exercise any rights under said charter subsequent to the alleged subscriptions to the capital stock therein purposed to be incorporated, that the assent of the Mayor and City Council of Baltimore was specifically required by the 169th section of Art. 23, of the Code of Public General Laws, which provided that no railroad company should occupy any of the streets of the city of Baltimore without the consent of the municipal authorities.

And your orators aver and charge, that said consent has not been sought or obtained, nor has the assent of the City Commissioner been obtained to the laying down of the tracks of said company, as hereinafter detailed.

8. And your orators are advised, and so allege, that by the provisions of the 169 section of Article 23 of the Code of Public General Laws, hereinbefore referred to, the said Act of Assembly

of April first, of 1872, became modified and changed, as by the 12th section of the same it was provided that the same could be altered, amended or repealed by the Legislature.

9. And your orators further aver and charge, that the said Baltimore and Hampden Passenger Railway Company, under its Act of Incorporation hereinbefore referred to, to wit, the Act of 1865, chap. 32, and by reason of the construction and operation of the railway therein mentioned upon the streets and avenues hereinbefore named, and especially upon Huntingdon avenue and Remington avenue at the points hereinbefore referred to, acquired a special easement in said streets for the purposes of the use by said Baltimore and Hampden Passenger Railway Company, and by the said Baltimore Union Passenger Railway Company, as the lessee thereof, of a portion of said streets necessary for the construction of two tracks, and the sidings required therefor, and that by the fifth section of said Act of Incorporation said use was granted unto said Baltimore and Hampden Passenger Railroad Company exclusively, and that the use of said streets, or any portion thereof, by the said Baltimore, Hampden and Lake Roland Railroad Company, or any parties claiming to use the same, through, by or under it, in the absence of legal and valid authority therefor, would be a special injury and damage unto your orators, not common to but distinct and different from that suffered by the general public from the unlawful construction of the proposed railroad of said Baltimore, Hampden and Lake Roland Railroad Company on said Oak street in front of the premises of your orator, the Baltimore Union Passenger Railway Company, and upon the said streets hereinbefore mentioned, and especially Huntingdon avenue at or near the intersection of Oak street and Remington avenue, at which place the stables of the Baltimore Union Passenger Railway Company are located.

And your orators further aver and charge, that the construction of the said railway of the said Baltimore, Hampden and Lake Roland Railroad Company upon Oak street, from Boundary avenue unto Huntingdon avenue, and on Huntingdon avenue, and on Remington avenue to Lake Roland, would be a competing railroad to that of the said Baltimore and Hampden Passenger Railway Company, having their points of commencement identical to it, Boundary avenue and their termini within a short distance of each other.

And your orators are informed and believed, and therefore charge, that the said William H. Whitridge, and other parties to your orators unknown, purporting to act as the said Baltimore, Hampden and Lake Roland Railroad Company, have begun the construction of certain railway tracks upon Oak street and First street, as hereinbefore mentioned, which shall pass, should the same be completed, the stables of your orator, the Baltimore Union Passenger Railway Company, situate at the corner of Oak street and Huntingdon avenue, and cross the line of the Baltimore and Hampden Passenger Railway, and also parallel the tracks of the said Baltimore and Hampden Passenger Railway Company on Huntingdon avenue and Remington avenue, and being constructed without due authority in law, the same would constitute a public nuisance.

10. And your orator further aver and charge, that the said Baltimore and Hampden Passenger Railway Company has begun the construction of, and partially completed, a siding or turnout connected with the tracks of the said Baltimore and Hamp-

den Passenger Railway Company at the intersection of Oak street and Huntingdon avenue, and situate on Oak street, extending from said Huntingdon avenue southerly to the intersection of Oak street and Fifth street, that said Baltimore and Hampden Passenger Railway intends to construct an additional track located on the streets and avenues hereinbefore referred to, for the purpose of facilitating the business conducted on its railway, and is prepared to build the same, but the construction thereof has been delayed by reason of the pending change of grade of Huntingdon avenue, owing to the construction of the railroad of the Baltimore Belt Railroad Company under the same, and that by reason of the exclusive use granted unto the said Baltimore and Hampden Passenger Railway Company of the streets hereinbefore referred to, the construction of tracks by the defendants on the same in violation of law, will be a special injury and damage unto the said Baltimore and Hampden Passenger Railway Company and to the Baltimore Union Passenger Railway Company, as the lessee and operator of the railroad thereof; further, that said Huntingdon avenue and Remington avenue are not of sufficient width to admit of the construction thereon of the double tracks of the Baltimore and Hampden Passenger Railway, and those proposed by the said Baltimore and Hampden and Lake Roland Railroad Company, without interference with the public user of the same.

11. And your orator further aver and charge, they began the construction of the siding aforesaid, to wit, that extending from the intersection of Oak street and Huntingdon avenue on Oak street southerly, nearly to the intersection of Fifth street, on the tenth day of October instant; and the said William H. Whitridge and certain others, purporting to act for the said Baltimore, Hampden and Lake Roland Railroad Company, with force of arms, illegally interfered with your orator, and especially with your orators, the said Baltimore and Hampden Passenger Railway Company, in the construction of the siding or turnout hereinbefore referred to, and threatened to and actually attempted to tear up the track of the said Baltimore and Hampden Passenger Railroad Company, situate at the intersection of Oak street and Huntingdon avenue, and alleged their intention to tear up and destroy the same, for the purpose of laying down certain tracks of the said Baltimore, Hampden and Lake Roland Railroad on said Oak street, from First street unto said Huntingdon avenue, and continuing out said Huntingdon avenue and Remington avenue on said streets and avenues already occupied by the railroad of said Baltimore and Hampden Passenger Railway Company; that by reason of the said illegal proceedings of the said William H. Whitridge and the parties purporting to represent the said Baltimore, Hampden and Lake Roland Railroad [Railroad] Company, a breach of the peace was imminent and violence was threatened unto your orators in the care and protection of their property and in the rights secured to them by law.

