Mayor & City Council
of Baltimore
vs
Porter

64 Sides
$4480

IN THE COURT OF APPEALS.

Appellees Stat

THE MAYOR AND CITY COUNCIL OF BALTIMORE,
AND WILLIAM T. VALIANT, CITY COLLECTOR.

Filed June 17 1861

vs.

GEORGE U. PORTER.

This is an appeal from an order continuing an injunction, restraining the sale of complainant's lots on North Avenue for grading taxes. The general facts of the case are as follows: North Avenue is an avenue or street upon the northern limit or boundary of Baltimore City; the ground upon its southern side lying in the city, and that upon its northern side in Baltimore *County*. Early in the year 1856, the subject of grading this avenue was brought to the attention of the City Commissioner, who reached the very correct conclusion, in which he was supported by the opinion of the City Counsellor, that owing to the location of the avenue, it could not be graded by the City under any of the then existing laws and ordinances. (Quincy's ev. Rec. p. 92, Shannon's ev. p. 145.) An act of the Legislature was necessary. Application was accordingly made to the Legislature, and a law was passed March 8th, 1856, authorizing the city, upon certain terms and conditions, to grade the avenue.

Subsequent to the passage of this law the avenue was graded between Pennsylvania Avenue and the Northern Central Rail Road, under a contract between Slater and Shannon, the City Commissioner. (Rec. p. 14.)

A tax for the grading was assessed by the Commissioner upon the lots of the complainant, fronting upon the avenue, and for the non-payment of this tax they were advertised for sale at public auction by the City Collector.

It is not pretended that an ordinance was passed by the city, under the act of 1856, ch. 164, allowing the grading, and providing for an ascertainment of benefits and damages; or that action upon the subject of any kind was ever taken by the Mayor and Council, other than by the ordinance of Dec. 9th, 1858, (Rec. p. 15,) by which, after the injunction had been granted in this case, a curious attempt appears to have been made, by retro-active legislation, to supply all omissions and correct all defects.

The City Commissioner intended to make his proceedings in grading the avenue, conform to the requirements of the "ordinance No. 15, establishing a system for the grading, paving and repaving streets in the City of Baltimore," approved May 20th, 1850, (see contract, Rec. p. 14,) and—with the exception of a fatal omission to be hereafter noticed—he seems to have done so. His notion was that the act of 1856, although he or his office is not alluded to in it, did by its direct force and operation, invest *him* as City Commissioner, with authority to grade the avenue, and assess the expenses precisely as he would have had a right to do, in the case of a street lying wholly within the city, (Shannon's ev. ps. 145, 146.) The defendants, therefore, throughout, in their answer, exhibits and testimony, rest their case, as they are obliged to do, upon the alleged compliance of the Commissioner, with the laws and ordinances for grading of streets in the *city*.

These laws and ordinances do not require an ascertainment of benefits and damages, and the Commissioner, therefore, made none, (Quincy's answer to 14th int. Rec. p. 95,) but assessed upon every foot of ground fronting upon the graded part of the avenue, without regard to the depth of the lot, a grading tax of

somewhat more than nine dollars. (See the warrant, Rec. p. 17, and Quincy's ev. p. 93.)

The evidence throughout shows this tax to be enormous and oppressive, and that in some instances it absorbs the value of the lots. (See testimony of B. Horn, Rec. p. 64; of Wm. Todd, p. 69; of Myers, p. 73; of Eden, p. 76; of Peters, p. 89; of Monroe, p. 102; of Thrush, p. 105; of Walker, p. 108; of Bond, p. 78;) and the complainant contends, and his bill alleges, that the proceedings of the commissioner, from the beginning to the end, were a clear usurpation of authority—that he had no power under the law to grade the avenue at all; and if he had, that his assessment, which he proposed summarily to enforce by a sale of complainant's property, is a mere nulity, because in its nature and essential character, it was wholly distinct from, and repugnant to the assessment contemplated by the act of 1856.

Whether the Commissioner had any authority in the matter, and whether his proceedings and mode of assessment were valid, must be determined by the proper construction of the act of 1856. It is the expression of the legislative will upon the subject of grading North Avenue: it defines the power of the City Government, the mode in which it shall be exerted, and the rights of the property owner. If the proposed sale of complainant's lots, arrested by the injunction in this case, be lawful, it must be because by the act of 1856, it was authorized.

It is not known that there is any dispute as to the correctness of this general statement of the facts and issues involved.

Preliminary to an examination of the points to be presented several things are to be remembered, and borne in mind throughout.

1st. The principle upon which a court of equity will interpose to enjoin a sale in cases like the present, is set forth in Holland vs. Mayor & C. C. of Baltimore, 11 Md. R. 186. In that case the *particular point* decided was that the city could not sell the property upon which paving taxes were assessed un-

less the owners of a majority of front feet had concurred in signing the application—that without such signing the assessment was void. But the *broad principle* of the case is that, if for any reason whatever, the threatened sale would *be void*, equity will restrain the sale to avoid multiplicity of suits, and to prevent a cloud from being thrown upon the title. If, therefore, the assessment in this case was wholly unauthorized, and the sale for its non-payment could convey no title, the order below must be affirmed. (Vide also Stewart vs. the Mayor & C. C. of Baltimore, 7 Md. R. 515.)

The fact that Porter signed the application, and that the act of 1856 gives an appeal, may be thought to distinguish this case from that of Holland vs. M. & C. C., and to deprive him of the right to come into Court upon the principle therein established. Whether this be so will be hereafter considered.

2D. Assuming the complainant's right to an injunction to be unaffected by the two last mentioned facts, the only question in the case is as to the defendant's power *to sell complainant's land*. The injunction interferes with no other right, than with the alleged right *of sale* by the City Collector. All other questions collateral to this one, and not bearing directly upon it, are consequently calculated but to embarrass and mislead.

3D. In this case the city has attempted to divest Porter of his property—to charge it with the cost of a public improvement, and to enforce payment of the charge by a sale. When such an act is done by the State, or the city, it is the exercise of a "high prerogative of sovereignty," (Canal Co. vs. Railroad Co., 4 Gill & J. 175,) and the act conferring the power must be strictly complied with. Without the explicit sanction of the Legislature the city can have no shadow of power to sell complainant's lots; and with such sanction, as the power is a most delicate one, and liable to abuse, she must proceed with caution. Nothing prescribed in the act, which confers the power, mate-

rial to the protection of the citizen, can be omitted. Upon this doctrine, vital and fundamental the authorities are unanimous:

Sharp vs. Spier, 4 Hill R. pages 81, 83, 85.

Beatty vs. Lessee of Knowles, 4 Peters R. 167, 169.
Ibid 358.

Jackson vs. Shepperd, 7 Cowen 90.
~~7 Cowper 88, 90.~~

State vs. Vaugerson, 3 Green (N. J.) 341.

Williams vs. Peyton, 4 Wheaton 77, 79.

Atkins vs. Kimman, 20 Wendell 249.

Thatcher vs. Powell, 6 Wheaton 119, 125, 127.

Coney vs. Cummings, 12 La. Annual R. 749.

Mayor of Liverpool vs. Chorley Waterworks, 21 Eng. Law & Eq. 625.

Allen vs. Smith, 1 Leigh 250.

Nalle vs. Fenwick, 4 Randolph 590.

Doughty vs Hope 3 Denio 599, 601.

Scales vs. Pickering, 4 Bingham 452.

Lyons vs Hunt 11 Ala R. 311 to end of the case
Stiles vs Weir 2 6 Miss (4 Cush) 187
Hubbell vs Weldon Hill 4 Denio (NY) 145.
Alexander vs Walker 8 Gill 260.
Alexander vs Pitts 7 Cush 505.
Early vs Doe 16 Howard 618

(a)

Specially delegated powers must be strictly pursued; and when the statue prescribes the mode of executing the power, it can be executed in no other way:

Andover and Bedford Turnpike Cor. vs. Gould, 6 Massa R. 44.

Canal Co. vs. Rail Road Co., 4 Gill & J. 175.

Rex vs. Croker, 1 Cowper 26, 29.

Barrickman vs. Commissioners of Harford Co., 11 Gill & J. 56.

State use of Levy Court vs. Merryman, 7 H. & J. 91.

Swan vs. M. & C. C. of Cumberland, 8 Gill 154.

Root vs. State, 10 G. & J, 374.

(b)

A corporation has only such powers as are granted by law and can only act in the manner prescribed.

8 G. & J. 319.

15 Johns R. 357.

Ang & Aimes on Cor. sec. 111.

Turning now to the act 1856, it will be discovered that most of the points in the case are embraced under two main enquiries, to wit: Has the city ever acquired power to grade N. Avenue? And if so, has it ever exercised the power—or *so* exercised it as to have entitled herself to sell complainant's lots for the non-payment of the taxes assessed upon them?

1st. *The city never acquired power to grade, because* (and the bill so alleges,) *no application to grade was signed by the owners of a majority of front feet.*

The act of 1856 demands that this should be done, as a condition precedent to the acquisition of power by the city. And when the law thus demands, and there is no compliance, the whole proceeding of grading is unauthorized, and can impose no charge upon the complainant or his property.

Holland vs. M. & C. C. of Balto., 11 Md. R. 186.

Sharp vs. Spier, 4 Hill 81.

Swann vs. M. & C. C. of Cumberland, 8 Gill 152.

Henderson vs. M. & C. C. of Balto., 8 Md. R. 353.

It may be remarked that although the act clearly contemplates that the application should be addressed to the M. & C. C. of B., the application in this case is addressed to the Commissioner,

(Rec. p. 14,) but by whom, or at what time, the words "City Commissioner" were inserted does not appear, (Bond's ev. Rec. p. 57.)

(c)

From the testimony of the City Surveyor (Bryson's ev. Rec. p. 97,) the distance—

From Pa. avenue to W. side N. C. Railroad (county side)	5,772ft.	5in.
From Pa. avenue to W. side N. C. Railroad city) side)	5,736ft.	9in.
The distance (per condemnation plat) from W. side N. C. Railroad to Falls Turnpike, (county side)	271	
W. side N. C. Railroad to Falls Turnpike (city side)	273	
	12,053ft.	2in.
One-half of 12,053ft. 2in	6,026ft.	7in.
Requisite to constitute majority	6,027ft.	7in.
The number of feet upon the face of the application is	7,047ft.	6in.
Deduct number constituting a majority	6,027ft.	7in.
Surplus	1,019ft.	11in.

(d)

According to the survey made by Bryson, the City Surveyor, (Rec. p. 98,) the number of front feet owned by the parties signing the application was	6,112ft.	6in.
Bryson's testimony omits the name of Lester, who, upon the warrant (Rec. p. 17) which was prepared from Bryson's survey, (Quincey's ev. Rec. p. 92 & 146,) is charged upon	246ft.	
	6,358ft.	6in.

Whole number of feet belonging to signers of the application, according to City Surveyor.....	6,358ft.	6in.
Deduct number constituting majority, (Table c.)	6,027ft.	7in.
Surplus.....	330ft.	11in.