And your orators further aver and charge, that the said Baltimore, Hampden and Lake Roland Railroad Company and the said William H. Whitridge, and those purporting to act under the authority of said company, design and intend, as soon as possible, to construct the tracks of the said Baltimore, Hampden and Lake Roland Railroad Company on Huntingdon avenue and Remington avenue, in close proximity to the tracks of the said Baltimore and Hampden Passenger Railway Company

already located thereon, and in so doing to occupy the portion of said streets and avenues necessary for the location of the second track of the said Baltimore and Hampden Passenger Railway Company thereon, and also to lay their tracks on and across the tracks of the said Baltimore and Hampden Passenger Company, located at the corner of Oak street and Huntingdon avenue, and that such crossing and such proposed construction is without warrant or authority of law, and would cause irreparable damage to your orators.

And your orators further aver and charge, on information and belief, that the pecuniary responsibility of the Baltimore, Hampden and Lake Roland Railroad Company, if it really has any corporate existence, which your orators deny, is of very limited extent, as your orators are informed and so charge, that the only subscriptions to the stock thereof was to an amount of five hundred shares of the par value of fifty dollars, upon which an instalment of five dollars per share has been paid, and that said subscription is the entire assets of said alleged company.

And your orators are informed and so charge, that said subscription was made by "The Roland Park Improvement Company of Baltimore City," a corporation organized under Art. 23 of the General Laws of Maryland, but with no power to subscribe to the stock of railroad companies.

And your orators further charge, on information and belief, that there is no reasonable probability that for the injuries which would be done to their property by the construction of the proposed road on Oak street and Huntingdon avenue of the defendant, the said Baltimore, Hampden and Lake Roland Railroad Company, they could recover any adequate compensation by proceedings at law, and that they are remedyless in the premises in a Court of Law, and are entitled to invoke the aid of this Honorable Court to protect them by the exercise of its equitable jurisdiction in the premises.

Wherefore they pray :

1. That the said defendants, and each of them, their, and each of their servants, workmen, and all persons whomsoever claiming to act under or by virtue of any agreement with the said Baltimore, Hampden and Lake Roland Railroad Company, or any other party, may be restrained by an injunction of this Honorable Court from interfering with the completion of the construction by your orators of the siding situate on Oak street, and extending southerly from its intersection with Huntingdon avenue to a point at or near Fifth street; and also from interfering with the construction of said siding, and the materials already on said premises, necessary for the completion of the same, or in any way interfering with such portion of said siding as is already constructed.

And that said parties may also be restrained and enjoined from constructing any portion of their said proposed railroad on said Oak street from its intersection with Fifth street, to and across Huntingdon avenue; and also from laying down and constructing any of their said proposed railway on Huntingdon avenue and Remington avenue, and the other streets and avenues hereinbefore referred to, and especially from constructing their proposed railway on any part of said street which may be needed for the second or additional track of said Baltimore and Hampden Passenger Railway Company; and also from in any manner tearing up said streets, avenues, or any portions thereof,

or in any manner interfering with or obstructing the same, or hindering your orators in the free and unobstructed use thereof, for the purposes hereinbefore referred to; and also from in any way laying the tracks of their proposed railway across the tracks of the Baltimore and Hampden Passenger Railway Company at Huntingdon avenue and Oak street aforesaid; and also from in any manner constructing any railway of their proposed railroad on Oak street, in front of the property of the Baltimore Union Passenger Railroad Company located thereon.

2. And your orators may have such other and further relief in the premises as the nature of their case may require.

3. And that subpoenas may issue against said defendants, the Baltimore, Hampden and Lake Roland Railroad Company, the alleged corporation aforesaid, and the said William H. Whitridge, the alleged president thereof, requiring them to appear in this Honorable Court on some day to be therein named, and answer the premises, and abide by and perform any decree that may be passed herein.

And as in duty bound your orators will ever pray, etc.

The Baltimore and Hampden Passenger Railway Company,  
by—

E. J. D. CROSS,  
President.

The Baltimore Union Passenger Railway Company, by—

NELSON PERIN,  
President.

COWEN & CROSS,  
HUGH L. BOND, JR.,  
Sols. for Pltffs.

STATE OF MARYLAND,  
*City of Baltimore, to wit:*

I hereby certify, that on this fourteenth day of October, A. D. 1891, before the subscriber, a Justice of the Peace of the State of Maryland in and for the city of Baltimore, personally appeared Nelson Perin, President of the Baltimore Union Passenger Railway, and E. J. D. Cross, President of the Baltimore and Hampden Passenger Railway Company, and for and on behalf of the said complainants, made oath on the Holy Evangelry of Almighty God, that the matters and things stated in the foregoing bill of complaint are true as therein stated, to the best of their knowledge, information and belief.

ROBERT A. THURSBY, J. P.

*Order of Court.*  
(Fd. 15th October, 1891.)

The Baltimore Union Passenger Railway Company, the Baltimore and Hampden Passenger Railway Company, Plaintiffs,

vs.

The Baltimore, Hampden and Lake Roland Railroad Company and William H. Whitridge, Defendants.

In the Circuit Court of Baltimore City.

Upon the foregoing bill of complaint it is, this fifteenth day of October, 1891, ordered, that the defendants show cause on or before the 21st day of October, 1891, why the injunction prayed for in said bill of complaint should not issue as prayed, provided a copy of said bill of complaint and of this order be served upon the said defendant, the said Baltimore, Hampden and Lake Roland Railroad Company, or the said Wm. H. Whitridge, on or before the 16th day of October, 1891.

J. UPSHUR DENNIS.

*Service of Above Order.*

Copy of the within bill of complaint and order of Court served on the Baltimore, Hampden and Lake Roland Railroad Company, by service on William H. Whitridge, president, and on William H. Whitridge on the 15th day of October, 1891, at 1.40 o'clock, P. M., in presence of Frank A. Wolvington.

GEORGE McCAFFRAY,

Sheriff fee, \$0.50.

Sheriff:

*Answer of Defendants.*

(Fd. 21st October, 1891.)

The Baltimore Union Passenger Railway Company and the Baltimore and Hampden Passenger Railway Company, Plaintiffs,

vs.

The Baltimore, Hampden and Lake Roland Railroad Company and William H. Whitridge, Defendants.

In the Circuit Court of Baltimore City.

The joint and several answer of the Baltimore, Hampden and Lake Roland Railroad Company, and William H. Whitridge, the defendants in the above entitled cause, to the bill of complaint of the Baltimore Union Passenger Railway Company, and the Baltimore and Hampden Passenger Railway Company, the plaintiffs therein, against them in said cause exhibited.

These defendants, reserving unto themselves the benefit of all proper exceptions to said bill of complaint for its manifest errors and irregularities, for answer thereto, or to so much thereof as they are advised it is necessary for them to answer, say:

(1.) In answer to the first and second paragraphs of the said bill, these defendants rely upon the Acts of Assembly and ordinances referred to therein for the legal right of the plaintiffs, but these defendants have no knowledge as to whether the incorporators of the said Baltimore and Hampden Company commenced the construction of said railroad within the time limited in said charter, as to whether the lease referred to in said second paragraph was in fact made in conformity with law.

(2.) In answer to the third paragraph of said bill, these defendants refer the Court to the provisions of the Act of Assembly of 1872, chapter 284, for a full account of the rights and obligation of the said Baltimore, Hampden and Lake Roland Railroad Company under the same.

(3.) In answer to the fourth paragraph of said bill these defendants say, that the said corporation has been duly organized

under said Act, and while these defendants admit that the said corporation did not commence the construction of the said railroad within three years from the first day of April, 1872, when said Act was approved, and have not completed it within ten years from said date, nevertheless these defendants say, that in the month of September, in the present year, the said corporation began the construction of its railroad from Boundary avenue to Lake Roland; that it has already practically completed the construction of its road with double tracks of the most modern and expensive street railway pattern on Oak street from Boundary to Fifth street, on First street from Oak street to Maryland avenue, on Cedar avenue from the Cedar avenue bridge for a considerable distance northwardly, and on Roland avenue from Merryman's lane northwardly, for a distance of about half a mile; that it has contracted for the material for the construction of the entire road, and that the rails and cross-ties and other necessary material are now being delivered along the whole route, and that specifications are now being prepared for the construction of a bridge to connect the tracks on Oak street with the tracks on Cedar avenue, and that the defendants, the said Baltimore, Hampden and Lake Roland Railroad Company, has expended or prepared to expend immediately upon the construction and equipment of the said road over one hundred thousand dollars.

(4.) In answer to the fifth paragraph of said bill, these defendants deny that the Act of Assembly, incorporating the said Baltimore, Hampden and Lake Roland Railroad Company, is unconstitutional and void, or that the General Assembly of Maryland was without power or authority to pass said Act, and they deny that - the date of the passage of the said Act there was a general incorporation law providing for the creation of corporations of the same general character as the Baltimore, Hampden and Lake Roland Railroad Company.

(5.) In answer to the sixth paragraph these defendants say, that the Acts referred to in said section six, were and are the corporate Acts of the said Baltimore, Hampden and Lake Roland Railroad Company, but these defendants say that the said Baltimore, Hampden and Lake Roland Railroad Company has not yet selected finally its route from Oak street to Cedar avenue, but is now engaged in surveying and locating the same, but that under the charter of the said company it has the right to lay down double tracks on Huntingdon avenue, Oak street and Remington avenue, and will do so if it sees fit.

(6.) In further answer to the sixth paragraph, these defendants deny that the Commissioners named in said Act have lost all power and authority conferred upon them in the same by reason of the fact that the said railway was not begun within three years from the passage of said Act, and was not completed within ten years, but to the contrary thereof these defendants say, that any delays in the organization of the said company, or in the commencement or completion of the said railroad, if they could be established, would be simply acts of non-user or misuser, which would constitute under proper conditions acts of forfeiture, which could only be taken advantage of by the State of Maryland through judicial proceedings provided in such cases, and that the plaintiffs cannot be heard in this Court in regard to the same.

(7.) In further answer to the sixth paragraph, these defendants say, that all of the commissioners named in said Act are still

living and united in the proceeding for the organization of said company with the exception of William G. Wilson and William H. Ward, both of whom were deceased, and that in conformity with the provisions of said Act, Douglas H. Thomas and Charles O'Donnell Lee were elected to fill the vacancies; that the said Act was passed for the purpose of furnishing railway facilities to residents and property holders on Roland avenue, all or most of said commissioners being largely interested in lands on said avenue; that the said Hiram Woods, Douglas H. Thomas and Charles O'Donnell Lee are members of the Board of Directors of the Roland Park Company of Baltimore city, which is engaged in the expenditure of a million dollars upon the purchase and improvement of lands on Roland avenue; that the said John A. Dushane still owns property and resides on said avenue, and that the said William C. Pennington has recently sold his land to said Roland Park Company; that it will therefore appear to the Court that in the construction and operation of the said road the original purposes of said Act, and the original design of the Legislature in passing the same, will in every particular be subserved; that the time is now only ripe for the construction of the said road, and that the plaintiffs are utterly unable to furnish any reason why the road should not now be constructed as well as within the period named in the charter, and that the Court cannot doubt that if the delay does amount to a cause of forfeiture, and the same was properly brought to the attention of the State of Maryland the cause of forfeiture would be waived.