The first statement (Table c.) presents the case in its aspect most favorable to the defendants. It concedes the accuracy of the numbers on the application, which were merely the rough estimate of the parties, who in some cases doubted whether their property fronted on the avenue at all, (Meakin's ev. page 79.)

The other adopts the survey of the City Surveyor. By that survey the Commissioner was controlled in determining to grade, and preparing the warrant of assessment.

The defendants deduct, in their calculation, the front feet covered by cross streets, and the part of the avenue, never graded (Rec. ps. 98, 147,) between the N. C. Railroad and the Fall's Turnpike. But for this they find no shadow of sanction in the act; which clearly requires a majority of front feet between the termini designated in the application. The act, being in derogation of private rights of property, must be construed strictly, (Dwarris on Statutes 750.) What word or phrase in it justifies the rejection of a single front foot from the computation?

The following signatures upon the application are assailed:

Mt. Hope Sisters of Charity.....	1051.
H. L. Bond.....	1581.6
E. H. Merrill pr. Alonzo Lilly.....	1292.
Saml. Meakin.....	227.
Jesse T. Peters, ex'r.....	141.
Wm. F. Frick and Chas. Frick, ex'r. Wm. Frick,...	204.
Chas. Myers.....	66.
James M. Lester.....	454.

Conceding to defendants the statement (Table c.) most favorable for them, it will be sufficient for our purpose to invalidate either one of the first three signatures.

And even conceding *their own* estimate most favorable to themselves, it will be sufficient to invalidate two of the three, or only one, if supported by a successful attack upon the other names above mentioned.

(e)

It is contended that the signature of "Mount Hope Sisters of Charity is invalid. The evidence relating to this signature is contained in Bevan's testimony, (Rec. 47 to 52), and that of Sister Aloysia, (Rec. 128 to 131.) The property was owned by a corporation styled "*The Sisters of Charity of St. Joseph's,*" whose chief officers resided at Emmitsburg, where its deeds and important papers were executed, and where the corporate seal was kept. Sister Aloysia, who signed the application, was bookkeeper of the Institution for the Insane, the sisters of which institution styled themselves "the Mt. Hope Sisters of Charity." What proof is there that sister Aloysia was authorized to sign? She does *not* sign the name of the corporation which owned the property, nor pretends that she *intended* to do so. *She* knew of no authority from Emmitsburg, but signed by direction of the Superior, who had, herself, no authority to sign unless derived from the corporate officers at Emitsburg. Had the Superior authority? The onus of proof is shifted upon the defendants. The complainant was not required to adduce further evidence, when he had shown that the person signing the application, neither signed the name of the owner, nor had any knowledge that she was authorized to sign it.

If the "Superior" had received authority to sign, could she delegate it? The general rule is otherwise. Story on Agency, secs. 13, 14, 15.

It may be contended that the signing by Sister Aloysia was subsequently ratified. Payment is not a ratification; but there is no proof of payment; the evidence adduced to show it has been excepted to, (Rec. 166,) and is clearly hearsay.

But, after the application had been acted upon by the Commissioner, there could be no ratification, by one owner of property on the avenue, of an unauthorized signature, which would bind other owners.

This is clear upon principle. A signature to an application of this sort, which, with others, makes up a majority binds every body—*every* owner upon the part of the avenue to be graded. When action is had, by the proper authorities, upon an application so signed, it is *valid* action, because the condition upon which the statute gives power has been fulfilled; if upon an application not so signed, it is *invalid* action, which binds *nobody*. Can subsequent ratification charge not only the party ratifying, but *others*, making that proceeding obligatory upon them, which before was a nullity? The case of Henderson vs. M. & C. C. of Baltimore, 8 Md. R. 353, is directly to the point.

The maxim, "*omnis ratihabitio retrotrahitur, et mandato priori equiparatur*" is by no means of universal application.

Story's Agency, sec. 245, 246, 247, and the cases cited in the margin.

The very question is, was the application signed by a majority, *at the time* it was acted upon as a basis of power?

If a party does not *profess* to act as agent there can be no ratification. Chitty on Contracts, 212.

Story's Agency, sec. 251 (a)
Saunderson vs Griffiths 5 Barn & Cres 915
Veal vs Ashby 10 Barn & Cres 298
Wilson vs Tumman 6 Manning & Granger 242
Newson vs Douglas 7 Har & John 451,

(f.)

That the signature of H. L. Bond, is invalid.

The evidence concerning this signature is found Rec. p. 47, and from p. 57 to 60. Bond was entitled to one undivided ninth of the property for which he signed upon the termination of the life estate of his mother then living.

There is no room for inference or presumption about Bond's authority from the other parties interested in the property, he

declares explicitly that he had none, Rec. p. 60, and that he does not think any of them "knew of the signing of any application," that so far as he could say "they knew nothing about it."

Then this signature must be null *in toto*. To give power, and bind all parties on the avenue, the substantial ownership of the whole (and not an undivided part) of each foot of ground, going to make up the majority, must be represented upon the application.

Holland vs. M. & C. C. of Baltimore, 11 Md. R. 186.

Act 1833, ch. 40.

(g)

That Alonzo Lilly had no authority to sign for Merrill.

All the evidence upon this signature is found in Merrill's depositions, Rec. p. 41 to 43, p. 156 to 161. Lilly's testimony, Rec. 80 to 88—112 to 115—126 to 128. Popplein's testimony, Rec. 132 to 134. George Peter's testimony, Rec. 154 to 155.

"Complainant's exhibit Alonzo Lilly, No. 1"—Rec. p. 43.

" " " " No. 2 — " 44.

Defendant's exhibit Alonzo Lilly, A.— " 44.

" " " " B.— " 44.

" " " " C.— " 45.

Merrill declares that he has no recollection of having authorized Lilly to sign his name to the application; and that he learned, for the first time, that his name had been signed through a communication he received from Wm. Frick, dated Feb. 3d, 1859. Rec. p. 42. This statement is corroborated by a conversation which he says occurred between him and Lilly, in which the latter said that *he* too had no recollection of having received authority to sign, but that, if called on as a witness,

he would have to say, "that he could not have signed it without an authority." Rec. p. 158. And when Lilly was afterwards examined this was really the substance of his testimony throughout. When asked by the defendants (whose witness he was,) by whose authority he signed the application? his reply is, "it must have been by Mr. Merrill's authority." Rec. p. 80. He subsequently says that his recollection of having received authority was "very indistinct." Rec. p. 80. That he could not say whether his authority was verbal or in writing, nor where it was given—whether in Baltimore or Brooklyn—nor when. He is simply certain he had authority, because he is sure he would not have signed without it. Rec. p. 82. This is the plight in which Lilly's testimony was left by his first examination. Subsequently, at his second examination, in compliance with a request previously made by complainant's solicitors, (p. 84,) he produces two letters to him from Merrill. Exhibits Alonzo Lilly, Nos. 1 and 2. Rec. p. 43, 44. It is in these letters, Mr. Lilly tells us, we find his authority for signing the application to grade North Avenue between Pennsylvania Avenue and Falls Turnpike. Rec. p. 114. The recipient of these letters, Mr. Lilly, does not himself regard them as directly conferring upon him authority to sign the application, which he did sign. He says (while these letters were in his pocket,) that he had "no express authority" to sign. Rec. p. 112. And no doubt he was right, in his construction of the letter, unless in some ingenious way, we can make York Avenue, and Falls Turnpike, mean the same thing. Lilly thinks that the words "York Avenue" were a mistake. Rec. p. 126, 127. But Merrill says he meant, in his letter, York Avenue and nothing else, that he knew that North Avenue had been condemned all the way through to York Avenue, that it was proposed to grade it all the way through, that the city had made an appropriation for a bridge across the falls, and that the general plan and expectation were to make the North Avenue all through, and

"that he had no thought or idea but that the grading was to be all the way through to York Avenue." Rec. p. 157, 158. And he gives his reason for his unwillingness that the North Avenue should be graded for a less distance. (p. 161.) In these facts, and his knowledge of them, Merrill is sustained by Popplein, Rec. p. 133 and 134, and also by Geo. Peters, Rec. p. 154 and 155. And these last two both sustain Merrill in the opinion that the grading would have been a far more valuable improvement, if, instead of stopping at the N. C. Railroad, or even the Falls Turnpike, it had been extended to the York Avenue.

That portion of Lilly's testimony in which he attempts to show that the words "York Avenue," in Merrill's letter, were a mistake, is not only in the highest degree vague and unsatisfactory—a mere opinion, founded at best upon indistinctly remembered conversations of a year or two before, Rec. p. 126 and 127,—but is inadmissible, and has been excepted to, Rec. p. 166.

When authority is given to an agent by a written instrument, it is subject to strict interpretation, Story on Agency sec. 68, 69, and the nature and extent of the authority must be ascertained from the instrument itself, and cannot be varied or enlarged by parol. Story's Agency sec. 76, 83.

This effort to show a mistake in a letter of instructions from a principal to his agent is a novelty. Shall an agent be permitted to say that he knows what his principal intended to write better than the principal does himself?

It was the duty of the Commissioner to ask for Lilly's authority, and to reject his offer to sign for Merrill. Story's Agency, sec. 127, (note) also the end of sec. 133.

But *if* the Court in a case like this could alter and reform Merrill's letter, by substituting Falls Turnpike for York Avenue, it certainly would not require less siringent proof for doing so, than it demands in reforming contracts; and in such cases if the proofs are doubtful or unsatisfactory, and the mistake is not made entirely plain, it will withhold relief. Story's Eq. vol. 1, secs.

152, 157, page 177 note 5. Sec. 160. Where can such proof be found in this record?

(h)

SAMUEL MEAKIN'S SIGNATURE.

The evidence upon this signature is found in Meakin's testimony, Rec. p. 78 and 79, and Bryson's, Rec. p. 99, 100, 109. 110, 112. Meakin's property did not front at all upon the avenue; an old public road, or lane being interposed, Rec. p. 79, 99, 100, 112. His property was not assessed by the city, Rec. p. 79; but the interposed public road was, (vide Assessment warrant page 18.)

(i)

LESTER'S SIGNATURE.

The evidence upon this signature is found in Lester's testimony, Rec. p. 67, 68, and Bryson's, Rec. p. 100, 109, 110, 112. The public road was interposed between a portion of Lester's property and the avenue, leaving 246ft. fronting upon the avenue, for which he was assessed, and for which his signature is valid.

(j)

CHARLES MEYER'S SIGNATURE.

Upon this signature the evidence is found in C. Meyer's testimony, Rec. p. 72. His property fronts upon the avenue, 8ft. 6 (page 72,) and that number of feet was assessed, and for that number his signature is admitted to be valid.

(k)

JESSE T. PETERS' SIGNATURE.

Rec p. p. 53 to 57. The title of the property for which Peters signed as executor, was held by Messrs. Rieman and Warfield under the will of Geo. Peters, in trust for the heirs of Geo. Peters, (page 54) some of whom were infants. He signed without the knowledge of either of the trustees, or of the heirs, excepting his brother George, and possibly B. H. Richardson, (page 57.)

(l)

THE SIGNATURE OF

WM. F. FRICK AND CHAS. FRICK, EX'RS. OF WM. FRICK.

Rec. p. p. 61, 62, 63. The title of the property for which Mr. Frick signed was in his mother for life, and at her death it goes to himself, his brothers and sisters—in all, at the time of signing, 8 persons. He was in the habit of managing the estate with the acquiesence and approval of all parties interested. He might, therefore, have properly signed the application in his and their behalf. But the power possessed by him as agent he did not exercise. He was asked to sign as acting executor (page 63) and he did so. This property was not leasehold, but in fee, act 1833, ch. 40.

II. *If the city ever acquired power to grade North Avenue, the power was never exercised.*

The bill charges that while the act 1856 gave to the Mayor and City Council of Baltimore, upon "the application in writing of a majority in front feet of the owners of the land," power to allow the grading (if in their opinion consistent with the public good,) and "to provide for ascertaining whether any, and what amount, of damage would be caused thereby to the owners of the land on each side of the avenue," &c.—"And to provide for assessing on the property of persons benefitted," &c.—The Mayor and City Council never considered the subject, nor made any provision for accomplishing the designated objects, nor took any action in the matter whatever.

And so far as any action of the Mayor and City Council, in their official corporate capacity is concerned, these allegations are not denied. The only question made is as to the necessity of such action. But can this really be a question?

Whatever the true construction of the act may be, an ordinance was absolutely essential to put it into operation.

How else than by an ordinance can the city assent to, and exercise powers vested in it by the Legislature? (Vide city charter, act 1796, ch. 68, sec. 8.)

The clause "if in their opinion consistent with the public good" shows the necessity of an ordinance. It presents a question exclusively for the consideration of the Mayor and City Council.

Methodist Church vs. Mayor and C. C. of Baltimore, 6 Gill 400.

On this point, see the reasoning in M. & C. C. of B. vs. Howard, 6 H. & I. 383.

III. *If the city has ever exercised the power to grade and assess, it has done so in a manner so essentially distinct from, and repugnant to the provisions of the act, that its proceedings are a nullity.*

This proposition depends upon the meaning and intention of the act of 1856.

The complainant contends that the act clearly requires an ascertainment of benefits and damages; that the assessment should be made upon the property benefitted, and in proportion to the amount of benefit. Is not this the true interpretation of the act?

Not only must a statute, which divests the owner of his property, be strictly pursued, but it must be strictly construed.

"A power derogatory to private property must be construed strictly."

So also where extraordinary powers are granted affecting property of individuals.

9 Law Library (Dwarris on Statutes), 750.

Sharp vs. Speir, 4 Hill 84.

Scales vs Pickering 4 Bingham 452.

The interpretation put upon the act by the complainant, that the owners of property damaged should be compensated, and that property benefitted should be proportionately assessed, is, in its results, fair and equitable; while the enforcement of defendants' views, is proved by all the testimony to be in the highest degree unjust and oppressive. (B. Horn's evidence, Rec. p. 64. Wm. Todd's, p. 69. Myers', p. 73. Eden's p. 76. Peters' p. 89. Monroe's, p. 102. Thrush's, p. 105. Walker's, p. 108. Bond's, p. 78.)

We should not lightly impute to the Legislature an intention to perpetrate so intolerable a wrong upon private rights of property. But such intention is not clearly expressed; and can only be inferred by ingenious speculation upon a single clause, of a few words, at variance, (if the defendants' view of them be correct) with the whole body of the act.

The act is made by its title supplemental to the act, 1838, ch. 226.

In the construction of an act the title and preamble may be regarded.

Canal Co. vs. the Railroad Co., 4 G. & J 1.

Kent vs. Sommerville, 7 G. & J. 274.

Lucas vs. McBlair, 12 G. & J. 17.

The language of a greater part of the first section of the act 1856 is a transcript, or nearly so, from the act of 1838, ch. 226.

The powers conferred by this language have been construed by the Mayor and C. Council, and carried into practice in many instances, and during many years Revis. Ords. 1850, No. 17, sec. 6. And their construction and practice have received the sanction of this Court.

Alexander vs. M. & C. C. of Balto., 5 Gill, 384.

The only difficulty in construing the act is presented by the last clause of the first section, to wit: "in the same manner as is now provided by existing laws and ordinances for the grading and paving of streets in the City of Baltimore."

The existing laws and ordinances, for grading and paving, did not require an ascertainment of benefits and damages, but authorize the expenses of the work to be assessed, in the form of a grading or paving tax, on the property fronting upon the street to be paved, equally per front foot. Act 1833, ch. 40. Revis. Ords. 1850, No. 15. And from this tax there is not provided a right of appeal.

Thus the *two words*, "grading and paving" introduce confusion into the act, and conflict in its provisions. And they are clearly an accidental substitution for the words (such as "opening and widening," or "laying out and opening) which would have furnished an apt reference to the act of 1838, ch. 226, (to which the act of 1856 is supplemental,) and the ordinances passed in pursuance of it.

Watervillet Co. vs. McKean, 6 Hill 617.

Inhabitants of Shrewsburry vs. Inhabitants of Boyston, 1 Pick. R. 105.

Brown vs. Sommerville, 8 Md. R. 456.

The fourth section of the act of 1856 is conclusive in favor of the complainant's interpretation. What meaning shall we attach to the words "*similar cases?*"

(m)

Even if the defendants' construction of the act be the right one, they could not properly embrace within their assessment the cost of masonry work executed in constructing tunnels under the avenue. The bill charges that this was done, (page 4,) and it is undisputed. Such work is not within the definition and

meaning of the word grading, and, by the usage of the city, has not been heretofore charged upon the lot-holder.
(Quincy's Ev. Rec. p. p. 94, 96, 97, Shannon's p. p. 148, 149.)

Libby vs Burnham 15 Mass. R. 144
Sykes vs Hunt XI Ala. R. 311.

(n)

The application was not endorsed by the Mayor's approval, in writing, of the Commissioner's determination to grade, (vide the endorsements Rec. p. 15.) Under the defendant's construction of the act, this was necessary to confer upon the Commissoner power to proceed. Without the Mayor's approval, thus endorsed, the Commissioner's proceedings were void.

Revis. Ords. 1850, No. 15, sec. 3, 35.

(o)

Although by the city ordinances, taxes for grading as well as for paving and repaving are made a lien upon the property upon which they are assessed, yet the summary mode provided for collecting those taxes, by advertisement and sale of the land, applies to the latter, and not to the former.

Revis. Ords. 1850, No. 15, secs. 35, 37.

The following may be urged as points of objection to the complainant's case:

A.

That the ordinance entitled "an ordinance to confirm the grading of North Avenue," (Rec. p. 15,) passed Dec. 9th, 1859, several months after the injunction in this case had been granted, confers validity upon the Commissioner's proceedings.

But the ordinance in question was a manifest assumption of authority which the city did not possess. Her powers were de-

rived exclusively from the act, which gives no right to confirm, as against the complainant, proceedings which were void.

Doughty vs. Hope, 3 Denio 599.

B.

That the complainant signed the application to grade. The act of signing is supposed to preclude the complainant from denying that the application was signed by a majority.

Does it? If the application was not signed by a majority, there was no power to grade. The power must either exist or not.

Had the city power, as against the signers, and none against those who did not sign? Would not the sale of complainant's lot be as illegal as that of any other lot on the avenue?

Dilly vs. Shipley, 4 Gill 49.

The rule is that the acts of a corporation, unauthorized by its charter, though assented to by the person dealing with the corporation, bind no one.

North River In. Co. vs. Lawrence, 3 Wendell 482.

N. Y. Fire In. Co. vs. Ely and Parsons, 5 Connec. R. 560.

8 G. & J. 319.

The application was carried about for perhaps a month (Bond's Ev. p. 59) among the various owners of property on the avenue, and presented for their signatures. (Rec. p. p. 79, 81, 113, 129.) The successive signers *could not* have known that the application would be signed by a majority, and could not have intended to assert the fact by the phrase—"being owners of a majority of front feet"—and were not understood as so asserting by the

Commissioner. (Shannon's Ev. p. 146.) There was, therefore, no legal estoppel.

Carter vs. Derby, 15 Ala. 698.
Copeland vs. Copeland, 28 Maine (15 Shep.) 540.
Bank vs. Wollaston, 3 Harrington 95.
Freeman vs. Cooke, 2 Welsb (H. & G.) 662.
Den vs. Baldwin, 1 Zabriskie 403.
Dezell vs. Odell, 3 Hill 219.
13 Penn. State R. (1 Harris) 432.
Alexander vs Waller 8 Gill 251 to 254

The words, "being owners of a majority of front feet" show that it was understood by the owners to whom the application was successively presented, that it was contemplated a majority should be obtained. The complainant gave his name to aid in making up the majority. *Non constat*, that he was any more willing, than those who did not sign, that the avenue should be graded without a majority of owners to the application. Then there is nothing in good faith to forbid him from contesting the application.

C.

That the act grants a right of appeal to Baltimore City and County Courts, and that complainant should have sought redress by appeal.

The complainant, in his bill, (Rec. p. 3,) alleges as one of his grievances, that he had been deprived of his right of appeal; and it is clear that the subject matter, to wit: an assessment of benefits and damages, from which the act granted a right of appeal never existed. But even if he could have appealed, if the proceedings of the commissioner *were void*, the complainant had a right to have the sale restrained by injunction.

Stewart vs. Mayor and C. C. of Balto. 7 Md., R. 515.
Alexander & Willson vs. Mayor & C. C. of Baltimore, 5 Gill 384.

(p)

But if complainant had the right of appeal, then *because of that right*, the order below continuing the injunction ought to be affirmed.

Revis. Ords. 1850, No. 17, sec. 8 and 9.

WM. F. FRICK,
CHARLES H. PITTS,
GEO. C. MAUND.
Solicitors for Appellee.

(p)

Note.—Under 1850, No. 17, sec. 8 and 9.

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MAYOR & CITY COUNCIL OF BALTIMORE,

vs.

GEORGE U. PORTER.

Court of Appeals,

No. 6,

SPECIAL DOCKET.

June Term, 1861.

Argument of Mr. Horwitz in reply.

This case is one of importance in all its aspects. It involves upwards of one hundred thousand dollars; it involves the consideration of most important and interesting legal propositions, and it involves the character of some of the parties to these proceedings. It deserves and will, doubtless, receive the pains taking and anxious consideration of the Court.

In order that the true nature of the case may be understood, it will not be out of place to present briefly its history.