(8.) And further answering said sixth paragraph, the defendants say, that there was a full meeting of the entire board of commissioners, (with the exception of Robert Gilmor, Jr., who afterwards united in the proceedings by signing the same,) and that the meeting of subscribers to stock to elect the directors was duly called by publication, as required, and that all of the requirements of said charter in regard to organization were fully and strictly complied with; and these defendants deny that said charter was not accepted within a reasonable time, but say that this is a matter for the judgment of the State of Maryland, and cannot be pleaded by the plaintiffs in this case.

(9.) In answer to the seventh and eighth paragraphs, these defendants say, that the said Baltimore, Hampden and Lake Roland Railroad Company is a street railway, and that it has been expressly decided by the Court of Appeals of Maryland, that the 169 section of Article 23 of the Code of Public General Laws does not apply to street railways, but even if it did apply there is no restriction upon the paramount authority of the State of Maryland to authorize the use of the public highways of Baltimore city, of Baltimore county, and that the said Act of Assembly directly authorizes the said Baltimore, Hampden and Lake Roland Railroad Company to use such streets and highways.

(10.) In answer to the ninth paragraph of said bill, these defendants say, that the fifth section of the Act of Incorporation of the Baltimore and Hampden Passenger Railroad Company does not give that company the exclusive use of the streets occupied by it, but only gives it the exclusive use of the tracks laid by it, and that the terminus of the Baltimore, Hampden and Lake Roland Railroad Company, at Lake Roland, will be at least three miles distant from the terminus of the Baltimore and Hampden Railroad Company, at Hampden, and that said termini will not therefore be within a short distance of each other, as alleged in said ninth paragraph.

(11.) In answer to the tenth paragraph of said bill, these defendants say that the pretended siding or turnout referred to in said tenth paragraph, was not begun in good faith for the railway purposes of the plaintiff or with any intention whatever of making a bona fide use of the same, but that the sole and only purpose for which said work, referred to in said tenth and eleventh paragraphs, was undertaken, was the embarrassment and delay of the Baltimore, Hampden and Lake Roland Company, and these defendants deny that they ever threatened or attempted or intended or now intend to tear up the track of the said Baltimore and Hampden Passenger Railway Company at the intersection of Oak street and Huntingdon avenue.

(12.) And in further answer to said eleventh paragraph, these defendants say, that the pecuniary responsibility of the Baltimore, Hampden and Lake Roland Railroad Company is ample for all its purposes, and they deny that the only subscription to the stock thereof was the amount of five hundred shares referred to in said eleventh paragraph; and they deny that any subscription was made to the capital stock of the said company by the Roland Park Improvement Company of Baltimore city, or by any other corporation.

And having fully answered the said bill of complaint, these defendants pray to be hence dismissed with their costs.

And as in duty bound, &c.

FIELDER A. SLINGLUFF,  
STEELE, SEMMES & CAREY,  
Solicitors for Defendants.

STATE OF MARYLAND,  
*Baltimore City, to wit:*

I hereby certify, that on this 20th day of October, in the year eighteen hundred and ninety-one, before me, the subscriber, a Justice of the Peace of the State of Maryland in and for Baltimore city aforesaid, personally appeared William H. Whitridge, the President of the Baltimore, Hampden and Lake Roland Railroad Company, and made oath in due form of law that the matters and facts set forth in the foregoing answer are true and bona fide as therein set forth.

JNO. T. MADDOX, J. P.

*Motion for Preliminary Injunction.*

(Fd. 21st October, 1891.)

The Baltimore and Hampden  
Passenger Railway Company  
and the Baltimore Union  
Passenger Railway Company,

vs.

The Baltimore, Hampden and  
Lake Roland Railroad Com-  
pany and William H. Whit-  
ridge.

In the Circuit Court of Balti-  
more City.

*To the Honorable J. Upshur Dennis, Judge of said Court:*

The plaintiffs move the Court to grant the preliminary injunction prayed in the bill in this cause.

COWEN & CROSS,  
HUGH L. BOND, JR.,  
Sol. for Pltffs.

*Order of Court.*

(Fd. 30th October, 1891.)

The Baltimore and Hampden  
Passenger Railway Company  
and the Baltimore Union  
Passenger Railway Company,

*vs.*

In the Circuit Court of Balti-  
more City.

The Baltimore, Hampden and  
Lake Roland Railroad Com-  
pany.

Upon consideration of the bill, exhibits and answer, and all other papers [papers] filed in this cause, it is thereupon ordered *pro forma* by the Circuit Court of Baltimore city, this 30th day of October, 1891, that the injunction prayed for by the plaintiff in its bill of complaint, and moved for in its motion filed in this cause, be and the same is hereby refused.

J. UPSHUR DENNIS.

*Prayer for Appeal.*

(Fd. 30th October, 1891.)

The Baltimore and Hampden  
Passenger Railway Company,  
and the Baltimore Union  
Passenger Railway Company,

*vs.*

In the Circuit Court of Balti-  
more City.