In the year 1854, it was thought desirable by property holders, looking to the progress and improvement of the west end of the city of Baltimore, that Northern Avenue should be condemned and opened. This Avenue forms the northern boundary of the city, and binds on one side on property in the *county*. The necessary machinery was put in motion, and the property forming the bed of the street was condemned. The system in the city of Baltimore, by which compensation is made to parties whose property is either taken away altogether or in any way damaged, by levying the value of the property taken

or damaged on the adjoining property ascertained to be benefitted by the contemplated improvements, is known to the Court. It has often been passed upon by this tribunal. All injuries to the property owners, who are deprived of their lands, or whose lots are rendered less valuable by reason of the contemplated street, *of its direction, of its established grade*, and the effect of its being opened upon the remaining property, are taken into consideration, and in the language of the authorities, *"liberal"* allowances are made to the parties in interest. Due notices are given to the owners of property, both at the time of the establishment of the grades of the streets and at the time of the condemnation of the property taken, in order that proper objections may be made, complaints heard and justice done to all parties. An Appeal is provided to the Courts from the action of the Commissioners, and the whole proceedings carefully guarded against injustice to the owner of the smallest strip of land. It is true, that owing to the imperfection of all human systems and to the practical working of those systems through agents, whose judgments may be defective, whose interest may be involved, or whose integrity may not be of the highest order, an occasional hardship may occur. A street may be prematurely opened, the majority may force an unwilling minority to give up their property, and a poor man, unable to pay the tax imposed as benefits, may be deprived of his homestead. These, however, are evils that cannot be guarded against by legislative enactment or judicial interpretation.

The parties who put the machinery in motion for condemning and opening Northern Avenue, are the same parties who subsequently applied to the City to have the street graded. As Mr. Hugh Lenox Bond represented a large property adjoining the City limits, and was desirous of bringing the same into market, particularly as he was a part owner, it was natural that he should have taken an active part in procuring the condemnation of the avenue, believing that it would materially advance the value of the surrounding property. On this condemnation his mother, Christiana Bond, the life tenant of the property, was adjudged to be damaged to the amount of

$2,466 95, and he, as her authorized agent, received and receipted for the same. (See Record, page 163.)

The parties desirous of converting Northern Avenue into a thoroughfare, having proceeded thus far towards the accomplishment of their object, next desired to have it "graded and paved." A difficulty here arose. The property in question was bounded on one side by the *County*. The power granted to the City by its Charter, and subsequent legislation, did not extend beyond the City limits, and it was necessary, therefore, that further power should be given in order that the wishes of those anxious for the grading of the avenue might be accomplished. Without going into the secret history of the act of 1856, or showing to the Court that the same parties were active in procuring its passage, suffice it to say that this mongrel act received the sanction of the Legislature in the month of March 1856. This act had scarcely passed, before the application for the grading, directed to the Commissioners, (Deft's Exhibit B,) was drawn up in the handwriting of Hugh Lenox Bond, signed by him as the owner absolutely of upwards of 1500 feet, without a word of explanation, and hawked about by him and other property owners, for signatures. A sufficient number is obtained by their exertions to constitute a majority. After the requisite forms are complied with, the work is advertised to be let in accordance with law. Mr. Bond, as far as appears by the evidence, failed to obtain that part of the contract for which he authorized.Mr. George Frick to use his name in bidding.— From that moment originated this case. The contract for the work is awarded to Mr. Wm. Slater, in July, 1856. Shortly after, without any knowledge to the contractor, a private meeting of the property holders takes place. Mr. Merrill is telegraphed all the way to Boston to be in attendance. Eminent counsel is to be employed. The meeting takes place in August 1856, after the work had been contracted for, but before it had been begun. At that meeting, after having considered all their interests, it was determined that it was "*inexpedient*" to apply for an injunction at that time. Not a word is said to the contractor. No notice of dissatisfaction given, or of any

future intent to dispute the correctness of the proceedings, or his claim to be paid. On the contrary, sub-contracts, *profitable sub-contracts*, are made with the contractor by some owners who took part at the meeting.

The work goes on. More than a year is employed in its completion. The contractor expends money and labor to an amount exceeding one hundred thousand dollars in executing the work. The whole benefit has been derived. The time for payment arrives, and after exhausting every effort to obtain amicable adjustments of the tax imposed, the City proceeds to enforce payment by sale. Then it is determined to be "expedient" to apply for Injunctions. The parties who were most active in procuring the condemnation and the grading of the avenue, who, at the meeting in August, *before the work was begun*, determined that it was "inexpedient" to apply to the Court, or to give notice to the contractor, are now, *that the work is completed*, most active again in attempting to stop the payment of the assessments. Mr. Bond, too, as counsel for his mother, Christiana Bond, once more appears as an actor. Not a word of complaint is made as to the faithful and entire execution of the work. No pretence of any fair or equitable ground of interposition. Not a dollar of compensation is offered to the contractor. But on purely technical grounds this Court is asked to interfere by way of Injunction in such a case. In the name of common honesty, can it be that such complainants can have a standing in a Court of Equity!

It will be observed that the case now under consideration of the Court is that of GEORGE U. PORTER, whose name is signed to the application for the grading in question. The principles that would govern the adjudication of this case might not dispose of all the questions that would arise and were discussed below in reference to those parties who had not signed the application. It is desirable, however, in order to put an end to litigation, that the various points raised by the respective briefs, material to the determination of the cases of non-signers should be also disposed of by the Court. The case will be argued with that view.

The question, by which the appellant is met *in limine*, and which really presents the only point that could interfere with its manifestly equitable claim, acquires some force in Maryland by reason of the decision of this learned Court in Holland vs. Mayor and City Council of Baltimore, (11th Md. 194.) It becomes important, therefore, to examine carefully the scope of that decision. Such an examination, it is believed, will shew conclusively that the case at bar is by no means covered by that decision, but is altogether outside of it. In that case, Holland, who had not signed the application for paving or done any act, so far as appears, to destroy his equities, applied for an injunction to prevent the sale of his property for the payment of his proportion of the paving tax. It was "conceded by the admissions of counsel," that one of the persons signing, without whose name there was no majority, was not the absolute owner of the number of feet for which he signed but only the reversioner. Thereupon this Court held that the lessee for years was the proper party to sign the application that there was not a majority of front feet, such as the law required to *give power* to the Commissioners to act, that the proceedings were therefore void, and that an injunction was a proper remedy.

I shall attempt to shew that in no particular does the case at bar resemble Holland's case.

A. It is insisted, that *in point of fact* there *was a majority* of owners of front feet subscribed to the application for grading. For the purpose of shewing this to be so, let us examine the objections to *Bond's* signature, to the signature of *Mt. Hope Sisters of Charity*, and to *Merrill's* signature.

The Court will observe that in the Bill in the case now under consideration, there is no *allegation in reference to the invalidity of the signature of the Mt. Hope Sisters of Charity, or of Merrill*, and in reference to their signatures, there is in point of fact *no issue before the Court*. However that may be, this case starts with the determination of the City Commissioners, acting by virtue of the authority conferred on them, that the signatures to the application are proper and sufficient, and that there is a majority of front feet affixed to the applica-

tion. This, it is true, has been said by the learned Judge, who delivered the opinion of this Court in Henderson's case, (8th Md. 360,) "to have *prima facie* effect only." In Holland's case that *prima facie* effect was destroyed by the admission of counsel and by an examination of the exhibits filed in the case. No denial was set up in the answer in Holland's case of the truth of want of ownership in Steuart. The question was presented to the Court upon the papers and concession of counsel. The Court may have the power to review the determination of the Commissioners upon a question of law arising out of the papers, when it could not review their finding on a question of fact *in pais*, where there was any evidence before them, just as in an award based upon an error in law apparent on the face of the award, the Court may set it aside, although it could not be interfered with, if the conclusion merely had been stated, without the reason for it.

How is the effect of this *prima facie* evidence attempted to be overcome in this case?

1. *In regard to Bond's signature.*

His want of ownership rests upon his own testimony, and upon the effect of the will of S. Birkhead. It will be observed that the greater part of the testimony in these cases is excepted to, (p. 164,) and it becomes necessary, therefore, to enquire into the validity of the exceptions in order to understand what case is before the Court.

The Court will see, by the agreement filed in the case, (p. 34,) that the testimony taken, though returned in this case, is applicable to *all the cases*, and it is therefore clear that the Complainants in the other cases to be determined by the testimony and decision in this case, are not competent as witnesses to establish facts for their own benefit. Under this head, it is insisted, comes also the testimony of Hugh Lenox Bond, for, although he is not a Complainant, but, as solicitor, (p. 34,) has filed a Bill in his mother's name, yet it is manifest that he is directly interested in the result. He has signed the application as the owner of the whole Bond property, and is admitted to be the owner of one-ninth in remainder. Is not

the tax a lien on the property, if properly levied; and is he not immediately interested in perpetually enjoining the sale of property to pay that lien, of which he owns even a part? Would not the sale dispose of the fee, and of course of his remainder?

But his testimony and Birkhead's Will, (if it can be seen by the Court to refer to this property at all,) shew that his (Bond's) mother, Christiana Bond, is *tenant for life*. Does it not follow from the decision in Holland's case, that the *life tenant*, (holding a larger estate in law than the lessee for years) is to be considered the owner for the purposes of signing the application in question. Does it not appear by the testimony of Bond himself, (if his testimony is in the case,) that he was the general agent of his mother, and as such empowered to act for her in reference to this property! But, above all, does not the evidence to be found on page 163 of the Record, conclusively shew that H. L. Bond had been accredited to the city government as the proper agent to deal with said property. It appears that enquiry had been instituted upon the subject by the proper officers of the city. "Upon examination of title," says Mr. Presstman, Counsellor for the city, "I find that *Christiana Bond is entitled to receive the amount of damages* above awarded and that *the order* of *Hugh Lenox Bond, Esq., will be a sufficient voucher.*" Upon this, the sum of $2.466 95 is paid to Mr. Bond for his mother and his agency for the property in question, fully established. How, then, does it lie in the power of Mrs. Bond, or Mr. Porter for her, to come now into Court and repudiate his acts in regard to the present proceedings with the very same parties, and in reference to the very same property.

2. *As to Merrill's Signature.*

The actual authority given by Mr. Merrill to Alonzo Lilly to sign for him by letters of May 11, and May 17, 1856, (see Record, pages 43, 44) during the time that the Defendant's Exhibit B, was in the hands of the property owners for signatures, and before it was delivered to the Commissioners, (on 28 May, 1856,) that he was desirous of co-operating with Bond,

Peters, and others, in the measure; *that he knew all about the proceedings* in the month of August following, when he came to Baltimore before the work was begun, and attended the meeting of property owners, is abundantly proved by the papers in the case and by the conclusive testimony of Alonzo Lilly. His letters written *in May*, desiring to unite with Bond, Peters and others, could have had no reference to anything except *the application which they were then signing* and persuading others to sign. It could not, by possibility, refer to any opposition supposed to have originated *three months afterwards*, from causes easily divined, when it is remembered that the contract was given out on 21st July. Merrill's subsequent contradictions, *his denying in his deposition the statements contained in his own letters*, the melancholy spectacle presented in the Record, (see pages 41, 156) of his effort to avoid responsibility, by endeavoring to throw it on his friend and agent Lilly, (Record, p. 80) are somewhat explained by his reply, (on page 159 of the Record) to the 4th cross Interrogatory.