The Baltimore, Hampden and  
Lake Roland Railroad Com-  
pany.

The complainants and plaintiffs pray an appeal to the Court of Appeals of Maryland, from the order of Court this day passed in the above cause, refusing the injunction prayed for in the above entitled cause.

BERNARD CARTER,

COWEN &amp; CROSS,

HUGH L. BOND, JR.,

Attys. for Pltffs.

Which said appeal being by the Court here also granted, it is thereupon ordered by the Court here, that a transcript of the record and proceedings in the cause aforesaid be transmitted to the Court of Appeals of Maryland, under the rules thereof; and the same is transmitted accordingly.

Test:—ALVIN ROBERTSON,

Clerk.

In testimony that the foregoing is truly taken from the records and proceedings of the Circuit Court of Baltimore city, in the cause therein entitled,

(Seal's Place.)

I heretunto subscribe my name and affix the seal of the Circuit Court of Baltimore city aforesaid, this fifth day of November, A. D. 1891.

ALVIN ROBERTSON,

Clerk of the Circuit Court of Baltimore city.

Filed November 18, 1891.

THE BALTIMORE AND  
HAMPDEN PASSENGER  
RAILWAY COMPANY,  
AND  
THE BALTIMORE UNION  
PASSENGER RAILWAY  
COMPANY,

vs.

THE BALTIMORE,  
HAMPDEN AND LAKE  
ROLAND RAILROAD  
COMPANY ET AL.

THE BALTIMORE UNION  
PASSENGER RAIL-  
WAY COMPANY

vs.

THE SAME.

IN THE

COURT OF APPEALS

OF MARYLAND.

OCTOBER TERM, 1891.

GENERAL DOCKET, Nos. 71

AND 72.

*Appeals from the Circuit Court of Baltimore City.*

BRIEF FOR APPELLANTS IN BOTH CASES.

These suits are both brought to restrain the appellees from proceeding to lay down railroad tracks on Oak street, Huntington avenue, and other streets and avenues in the annexed district of Baltimore city. The appeal in each case is from an order below, refusing a preliminary

injunction. In No. 71, the appellants are, respectively, the lessor and the lessee of Baltimore and Hampden Passenger Railway, whose tracks are located on Maryland avenue, from Boundary to Huntingdon avenue; thence on Huntingdon avenue, passing Oak street, to William street; thence on William street to Remington avenue, and so on streets and avenues mentioned in the first paragraph of the bill, out to a point on Roland avenue, near Merryman's lane. In No. 72, the appellant is the lessee and owner of a lot at the southeast corner of Oak street and Huntingdon avenue, fronting 250 feet on Oak street, and 150 feet on Huntingdon avenue, on which are situated its stables and other buildings. The bill in No. 71 alleges that the appellees intend to lay tracks out Oak street, crossing the tracks of appellants on Huntingdon avenue, and to lay tracks on Huntingdon and Remington avenues, parallel to the appellant's track; that in so doing the appellees threaten to, and will, (1,) interfere with a switch of appellants on Oak street; (2,) tear up and interfere with appellant's tracks on Huntingdon avenue; and, (3,) occupy the space on Huntingdon and Remington avenues, on which the Baltimore and Hampden Railway Company is authorized and intends to lay an additional track, the laying of which has been delayed only by the work of the Baltimore Belt Railroad Company, in changing the grades of said avenues.

The appellees in both cases defend under the alleged charter of the Baltimore, Hampden and Lake Roland Railroad Company.

The answer alleges that the Acts complained of are those of the Baltimore, Hampden and Lake Roland Company, authorized by the Act of 1872, chapter 284, and that the other defendants are acting merely as the officers or agents of that company.

The facts of these cases raise all the questions as to the corporate existence and powers of the Baltimore, Hampden and Lake Roland Railroad Company, that are raised by

the case of Bonaparte vs. that company, lately argued (No. 70) with the additional question as to the rights of the company within the city of Baltimore, under the provisions of the Code relating to railroads within that city.

#### POINTS.

The appellants contend :

I. That the Act of 1872, chapter 284, is unconstitutional and void.

II. That the said charter Act was not accepted within a reasonable time, and that, therefore, the corporation contemplated therein never came into existence.

III. That even if originally valid and accepted in time, the said charter Act could be accepted in 1891, only subject to the provisions of section 169 of article 23 of the Code of Public General Laws; and that, therefore, it gives no right to build a railroad within the city of Baltimore, without the consent of the Mayor and City Council thereof.

#### I. THE ACT IS UNCONSTITUTIONAL.

We cannot do better than adopt the admirable argument on this point, contained in appellants' brief in number 70.

By article III, section 48, of the Constitution, a special Act of incorporation is *void* if a general law exists providing for the creation of corporations "of the *same general character* as the corporation proposed to be created." The "general character" of the corporation proposed to be created by the statute in question, was that of a railroad company, empowered to transport for hire both passengers and freight, but restricted to horses as its motive power. Now chapter 476 of the laws of 1870, a general law existing when this Act was approved, (*i. e.*, April 1st, 1872,) certainly provided for the creation of corporations of this general character; and the fact that

the proposed corporation was to be a *horse* railway made no difference.

Oler vs. Balto. and Randallstown, &c. Co., 41 Md. 584.

Consequently this special Act of incorporation was unconstitutional and void. There is nothing to controvert this proposition in either the case of Hodges vs. Union Pass., &c., R. R. Co., 58 Md. 603, or the later case of Reed vs. Balto. Trust and Guarantee Co., 72 Md. 531, which were relied upon by the appellees below.