"When that letter was written," he says "it was in May, 1856, *I was then in health*, and from the contents of that letter must have had some idea of the proceedings necessary for the opening of North Avenue. In the spring of 1857, I had a paralytic stroke, and was disabled for a long time; *my left side is now numb*; *my head would become very much affected and diseased*, and when I gave that deposition *the whole of these things had escaped my memory entirely, including the letters; I had no idea that there were any letters in existence.*"

Fortunately for the purpose of charity, it is believed that Merrill, (who is a party to Horn's bill,) is incompetent by his testimony to destroy the source of the power by which a lien is imposed on his property. His testimony has been therefore excepted to.

3. *As to the signature of Mt. Hope Sisters of Charity.*

That this signature was appended in good faith by the ladies at the head of the Mount Hope Institution, and with all the requisite authority from the mother corporation cannot be doubted, upon reading the testimony. No question has ever

been made by *them* of the authenticity or even propriety of the signature, deliberately placed there by the advice of Mr. Bevans and other friends. (Record p. 129.) No application for an Injunction on their part, no attempt to enjoy the labor and money of the contractor without compensation, but an actual settlement made by them of the assessment on their property without a single word of complaint or an intimation that the signature to the application was unauthorized. (Record pp. 129, 130, 131.) It was reserved for the complainant in this case to discover that the charitable ladies at the head of this noble institution might have set up certain technical objections to their responsibility not for their own benefit, (for they have always been ready to make compensation,) but for the benefit of others! All has been done, however, on their part necessary to make the signature binding. To prevent the abuse of the "power," says Justice Tuck in delivering the Courts' opinion in Henderson's case "certain preliminaries are prescribed, which must appear to have been at least *substantially* complied with and among these, as most important, is the assent of the proprietors of the requisite number of feet binding and fronting on the street to be paved."

It was never intended that the Commissioners should enter into the nice legal enquiries suggested by the complainants brief. The power of a corporation, its mode of acting, the doctrines of agency, general and special, were not to be passed upon by them. *Substantial* compliance was all that was required. Technical precision was not deemed necessary for all ordinary purposes.

The Court will perceive that if *any two* of the foregoing signatures are sustained, there are many more feet than required for a majority.

As to the other signatures objected to, representing a small number of feet, it is not thought necessary to trouble the Court in this printed argument in regard to them. Their validity is submitted on the oral argument already presented, it being rather my object to press upon the consideration of the Court the objections in law to the pretensions of the Complainant, than to discuss the facts.

It is believed that the foregoing review has substantiated the actual existence of a majority of front feet of signatures to the application. But, supposing that to be an error, let us next enquire in what respect this case differs from Holland's case, and how it is freed from the effect of that decision.

Holland's case arose upon an application *to pave under the general legislation for the City and its ordinances on the subject.* In such a case *there is no right of Appeal.* It differs in that respect from an application to condemn and open. If no right of appeal exists, then the only remedy for parties aggrieved is by Injunction. But in this case, by the special provisions of the Act of 1856, chap. 164, sec. 4, an appeal is secured. Upon appeal, the very question now under consideration, together with the legality of all the proceedings of the City Commissioner, would have been enquired into and finally determined. The case of Derickson and others vs. Predeaux and others, cited in the note to Brumbaugh vs. Schnebly, in 2d Md. page 325, and the case of Brumbaugh vs. Schnebly itself, establish clearly that where the right of appeal exists, it is the *only remedy*, and a failure to take advantage of that right deprives a party of all relief in equity. Both the above cases involved a question of jurisdiction ; in the one, because of the rendition of a judgment without issuing a warrant, and in the other, because of the splitting up of a large account into small sums to bring them within a magistrate's jurisdiction. And yet this Honorable Court say that "the defendant in such case, having full and ample relief at law, the remedy *could only be* in a Court of Law by a reversal of the judgments on appeal to the proper tribunal, for a want of jurisdiction by the Justice of the Peace giving the judgments, and *equity could furnish no relief. The question of jurisdiction being a question only of law and the judgments good until reversed on appeal.*" In further support of this view (which is deemed conclusive and a complete answer to the attempt to invoke Holland's case on the part of the appellee,) the Court is referred to the cases cited on page 13 of the brief, and particularly to the case of Methodist Protestant Church vs. Mayor and City Council of Baltimore, 6th Gill., 402.

The appellee insists in his printed argument, page —, that the complainants were not entitled to such appeal from the assessment of "benefit or damage from the grading" of North Avenue, for these reasons, viz: 1st. Because the city passed no special ordinance providing for such appeal; 2d. Because no general ordinance existed for an appeal from *assessments for grading* or paving; 3d. Because no such assessments were made and no proper notices given. Let us examine the validity of these reasons:

1st. There was no need for a *special* ordinance to be passed by the city. The act itself, by its very terms, gave the right of appeal. The language of the act (sec. 4) is, "The *same* right of appeal from any assessment of benefit or damage, &c., *shall be granted* to any owner, UNDER THIS ACT, as is now provided," &c. The act itself *proprio vigore* gave the right of appeal, and it required no further legislation to secure it.

2d. The very non-existence of the right of appeal by *general* ordinance in the case of grading and paving, was the necessity that required the insertion of the 4th section of the act. This section would have been quite unnecessary, if in all cases of grading and paving, or either, any appeal was allowed. Hence its insertion, and hence, also, its peculiar language. The appeal is to be the same as is now provided *in similar cases*, that is to say, in cases of assessments of benefits OR damages.

3d. To shew that an assessment of benefits *was* made, it is only necessary to call the Court's attention to the Defendant's Exhibit No. 3, (Record, p. 17.)

Now, whether that assessment was in accordance with the law, and properly made; whether the right notices had been given as provided "in similar cases," were *the very matters to be tried on appeal.* And to argue that the right of appeal was denied, because due notice was not given, is to argue in a circle. But let us look to the Record for the facts, both of the assessment and of the notice. The appellee himself has filed with his bill of complaint the following notice, given by the Collector; (Exhibit A B. Record, page 4.)

"CITY COLLECTOR'S OFFICE,

BALTIMORE, *July*, 1858.

In accordance with an act of the Assembly of Maryland, passed March 8, 1856, &c., &c., *Notice is hereby given* to the owners of the following described parcels of ground, ASSESSED for the grading of North Avenue, &c., that unless said "*assessments*" be paid within ten days after the completion of this notice, all such lots on which *said assessment* and costs remain unpaid, will be advertised for sale to satisfy the same."

Here was an *assessment of benefit* made, as the city authorities believed, in accordance with the act of 1856, and notice of it published in July, 1858. From this an appeal could readily have been taken, and the propriety of the assessment and notices duly enquired into. But this simple process did not suit the complainants. They took no notice of the advertisement at the time, although they now file it. After a delay of about sixty days, on 1st September, 1858, another notice is published, (Record, page 5,) fixing "Friday, October 1, 1858," for the day of sale. This notice, toc, is disregarded until the last hour of the last day preceding, (30th Sept., 1858,) when application is made for the injunction in this case. How, then, can it be said that there was no assessment, no notice, no right of appeal?

But there is another unanswerable distinction, it seems to me, between the case of Holland and the one under consideration.

In Holland's case the usual form of the application was followed, as will be seen by *reference to the record in that case.* There was *no allegation there* that the subscribers owned a majority of the front feet binding on Hollins alley. *Here*, however, the subscribers have voluntarily chosen to frame for themselves a special form and to allege that *they were the owners of a majority of front feet.* Is not each man, whose name is subscribed to that paper, *estopped* from denying the truth of that allegation? Is not this complainant whose name was affixed to that paper, after the names of Bond and Lester and Merrill and Frick and the Mt. Hope Sisters, especially estop-

ped from denying the truth of its allegations. The peculiar nature of the contract in question, must be taken into consideration. Where the city faithfully performs its duty, it is only the connecting link between the owners and the contractor. The contractor must look to the sufficiency of the authority conferred on the Commissioners, and must act at his peril. The law in this regard is hard, but what would be the extent of its hardship if, after having positively asserted to the contractor the truth of certain facts, it were competent to the parties who had availed themselves of those allegations, to turn round, when the day of payment arrived, and deny their truth, and to call upon those who had aided them in deceiving the contractor to become witnesses to free them from responsibility. The law says that this would be to encourage a fraud, and sets its face against it. It is not competent, say the authorities, for you to allege that you own a majority of front feet, when you want certain work done, and, *after it is done*, to swear that you do not own such majority. This is the principle established in the well known case of the Philadelphia and Wilmington Railroad Company vs. Howard, 13 Howard's Reports, 307. Such is the principle running through the long list of authorities so carefully collected by the young gentleman who prepared the appellant's brief on page 12. But so far as this complainant is concerned and all those similarly situated, this is a question that requires no special adjudication to support it. It addresses itself to the common sense and common honesty of every man. Would it not be monstrous to suppose, that a Court of Equity could sustain a party who comes within its halls and says in substance, "I signed a certain paper, representing certain facts, and thereby induced a neighbor to expend his money and his time to a large amount, *for my benefit*, and when he, in turn, asks for compensation, my answer is that the representations were untrue, and I therefore pray the Court to protect me from paying him one dollar."

It will be noted that the application was to have the North avenue graded between the "Pennsylvania avenue and the Falls road;" and that the parties signing the application not only say that they own a majority of front feet, but add that

they are "ready to comply with the ordinances of the City of Baltimore relating thereto."

The application was received and approved on the 5th June, 1856. The proper advertisements were then published, and the contract was not entered into until 4th day of August following. During all this time the parties who had been instrumental in forwarding the work, as well as those interested who were notified by the advertisements, had ample opportunity of correcting any errors into which they had themselves fallen, or had unwillingly led the Commissioners. But, with the application on record, containing the allegations above named, not one word of remonstrance or of warning to the contractor is heard. On the contrary, in the month of August, after the execution of the contract, but before the commencement of the work, the property holders meet and determine even then that it is "inexpedient" to interfere with the progress of the work. The effect of this conduct on the responsibility of the parties to it, (signers and non-signers,) has been clearly set forth in the oral argument delivered, and is abundantly shewn by the authorities in the brief.

The brief also so clearly contains the propositions and authorities by which the property owners who were not signers to the application, but who stood by and saw the work in progress, are estopped now from urging before this Court, as a Court of Equity, any objections to the payment for the work which they might have urged before it was done, that the Court is referred to those authorities without further comment.

Having, it is believed, thus clearly established that there is a majority *in point of fact*, and that it does not lie in the mouths of these complainants to deny the existence of such majority, but that as to them, whatever the fact may be, there is a majority *in point of law;* it follows, thence, that the jurisdiction of the City Commissioner attached, and that his proceedings within his jurisdiction cannot be impeached collaterally. This brings us to the examination of the *second* enquiry, viz: the nature and construction of the Act of 1856, and the materiality of the objections to the proceedings of the Commissioner thereunder.

B. It must be admitted, that it is difficult to put upon the Act of 1856 an intelligible and satisfactory construction to those who are familiar with the legislation in Baltimore and other cities in reference to the opening of streets on the one hand, and to the grading and paving them on the other. The systems are entirely different, and rest upon entirely different principles. The bungler who drew the Act, was manifestly ignorant of the existence of the two systems and the Legislature by which it was passed carelessly endorsed the blunder. That comity which prevails between the co-ordinate branches of the Government requires that some effort should be made on the part of the Judges to impute a meaning to the work of the Legislators of the State. This effort, it must be conceded, is often the most difficult of the onerous duties of the Judges, and it is submitted, that, keeping in view the two systems of opening and of grading, a more difficult task than that of reconciling the different parts of this Act has not lately been imposed on this Court.

The condemnation of private property for public uses is among the highest prerogatives of sovereignty. The citizen can only be required to yield his right to the exclusive enjoyment of his estate when it becomes necessary to the public convenience. Private right must then yield to public good. But the exercise of this high attribute of sovereignty—this right of eminent domain—has been carefully guarded, so that *even for the public* benefit no man shall be deprived of his freehold except upon just compensation, and that too upon the judgment of his peers. He must be fully compensated, and he must have the right of a trial by jury. In framing a system, therefore, in the different States, for the *condemnation* of property with a view to the *opening* of streets, these principles have been carefully borne in mind. In this State, as in all the other States, it is provided, that it must be determined "*by ordinance*" that the opening of the thoroughfare will be for public good. Except for the benefit of the *public*, an individual cannot be deprived of his private property. The ordinance cannot be passed by the Mayor and City Council of Baltimore upon its mere motion, even if it should appear to be an

improvement manifestly required by the progress of the city, (Act 1838, Ch. 226,) but it must be called for by an application of a majority of the property owners on the line of the the street, (Act 1834, Ch. 377, Sec. 3, and Act 1838, Ch. 226—proviso to Sec. 1,) although it is left discretionary with the authorities to assess and levy the damage and expenses on the whole property of the city, or on the property of persons benefitted.

The learned gentlemen who has prepared such an elaborate argument on this branch of the case is mistaken in supposing that the machinery for condemning and opening a street cannot be put in motion by the act of the property owners. On the contrary, prior to the passage of the Act of 1834, it could *only* be done upon the application of two-thirds, and now *only* upon the application of a majority of the proprietors. (See Acts 1817 and 1834.) The whole of that part of his argument, therefore, based on this error, of course falls with the detection of the error. The Mayor and City Council having determined that the public good requires the condemnation, provision is made for the payment of the value of the land taken, and of the damages to all surrounding property, and of the expenses. The right of appeal and of a jury trial is secured to each owner. This being done, the property condemned becomes the property of the public, with the entire and absolute control of the same for public purposes. The individual has lost his interest in it, has been paid its value, and now has no more control over or right in it than any other citizen. Not only has he been paid for the land actually taken, but he has been paid for *all damages to his surrounding property*. It is very important to the proper understanding of the equities of this case, that the nature of this part of the compensation should be clearly understood. The property condemned is taken for a street. *The grade of the street has already been fixed.* In this case the grade was established in 1853. (See Act 1835, chapter 390, and City Ordinance 1853, No. 43.) Notice is duly given to the property owners to attend, to object if dissatisfied, and to appeal if their objections are disregarded. Once fixed, each proprietor is at once advertised of

the effect on his adjoining property. The moment the grade is established the relative position of each lot to that grade can be calculated to a line. Then come the condemnation and the assessment of damages and benefits by reason both of the taking of the property and of the injury to the adjoining land. The owner is entitled to be paid all damages, *present and prospective*, to the part left as well as compensation for the land condemned. By Sec. 7 of Ordinance No. 15 (Revised Ordinances 1858, which is referred to for convenience, being the same in the particulars relied on as the former Ordinances,) provision is made for parties who own a larger quantity of ground than the part required to obtain the full value for the whole lot, if they prefer it.

It is the duty of the Commissioners, or the Jury, or whatever body may be empowered to determine the question, to ascertain all such damages, and the law presumes that they have been ascertained. In this case, for example, the damages awarded at the condemnation of the property of any of the owners along the line of the Avenue, for the purposes of the Avenue, included not only the actual value of the property taken, but the injury to the residue of the property of any owner, (when part only was taken,) *by reason of the intention to make a street at a grade higher or lower than the grade of the property not taken.* For this anticipated injury full compensation was allowed, and of this character of injury, evidence is allowed to be offered either to the Commissioners or Jury, as the case may be. And so clear is the law upon this subject, that no action can be maintained even for a consequential injury arising from the condemnation and subsequent use of the property in the mode originally designed. *The future injury that may result from an inconvenient grading, is paid in advance at the time of condemnation.* The true doctrine on this subject is clearly laid down in the case of the Chesapeake and Ohio Canal Company vs. Grove, 11 G. & J., 398–404. Justice Stephen in that case says, "It was unquestionably the right and province of the jury, in estimating the value of the land condemned for the use of the Canal Company, to take into their consideration also all damages which the owner of the land would sustain by an appropria-

tion of it to such use, whether the same were *immediate*, *remote*, or *contingent*, and *the legal presumption is, that such duty has been faithfully performed by them*, conformably to the oath which they took at the time of the valuation, no objection having been made upon the return of the inquisition, and the same having been recorded. To support this action, therefore, would not only be a violation of the policy of the law, which was to prevent litigation, but would be to award to the plaintiff a compensation in damages for an injury for which, in legal construction, he has already received an adequate indemnity. This is a measure of remuneration which cannot be sustained upon the rules of fair dealing, and which the principles of law and justice will not tolerate.''*

It is manifest, therefore, that in 1854—(not 1852)—when Northern Avenue was condemned and opened as a public highway, *all* damages to the property owners, present and future, arising from the grade fixed the year previously were either allowed in point of fact or of law. The effect of this mode of adjustment, it will be at once perceived, is to place all the pro-

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*There is a singular mode of reasoning in the Appellee's argument by which the case under consideration is distinguished from the above case of the Chesapeake and Ohio Canal Company, vs. Grove.

The learned counsel, on page 13, suggests that there was no power conferred by the ordinance of 1854, (No. 75,) to assess "*damages on the County*, and it is clear, therefore," says he, "that, prior to the Act of 1856, chapter 164, there had existed no power to ascertain and provide for the payment of *damages* to County property that might arise in any way from the opening of Northern Avenue," &c.

Is not this a manifest error? The Act of 1838 gave the power to the City "to provide for ascertaining" the damages and benefits to the owner or possessor of any ground or improvements within or *adjacent to* the City, &c., &c. In exercising the power the City confined the authority of the Commissioners to ascertaining all damages to all parties damnified, but limited the assessing and levying of all benefits to City property. Finding its error in this particular, it passed the ordinance above referred to, by which it still further exercised the power given it, and authorized the levying of benefits on the County property benefitted. The *damages* are paid from the benefits. Damages to property in the County were paid by assessments on the property in the City supposed to be benefitted, and, in reference to the power to levy on property within the City limits, there was no difficulty. It is not so clear, therefore; particularly as the authority to assess for damages, acquired under Act of 1856, was only for damages arising from the grading, and not from condemning and opening.

perty binding on the street on a dead level. The hollows are filled up, the embankments cut down, by full compensation, so that the adjacent owners are placed on a complete equality.

The next step towards the improvement of the city property is the grading and paving of the street so as to adapt it to building purposes. For this object a different system has been devised. The bed of the street already belongs to the city. It has the right to dispose of its property as it sees fit, looking to its own interest. There is no longer any need for the exercise of the prerogative of sovereignty, of the right of eminent domain. The thoroughfare has been opened, and to the property holders who are believed to be sufficiently alive to their own interests, is left the time when it shall be adapted to building purposes. It is somewhat surprising that in the printed argument the gentleman should have erroneously satisfied himself, that there was no necessity for any application on the part of property owners for the purpose of opening or condemning a street *because it was for the public benefit*, and yet should have omitted to observe that, in this case, a prior application by a majority of property owners being a condition precedent, it would seem to have followed by parity of reasoning, that the public benefit had but little to do in contemplation of law with the grading of the Avenue, as it had in point of fact.

Upon the application of a majority, it is made the duty of the City Commissioner, if he should so determine, to cause the grading and paving to be done. The expenses are equally divided, *because all are equally benefitted.*

The importance of this position is such that I may be excused for dwelling on it a little longer. Stress has been laid in the testimony on the fact that some lots are very shallow whilst others are very deep ; and it is asked, can they be *equally* benefitted by the *grading*. A little reflection will show that this is so beyond doubt. Now it will always be borne in mind, that by the assessments made at the original condemnation for grading purposes, all allowances have been made looking to the topography and the depths of the lots, and a choice has been given to the owners to "throw up" or retain the residue as may seem to them most desirable. Such being the

case, labor and expense are bestowed in grading the street. How should they be paid? Equally, we say, is the true answer. It will be observed that the moment the street is graded, the shallow lot, with a depth of but 20 feet, is needed to give a front on the street to the lot on the rear of it. The shallow lot worth, before the grading, but $200, will be readily purchased by the owner of the rear lot, or by a thoughtful speculator, at $380. It makes his rear lot front on the street, and in truth, the *price of the grading is in the end* paid upon the *same* depth all the way along the avenue—that is, upon the usual building depth.

"It must be borne in mind," says our learned friend in his printed argument, "that the course of the North Avenue, was through a region of small farms and country seats, *yet distant from the city streets and grading*, and over a broken and uneven surface of country, traversed by streams and obstructed by ice ponds. The cost of construction of such an Avenue, involved considerations not applicable at all to the case of grading and paving an ordinary city street."

How the facts upon which this clever description is based are gathered from the Record, it is difficult to see—nor will it be easily believed by those familiar with the city of Baltimore, that the surface of the country in the neighborhood of Northern Avenue differs much from the former condition of Centre, Franklin, Monument, Hampstead Hill, and other now beautiful and closely inhabited streets of the city. The only difference being that the country around Northern Avenue is less broken and uneven than were those streets, and is far more level than the neighborhood of Chester street, Patterson's Park, or Charles street in the vicinity of Jones' Falls. It will also be remembered that the Northern Avenue cannot be very distant from the city streets, when $18,000 worth of work was obtained by the heirs of Judge Frick in grading *the adjoining streets* through their property under this very contract, and that the Avenue itself was only graded because a large majority of the owners binding on it so desired. But the reasons assigned for requiring a different law to be applied to North Avenue, from the law applied to other streets in the

city are, that a "tax would have been unequal and improper when applied alike to a city and a county front." Why? "Because the former is valued by a different standard, subject to a different system of general taxation, and enjoys or suffers, as might be, the benefits or disadvantages of a municipal control, of which the county part was deprived."