In the latter case, the corporate purposes of the appellee were *inter alia* to act as executor, administrator, guardian, assignee, receiver, committee, depository for public funds, and public arbitrator, and to take the custody of legal documents, and of property or money in the hands of Court officers. The Court of Appeals held that there was no general law in existence providing for the creation of corporations of this general character, (72 Md., page 534,) and consequently that the special Act was valid. This was precisely what the General Assembly had declared in the preamble to the Act repealing so much of the general corporation law as provided for the formation of "Trust" and "Guarantee" Companies, (chapter 272 of laws of 1890, page 296 of the printed volume,) passed more than two months before the case was decided. The decision of this case, therefore, establishes only that if the *corporate purposes* of the proposed corporation cannot be attained under the general law, that law does not provide for the creation of corporations of the "same general character."

It was suggested, in argument, at the hearing below, that under the general law of 1870, the corporation sought to be created by this statute could not have acquired a *monopoly of roads and streets* as granted by section 6, but to acquire and hold such a monopoly was not one of its *corporate purposes*, one of the ends of its existence; the

power thus conferred (if any such was conferred) constituted a mere special privilege—a means, (and one of very doubtful public policy,) to attain the end in view. It has also been suggested that section 7 of the special Act differs from the provision as to condemnation of private property, contained in the general railroad Act of 1870, by requiring that the owners of land condemned thereunder “shall have at least ten days’ notice, to be given by the president of said company,” of the day appointed for the meeting of the jury of inquisition on the premises—and intimated on behalf of the appellees that the omission of such a requirement from the general law, would have the effect of invalidating condemnation proceedings thereunder.

Without pausing to consider the merits of the legal proposition thus advanced, it is sufficient for the purposes of this case to point out, that to grant or refuse a railroad company the power of condemning its right of way, does not change its “general character;” it is not essentially a corporation created to condemn land, but a corporation created to build and operate a railroad; the power of condemnation is again merely a means employed to effect its corporate purposes; it would be none the less a corporation “of the same general character” if obliged to first purchase its right of way or obtain this by voluntary concession, before locating its route or constructing its railroad.

So also as to the difference in the maximum rates of fare allowed to be charged for passengers, which, in the special Act is five cents per mile, while the general law limits it to three cents per mile. To claim that this privilege rendered the railroad thus specially favored a corporation of a different “general character” from one permitted to charge only three-fifths as much, would be simply to stultify the constitutional inhibition, and construe it as if it had read, “where general laws exist, providing for the creation of corporations,” not “of the same

general character," but "identical in every particular with the corporation proposed to be created."

It is apprehended that this Court will be reluctant to place upon Article III., section 48 of the Constitution, a construction which would not only defeat its well understood purpose, *i. e.*, to prohibit legislative partiality towards particular corporations and the attendant jobbery and corruption—but would do in fact what one of the appellees' counsel claimed (as we think erroneously,) in the argument below, had been already done by the decisions in Hodges' and Reed's cases, namely: "Reduce that provision of the Constitution to a dead letter."

As a matter of fact all that this Court decided in Hodges vs. Baltimore Union Passenger Railway Company, 58 Md. pages 620, 621, as to Article III., section 48 of the Constitution, was that a corporation formed under the general law, could have its powers enlarged and its charter amended by special act. This decision makes a distinction between special acts which *create* corporations and those which *amend* the charters of corporations already created; pointing out that the latter are nowhere forbidden by the Constitution, and that they are the appropriate means to be resorted to when "one corporation may need to have its powers enlarged while it may not be advisable or necessary to confer such powers on other corporations;" so that there can be no argument *ab inconvenienti* against declaring void, as the Constitution does, such special acts as the one under review, for any usual powers which the Legislature deemed advisable to confer upon the Baltimore, Hampden and Lake Roland Railroad Company might have been lawfully granted by way of amendment to a charter taken out under the general law of 1870.

The appellees' counsel seek to weaken the force of the foregoing argument by saying that the power remaining in the Legislature to amend the charter of a corporation

organized under the general Act, enables the Legislature to evade the provisions of section 48, article III, of the Constitution, and to defeat the object of those provisions, by granting additional powers in special cases. They argue that it makes no difference whether such additional powers be granted by special Act of incorporation or by mere enabling Act, and that, therefore, this Court should so construe the Constitution as to validate any special Act of incorporation which contains a grant of any privilege or power, however incidental or ancillary, different in any respect from the privileges or powers that could be acquired by an organization under the general Act.

We submit that this argument rests upon false assumptions. There is a very substantial difference between the passage of special Acts of incorporation and the passage of enabling Acts to meet particular cases.

Section 48 of article III, contemplated the passage by the Legislature of general incorporation laws which should classify corporations according to their "*general character*," and should prescribe the *powers, duties and liabilities* of the corporations embraced in each class. The power was left in the Legislature to grant additional powers by special Act, but that power is prohibited by section 33, in "any case for which provision has been made by an existing general law."

Before the corporation can ask the exercise of this power, it must have assumed all the duties and liabilities imposed on corporations of its class, by organizing under the general Act.

Its powers, duties and liabilities will be those prescribed for corporations of its class, except the Legislature see fit for special reasons to vary or add to its powers.

If, on the other hand, corporations may be created by special Act of incorporation, as contended by appellees, the powers, duties and liabilities may be such only as are prescribed in each particular Act; there will be no body

of powers, duties and liabilities common to all corporations of the class. The vigilance required of the Legislature would, in the latter case, be far greater than in the former; and, moreover, the intelligent legislative regulation of corporations is rendered far easier when all of the same general character stand upon a common foundation of rights and duties and liabilities, in the first place. See section 85, article 23, of Code.

Uniformity to this extent has been established by our present Constitution.

We submit, that such uniformity is a great advance, as compared with the chaotic legislation by special Acts of incorporation.

## II. THE ACT WAS NOT ACCEPTED IN TIME.

Such a charter Act is inoperative until accepted by those in whom the corporate franchises are to vest.

Beach on Corp. sec. 15.

Lyons vs. Orange & R. R. Co., 32 Md. 18.

Smith vs. Silver Valley Mining Co., 64 Md. 85.

State vs. Dawson, 16 Indiana, 40.

Dartmouth College vs. Woodward, 4 Wheat. 518, 688.

Walker vs. Devereaux, 4 Page Chan. 229.

This acceptance must be signified within a reasonable time, and upon the terms offered. Failure to accept within a reasonable time, will be deemed a refusal.

State vs. Bull, 16 Conn. 179.

Morawetz on Corp., page 22, (2d Ed.)

In the present case, the Court is not called on to lay down any close rule as to what is a reasonable time. The 11th section of the Act provides "that said company shall commence said railway within three years from the passage of this Act, and complete the same in ten years." No action whatever was taken under the Act until September, 1891, more than *nineteen* years after its passage. This is neither an acceptance within a reasonable time, nor an acceptance upon the terms offered.

The counsel for appellees contend that the failure to accept the Act cannot be urged in these cases, but can be taken advantage of only by the State in a direct proceeding to forfeit the charter. The cases cited by them hold that corporate existence can be *forfeited* only through a direct proceeding by the State.

The appellees seek to defend acts which create a public nuisance if not authorized by the Legislature. They say: "We have obtained power from the Legislature by incorporating under a special Act, i. e., by accepting the offer of powers as made in the Act." The appellants say: "You never accepted the offer while it was open to acceptance, by its terms. Therefore, you never incorporated, or obtained the offered powers." It is not a question of the dissolution of the corporation for failure to perform the terms of its contract with the State. The question here is whether corporate powers were ever acquired—whether the contract was ever made—not whether when made, its terms have been complied with. This question is directly parallel to that which arises under the general incorporation Act when the certificate of incorporation fails to comply with the requirements of the Act. The general Act is an offer of corporate powers which must be accepted as therein provided. If the would-be incorporators fail to signify their acceptance in the prescribed form, their corporation does not come into being. Any one can question its existence.

Beach on Corp., section 16.

Boyce vs. Trustees, &c., 46 Md., 372.

Atlantic & Onio R. R. Co. vs. Sullivant, 5  
Ohio St. 276.

The cases cited by appellees' counsel have no application, least of all the case of Hodges et al. vs. Baltimore Union Pass. Ry. Co., 58 Md., 603. In that case the ordinance had been formally accepted by the individuals named in it, had been formally assigned by them to the company; and the company's rights thereunder had been ratified by the Legislature. Work had also been begun under it.

### III. THE ACT GIVES NO RIGHT TO BUILD IN BALTIMORE CITY, WITHOUT THE CONSENT OF THE MAYOR AND CITY COUNCIL.

Section 169 of article 23 of the Code provides that "no railroad shall be allowed to pass through the city of Baltimore without the consent of the municipal authorities."

The Code became the law after the annexation of the northern belt, so that the words "City of Baltimore" in the Code, mean the city including the annexed districts.

The appellees' counsel argue that the Legislature has the power to authorize the use of the city streets without the consent of the municipal authorities. This is admitted. But inasmuch as the general Act, forbidding such use, is subsequent in date to their special Act, we do not see the application of the proposition.

They argue further that the Hodges case (58 Md. 603) decided that section 13 of the Act of 1876, chapter 242, (from which section 169 of article 23 is derived,) did not apply to street railways. We submit that the Hodges case decided no such thing.

To give to the language of that opinion, used *arguendo*, the meaning contended for, would be to say that the decision overruled the decision in Oler vs. Baltimore and Randallstown Railway Co., 41 Md. 584, and held invalid the incorporation of the Baltimore Union Passenger Railway Company, the appellees in the Hodges case. If city passenger railway companies can be incorporated under the Act of 1876 at all, then section 13 of that Act must apply to such companies, because from that section alone can they derive the right to use the streets of the city and the county roads, and because from that section alone do the municipal and county authorities derive the power to authorize such use. Clearly, then, the language of the opinion in the Hodges case cannot be construed to decide that the word "railroad" in section 169 does not include such a railroad as the Baltimore and Randallstown, or as

that which appellees seek to build, viz.: a railroad for the transportation of freight and passengers by horse power. The language is used in the discussion of the alleged violation of Section 33 of Article 3 of the Constitution. The subject matter will appear by reference to page 617 of the report (58 Md.), where the brief for the company states the difference between the cases provided for by the general Act and the case provided for by the special Act, so far as concerns the use of streets, as follows: "Under Section 5 of the Act of 1876, Ch. 242, the company could build a *main line* between the terminus at Light street and the terminus on Wilkins avenue, and *branches* from the main line. But the company desired not only to ~~construct~~ the main line and branches, but also to construct laterals to branches and also railways not at all connected with either main line or branches. This it could not do under the 'existing general law' under which it was organized. In the present instance the main line is the Lombard street railway and the branch is the Park avenue and St. Paul street road; but there is now a lateral to this branch, and other laterals may be desired in the future. The special Act gives this additional power not provided for by the 'existing general law.'" The language of the opinion on page 622 cannot be interpreted to mean that the Balto. Union Co. could not have built its main line and branches without the special Act, as the appellees here contend. The last paragraph on page 622 shows the scope of the decision.