Now I candidly confess, that I do not know the standard to which the learned counsel refers. The buildings erected on the property on Charles and Decker streets, beyond Northern Avenue, are, I should suppose, valued as any other property on any other street. Their situation, distance from the centre of the city, amount of taxation, present and prospective, form the basis of calculation. To one who had not carefully traced out the boundaries of the city of London, it would be very difficult to know when he had reached Westminister. He certainly could not distinguish "Bishops gate street within" from "Bishops gate street without." It seems to be equally unintelligible how, upon the supposition that an equal benefit is conferred by grading upon both sides of the street, the compensation for it should not be the same, "because a different system of general taxation and political control" applies to the two sides of the street, which system of taxation and control remains unaltered. For example, there are two pieces of property on opposite sides of a street equally benefitted; a house is erected on each of the same size and character; the expense to each is $5,000. Now, says our friend, they ought not to pay equally for the same building, "because there is a different standard, because there is a different system of general taxation, because there is a different political control." These answers might be very conclusive to the party from whom the burden is attempted to be shifted, but would be very unsatisfactory to the carpenter who had built the houses, and was waiting for the payment of his bill.

But, the truth is, that the injury that may have been done to some owners on account of the grade itself has been already paid. It arises *not from the actual grading* but from the *taking of the property with a view to grading* on an established grade.

Hence the proceeding in reference to grading and paving is simple when compared with the exercise of the higher right of condemnation. No appeal is provided in regard to it. No jury trial is needed. As well might there be an appeal from the tax for the City Court or for the Alms House, or the Public Schools, and an ascertainment of its amount by a jury.

Bearing these views in mind, it will be seen that the Act of 1856, Ch. 164, is an absurd mixture of two systems that coalesce as little as oil and water.

If the views I have attempted to present are correct, then it is insisted that the following words contained in the law are nugatory and unconstitutional, viz: "to provide for ascertaining whether any and what amount of benefit or damage will be caused thereby to the owners of the land, on each side of said North Avenue, both in said city and Baltimore county, for which said owner or owners should be compensated, or ought to pay a compensation, by reason of the grading or paving, or both, as aforesaid." They are nugatory, because they provide for ascertaining that which had already been ascertained and paid for. They are unconstitutional, for they provide for the assessment and levying a second time on property damages which have already been assessed and paid. It seems to me to be equally unjust and unconstitutional to make a proprietor pay twice for the same benefits, as it is to take away his property without compensation. It is just as effectual a mode of depriving him of his property without an equivalent. Let us read the law with this sentence omitted and it is intelligible. It reads as follows: "*Be it enacted by the General Assembly of Maryland,* That on the application in writing of a majority in front-feet of the owners of the land, in Baltimore County, and in the city of Baltimore, fronting on said avenue, or in any part thereof, to the Mayor and City Council of Baltimore, to have the same, or such part thereof as such majority may apply for, graded or paved, or both graded and paved, they shall have full power and authority (if in their opinion consistent with the public good,) to allow the same, and to provide for assessing and levying on the property of persons benefitted within the same limits, the expenses

which may be incurred in the grading or paving, or both, of said North Avenue, or any part thereof, as aforesaid, in the same manner as is now provided by existing laws and ordinances for the grading and paving of streets in the city of Baltimore," and according to that reading it was properly and faithfully executed by the city officers.

But, upon the hypothesis that I have succeeded in demonstrating the existence either in fact or in law of a majority of owners to the application and the consequent power conferred on the authorities to act, then this application for an Injunction is based upon irregularities in the proceedings under the Act of 1856,—irregularities that might have been enquired into and corrected *on appeal.* Is not the case in 1 California, page 455, a complete answer to the complainant's equities? The Court's attention is especially directed to the careful consideration of that case: for it disposes of the numerous petty objections made in a Court of Equity to the payment of the debt due by the complainant.

But if that be not so, and upon this application for an Injunction the complainant has a right to enquire into the correctness of the proceedings of the Commissioners under the Act of 1856, then what has been the effect in law of the existence of a right of appeal and the failure on the part of the complainant to exercise it. That an assessment *was* made of benefits, &c., (whether properly made or not,) there can be no doubt. To correct such assessment the appeal is provided. The complainant does not avail himself of it. The consequence of this neglect will be found fully set forth in the authorities to be found on page 12 of the brief.

Let us now examine the objections not already disposed of in detail.

In the first place it is said that the city has not, *by ordinance*, declared that the grading, &c., "*was consistent with the public good,*" and this objection is urged by a complainant, who made application to have the work done, and undertook expressly to comply with the city ordinances on the subject.

The answer to this is fourfold:

1st. Wherever an ordinance is expressly required, it is so provided. See act 1838, ch. 226.

2d. The acceptance by the City Officers and the making of the contract, are sufficient to show that it is "consistent with the public good."

3d. The Mayor and City Council of Baltimore are the defendants, *and do not set up any such defence*, although they are the only parties who could take advantage of it.

4th. The ordinance of December 9, 1859. Record, page 15.

Secondly. It is said that the culverts should not be paid for.

No reason is assigned for this by the appellee, nor can one be readily assigned.

An abutment is no part of a bridge, but it would be singular if the expense of erecting it should not be paid for in the same way as the bridge.

Grading must be done, if at all, properly. To grade properly, culverts are necessary to carry off the water. To make culverts, mason-work is needed; and yet the complainant says that the culverts should not be paid for. They are just as necessary as the hauling of the dirt.

Thirdly. It is argued that there is no power of sale until after the street has been paved.

The answer to this objection is to be found in the law itself, which says that the expenses shall be assessed and *levied* on the property of persons benefitted, in the GRADING OR PAVING, in the same manner as is now provided for the grading AND paving of streets in the city of Baltimore.

The last objection made is as to the difference between the application, the contract, and the ascertaining and levying of the benefits or expenses. The application and the contract are for grading between Pennsylvania Avenue and Falls Avenue. The assessment is between Pennsylvania Avenue and the Northern Central Railroad.

It seems to be supposed that if the work had been completed to the Falls Road, the grade would have been changed and the access to the Falls Road, by way of Northern Avenue, would have been made easy. Some nonsensical testimony about a "climbing horse" is quoted with approbation as disposing of this question in a very ridiculous way. Now what have the termini of the work to do with the grade? The grade was

already fixed. It had been established in 1853, and the contractor was bound to follow the grade. Is it supposed that by following the same grade for 300 feet farther, it would have rendered the descent more gradual. On the contrary, it would have been still more abrupt. The grade of Northern Avenue, on this side of Jones' Falls, was made to correspond with the grade established on the other side, and the intention is to connect the two sides by a bridge, (see Act 1858,) under which will run the Falls Road. The learned gentleman has fallen into the error of supposing that to grade between two points necessarily means that the grading must run *from one down to the other*. The object of the grade fixed by the proper officers may be directly the opposite. For instance, it was designed in this case to keep the grade on the west side of the Falls the same as that on the east, and connect the opposite banks by a bridge. The same thing has been done in the neighborhood of Mt. Clare Depot with Schroeder Street. Suppose the intent had been to grade to York Avenue, then, of course, it could not have been graded down to Falls Road, and again up to York Avenue, without destroying the reasoning of the counsel, and also all the grading and paving already done on the east side of the Falls, for the Court will remember that there has been already graded and paved 400 or 500 feet on the east side of the Falls, in front of the cottages.

But the true answer to this difficulty is to be found in the law itself, which, by its 2d section, provides, that before the Mayor and City Council shall proceed to grade or pave *that portion of North Avenue* lying between the Northern Central Railroad and Pennsylvania Avenue, they shall divide the same into sections, not less than five, &c," and shall advertise for each of said sections, &c. Accordingly, the advertisement was so made, and the specification by which the bidding was regulated, (see Record, page 13,) was for these five sections, extending from Station O, east side of Pennsylvania Avenue, to Station 57, *west side of Northern Central Railroad.*

The law in the same section provides, that the *cost of executing said work* shall be levied generally *from Pennsylvania*

Avenue to the Northern Central Railroad. So that the assessment is properly made between those points for the work already done, and if the residue of the work to the Falls Road should be required to be done, instead of suffering the railroad track to run under the same bridge with the Falls Road, as is manifestly the only proper course, it will be a subject for a distinct assessment for a separate job, the cost of which will not be assessed generally, but specially.

It will be further observed, that this section requires the *cost of executing the work to be levied generally*, not on the persons benefitted, but on all persons between Pennsylvania Avenue and the Railroad.

The Court will observe, that the general propositions contained in the appellee's brief, supported by so many authorities, are not disputed. It is not intended to be denied that in ejectment the plaintiff must succeed on the strength of his own title, that parties who set up adverse rights obtained by the execution of special powers must shew that the acts conferring the powers have been strictly complied with. It is not denied that specially delegated authority must be strictly pursued, and that a corporation is limited in its powers by its charter. All these general propositions of law are cheerfully conceded. They are not believed, however, to interfere with the rights of the appellant. The application to this Court is to sustain an Injunction. It is an appeal to the equitable powers of this tribunal.

Almost the first doctrine taught the student of Chancery law is, that the complainant must come into equity with clean hands; that, if he desires to invoke the equitable interposition of the Court in his behalf, he must in the first place show that he has dealt and is willing to deal equitably and justly with his adversary. He cannot otherwise hope to succeed. If the facts stated in this argument and believed to be proved in the Record are true, then it is manifest that the hands of these complainants, instead of being clean, are soiled all over; that instead of dealing justly and fairly with their fellow-man, they are anxious to appropriate his labor and time to their benefit without compensation, and without complaint against him.

True it is, that all those who insisted, before the work was done, that they would be benefitted and their property *improved*, now consider that they are *all injured* and *their property ruined*. True it is, that all those who applied for the grading and who solicited others to sign the application, now find out that they have been all damaged and all expect to be compensated. Did they not know (the grade having been established) the precise effect it would have had on their property at the time that they urged that the grading should be done, or knowing it, were they all anxious to be damaged? Indeed, no more profitable operation could well be conceived than frequent condemnations and frequent gradings to these unfortunate owners. Doubtless, when the time for paving arrives, these property owners will again prove, after having secured the paving, that their lots have been damaged *more than their value*, and that it is a hardship that they should be subjected to the payment of the taxes on worthless lots. But if all these parties, including the complainants, who constitute the greater part of the owners of any lots of magnitude, have met with a nearly total loss,'' by whom do they expect the damages to be paid. According to their theory, the damages and expenses were all to be paid by the *parties benefitted*. No one, it seems, can be found that has been benefitted, and the *argumentum ad absurdum* is, that the contractor is not to be paid.

A Court of Equity under such circumstances will look well before it will suffer principles of law to be perverted to injustice, and will say, that, having found that in fact or in law, the Commissioner had authority to act, his proceedings will not for the purposes of an Injunction now be scrutinized, particularly where an appeal has been provided and disregarded. It will examine the Act of 1856 carefully, will strike out the parts that are nugatory and idle, and will find that the residue has been accurately followed. And, thereupon, it will reverse the order of the Court below, dissolve this Injunction and enable the contractor to recover his just claim.