"There is then no general law conferring the rights, and prescribing the terms and conditions on which the defendant was to construct and operate its railway on *certain* streets in the city of Baltimore, and the Act of 1882, ratifying ordinance No. 150, and authorizing the defendant to build and operate its railway *on such streets, and on such conditions as the Mayor and City Council of Baltimore may prescribe*, is not, therefore, in conflict with section 33 of article 3 of the Constitution."

We submit that the appellees can not accept in 1891 an Act passed in 1872, except subject to the general legislation of the State during the interval of nineteen years.

State vs. Dawson, 16 Ind. 40.

BERNARD CARTER,  
COWEN & CROSS,  
HUGH L. BOND, JR.,

*Counsel for Appellants.*

Filed November 18, 1891.

THE BALTIMORE AND  
HAMPDEN PASSENGER  
RAILWAY COMPANY,  
AND  
THE BALTIMORE UNION  
PASSENGER RAILWAY  
COMPANY,

vs.

THE BALTIMORE,  
HAMPDEN AND LAKE  
ROLAND RAILROAD  
COMPANY ET AL.

IN THE

COURT OF APPEALS

OF MARYLAND.

OCTOBER TERM, 1891.

GENERAL DOCKET, No. 71.

*Appeals from the Circuit Court of Baltimore City.*

SUPPLEMENTAL BRIEF FOR APPELLANTS.

In addition to the points common both to this case and to No. 72, which are treated in a brief filed in both cases, there arises in this case a question that is not presented in No. 72. The bill in this case alleges that Huntingdon avenue and Remington avenue, on which the Baltimore and Hampden Company has already one track, and on which it has the right and is about to construct an additional track, are not of sufficient width to admit of the

construction thereon of the proposed tracks of the Baltimore, Hampden and Lake Roland Company, without interfering with the public user of those avenues; and the appellants pray, as part of the relief sought in the bill, that the Baltimore, Hampden and Lake Roland Company be restrained from constructing its proposed railway on Huntingdon avenue and Remington avenue, so as to occupy the portion of said avenues needed for the additional track of the Baltimore and Hampden Company, or so as to interfere with the laying of such additional track.

The fifth paragraph of the answer does not deny the allegations of the bill, but says that the Baltimore, Hampden and Lake Roland Company "has not yet selected finally its route from Oak street to Cedar avenue, but is now engaged in surveying and locating the same, but that under the charter of the said company, it has the right to lay down double tracks on Huntingdon avenue, Oak street and Remington avenue, and will do so if it sees fit."

The Act of 1872, chapter 284, under which the appellees claim, by its sixth section provides "that the company hereby incorporated shall have power to construct a railway with one or two tracks and the necessary sidelings for the transportation of travellers or freight by horse power, and have the exclusive use of any streets or county roads over which they may wish to lay their track between Boundary avenue and Lake Roland; provided said track or tracks are constructed in such a manner as not to interfere with the travel over said streets or roads."

Even granting the appellees' contention that this section gives the company the right to select any street or road on which to lay its track, still it is too clear for argument that such right must be exercised subject to the rights already acquired by the Baltimore and Hampden Company; moreover, the right must be exercised subject to the right in the public to travel over said street or road, and if, as is

alleged in the bill and not denied in the answer, the tracks of the Baltimore, Hampden and Lake Roland Company can not be laid on Huntingdon and Remington avenues without obstructing the travel over those streets, then clearly the construction on those avenues must be enjoined until the appellees are able to show that the tracks they propose to construct will neither deprive the Baltimore and Hampden Company of its rights on those avenues nor obstruct public travel on the same.

We submit that this conclusion follows from the conceded facts in the case.

BERNARD CARTER,  
COWEN & CROSS,  
HUGH L. BOND, JR.,

*Counsel for Appellants.*

Filed November 18, 1891.

THE BALTIMORE AND  
HAMPDEN PASSENGER  
RAILWAY COMPANY,  
AND  
THE BALTIMORE UNION  
PASSENGER RAILWAY  
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*vs.*

THE BALTIMORE,  
HAMPDEN AND LAKE  
ROLAND RAILROAD  
COMPANY ET AL.

IN THE

COURT OF APPEALS

OF MARYLAND.

OCTOBER TERM, 1891.

GENERAL DOCKET, No. 71.

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APPELLEES' BRIEF.

The bill filed in this case is substantially the same as the bills in the Bonaparte case and in the case of The Union Passenger Railway Company.

An additional plaintiff is joined, The Baltimore and Hampden Passenger Railway Company.

The appellee relies on its brief in the Bonaparte case and The Union Passenger Railway Company case.

An additional allegation is made in the bill in this case, that, under the charter of the said The Baltimore and

Hampden Passenger Railway Company, it was given the exclusive right to the use of the streets or roads occupied by it.

It is only necessary to examine its charter, chapter 32 of the Acts of 1865, to see that this claim is unfounded.

Section 5 of said Act is the section relied on for this privilege. It says: "That said company hereby incorporated shall have power to construct a railway, with one or two tracks, and the necessary sidelings, and have *the exclusive use of the same.*"

It only has the exclusive use of its tracks and sidelings under this section.

An exclusive use of the streets is given in very different language, as will appear from the charter of The Baltimore, Hampden and Lake Roland Railroad, chapter 284 of the Acts of 1872, section 6: "The company hereby incorporated shall have power to construct a railway, with one or two tracks, and the necessary sidelings, for the transportation of travelers or freight by horse power, and have *the exclusive use* of any streets or county roads over which they may wish to lay their track, between Boundary avenue and Lake Roland."

STEELE, SEMMES & CAREY,

FIELDER C. SLINGLUFF,

*For Appellees.*