ORVILLE HORWITZ,

SOLICITOR FOR APPELLANT.

Additional Notes by Mr. Dulany.

TERMINI OF THE AVENUE GRADED.

The application for the grading of "North Avenue, between Pennsylvania Avenue and Falls Turnpike"—not *from* Pennsylvania Avenue *to* Falls Turnpike—the construction of this application though not a literal or necessary one in the interpretation of the *words* used, would probably be regarded as asking for the grading from point to point, were it not for the previous passage of the law of 1856, which directs and has made provision for, the grading only from Pennsylvania Avenue eastward to the Northern Central Railroad, which is a point between the Pennsylvania Avenue and the Falls Turnpike road. Now, as the application is made in subordination and with a view to the law, they must be construed together, and so considered, the application should be deemed as requiring the grading from Pennsylvania Avenue to Northern Central Railroad, and by so considering them no violence is done to any word used in the application.

See application Record, page 14.

See Laws of 1856, chapter 264, section 2.

But still the contractor would be entitled as far as the work was completed.

1 Parsons on Contracts, edition of 1860, page 70. M.

The contract is to grade according to specifications, page 14 of the record. The specifications are to be found on page 13 of the record. Beginning at O East line of Pennsylvania Avenue to the West side of Northern Central Railroad, so that the contract referring to and embracing the specifications is in accordance with the proper interpretation of the application, as above suggested.

No property holder east of the west side of the Northern Central Railroad signed the application to have the Northern

Avenue graded, nor were there any assessments of benefits against them.

Whole distance from east side of Pennsylvania Avenue to west side of Northern Central Railroad, in feet, (see Assessment Plat, No. 1,)...11,509*ft.* 2*in.*

Bryson's Dep. 3d answer, Record page 97.

Deduct for streets on Poppleton's Plat, also on said Plat No. 1, running to Northern Avenue, for which City is to pay, see Act of 1856, ch. 265.....686*ft.* 7*in.*

One-half of which.....10.812*ft.* 5*in.*

Is.....5,411*ft.* 2*in.*

The whole number of feet signed for by application.....7,047*ft.* 00*in.*

Deduct surplus feet signed for by Meakin, he signed for 227. Bryson says, see Record p. 109, he had on the old road 147,—deduct therefrom 80

6,967*ft.* 2½*in.*

No deduction is made from the number of feet signed by James Lester, because Bryson says, on page 109 already referred to, that he owned 454 feet on the old road, and when that was taken away as a matter of law he advanced to the Avenue, and claimed that as his line by his signature to the application.

Charles Myers, as appears from the Assessment Plat, has two lots adjoining each other, 25 feet each, and another small lot 8 feet 6 inches, which gives 58 feet 6 inches, he signed for 66 feet—deduct the difference.....7*ft.* 6*in.*

6,959*ft.* 6*in.*

No deduction has been made for the 704 feet signed for by Frederick and Chas. Frick, Executors of Wm. Frick, because the testimony of William Frick, pages 62 and 63 of the Record shews clearly that they had authority to sign.

No. of feet brought forward	6,959*ft.* 6*in.*
No deduction ought to be made from the number of 141 feet signed for by Jesse T. Peters, Esq., because he always acted for the Trustees in the management of the Estate, and it is obvious no objection was made until after the work was completed, and payment demanded, but deduct the number of feet	141*ft.* 0*in.*
	6,818*ft.* 6*in.*
One-half the number of feet is	5,411*ft.* 2*in.*
Majority of 11,509 feet 2 inches is	1,407*ft.* 4*in.*

Assuming then that according to the true construction of the application, contract and law taken together, that the termini of the grading was to be from the east side of Pennsylvania Avenue to the west side of the Northern Central Railroad, embracing a distance of 11,509 feet 2 inches, there is a majority of feet signed for, even excluding which ought not to be done, the 141 feet of Peters, of 1,407 feet 4 inches as above.

I have not excluded from the calculation of the number of feet signed for, the 1,581 feet subscribed by Bond, because I think the evidence taken in the whole, shews that he had authority to sign as the agent of the owners, thereby sustaining the averment in the answer, (Record, page 9,) that both Bond and Peters were authorized to sign for the owners the number of feet put opposite to their names.

Decision of the City Commissioner.

But suppose the Court should not be satisfied of the authority of Bond from the facts stated in the record, supposing that the question of his agency came before them on appeal to be reviewed, or as an original question of fact—how should it be regarded as it presents itself in proceedings brought collaterally into issue, in which by the judgment in those proceedings, the authority of Bond to affix his signature to the application was established by the judgment of the City Commissioner,

page 17 of the Record, it is recited "that a majority of the feet of ground, &c., did request to have, &c., North Avenue graded, &c." It is also, page 15 of the Record, endorsed on the application "June 5th, 1856, determined to grade North Avenue, &c., &c. Now the Commissioner in his decision thus evidenced, necessarily determined the existence of every jurisdictional fact, without which he could have pronounced no judgment at all. He must therefore have determined that the application was made by a majority of owners, and as he had a right to decide this question, the Court will presume that with care and capacity he discharged his duty, and the question now is, whether his judgment is final and conclusive, coming collaterally in question, or is presumptive only, and liable to be again tried, and overthrown by opposing proof?

I think that his judgment is conclusive—nor do I think that there is anything in the cases of Henderson and Holland, 8th and 11 Md. Rep's. to the reverse of this position; the question in both those cases upon which the jurisdiction depended, were *legal* questions on the construction of instruments of writing; moreover, in Henderson's case, the proceeding was by action at law, and the judgment of the Commissioner the foundation of the action. The question in this present case is purely a matter in "pais." It is admitted that Bond was not the owner of the property fronting on the Avenue, for which he signed, but the validity of his signature as binding the owner depended upon his authority from his mother, the tenant for life—whether he had authority or not depended entirely upon matters of fact, matters in "pais," upon no construction of legal documents—for none such existed—his powers then to bind the owner could only be ascertained by enquiries at the time which Shannon, the City Commissioner, in page 146 and 12th answer, says: he made and satisfied his mind as to the correctness of the application, and he is speaking in regard to the ownership. Now, on page 58 of the Record, in answer to the 9th cross interrogatory, Bond says, "the property was assessed to Dr. Bond, and was so marked on the Plat of the City, and I believe that *everybody I applied to knew* that it belonged to the family, and I made no explanation of *my* interest in it."

That is though dealing with the property by acts that would indicate an ownership, yet that everybody would understand he was acting not for himself, but as agent for the owners—as everybody to whom he applied knew that the property belonged to the family—hence he signs the application, addressed to Shannon, H. L. Bond, without adding agent. He signed in the same way, two years before, in a receipt for the amount of damages to the City for the opening of this very Avenue, see Record, page 163.

Now there is abundance of evidence in Bond's own deposition and in the proofs, that in the management of his mother's Estate, who resided in the city of New York, he habitually, and ever since the death of his father, used powers in regard to this Estate even higher than would enable him to commit and bind his principal, by his signature to the application in question.

Now the Court, I apprehend, will attribute to the officer the disposition and ability to enquire into the facts in regard to this matter in "pais" of Bond's authority, and to be convinced from the record, that there is some evidence, at least, bearing upon that point, which it must be presumed was the subject of inquiry and consideration by the Commissioner.

In Henderson's case, 8 Md. Rep. 360, after deciding the cause upon the construction of the instruments, in evidence, there being no facts in controversy, the Court says: "It (that is the authority referred to in that cause) was granted for the purpose of giving sanction to acts in "pais" affecting the property and rights of others; but when made the foundation of an action, as here, it must appear to have been exercised according to *law*." So in Holland's case, the whole controversy termed upon a question of law, *the facts being all admitted.*

But in the case now under consideration, the whole dispute turns upon a matter in "pais," of which, it was determined in the People vs. The City of Rochester, 21 Barbour 657; the councils who stood in the same relation to the subject there, as the City Commissioners here, were the final Judges. The point there to be determined was a jurisdictional fact, of the

same nature as the one here, as to a *majority*—it was one the councils were to decide in liminie, and one without which they had no jurisdiction, and yet at the same time being a matter in "pais," their determination of it was held final and conclusive, p. 669–670. The Commissioner says in the passage before cited from the record, that he satisfied his mind by inquiries as to the correctness of the application ; this record discloses that there was strong evidence, from which he might have reached the conclusion he did, and it must be presumed that he availed himself of all sources of information within his power, much of which his memory would not enable him to recall—it may have been that he had such proof at the time as would leave no doubt upon the mind of any that Bond had authority to bind his mother, and yet being a mere matter in "pais," and no duty requiring him to incorporate such facts in his judgment or among the proceedings, may have escaped his recollection, and it would be hard, indeed, if the whole proceedings were to be set aside after the lapse of five years, because of the loss of evidence of a fact, which must be presumed to have existed at the time, and without which the Commissioner could not have properly pronounced the judgment he did. The cases of Henderson and Holland were wholy different—the facts were all admitted—and want of jurisdiction was apparent as matter of law.

I invite the Courts attention to p. 670–671, 21 Barbour—where the Court say they "The Common Council were called upon to decide on the facts upon which their jurisdiction depended, and we cannot say, from any evidence returned to us, that they decided erroneously :" that is, any evidence on the face of their proceedings returned under the writ of certiorari ; nor can it be properly said that there is any evidence here in the proceedings to contradict the decision of the Commissioner : nor in the depositions, even if upon a matter merely in "pais," such evidence would be admissible for taking Bond's evidence in the whole, and giving to it a proper construction ; he does not say that he was without authority from his mother to have North Avenue graded, but that he received no direction to perform the *act* of *signing* the application, on p. 59 of the Record,

at the bottom of the page, Bond is asked to state whether he had any authority or was requested *to sign* the application to grade the North Avenue? To which he replied, I had no verbal or written authority to do so: that is, to *sign* the application, "nor any request:" that is, to do that particular act. In his answer to the 15th interrogatory, on the same page, which asked of him "whether he had communicated to his mother—that he had *signed* the application," &c., he says, "I said nothing to her about any forms that had been gone through, to have the avenue graded;" and in the same answer he says, "I do not think that any of them," his family, "knew of the *signing* of any application, because I did not tell them *that*." Now taking all this to be true, to the best of witnesses recollection, still it does not establish the fact that he had no authority to sign the application for his mother, on the contrary, the strength of the indirect proof is the other way. Bond states that he conversed with his mother on the subject of the grading, that she expected to pay for it—for such is the purpose of his answer to the 16th interrogatory, that he prepared the application, which was in his own handwriting, not as claiming the property for himself, but in his character of agent, though he did not so sign, because, to use his own words, "every body knew with whom he dealt," &c., (we may say, emphatically, the City Commissioner,) "that the property belonged to the family."

Now it is impossible not to believe, but that Bond in his conversations with his mother, informed her that he had written the application and gave her to understand that he approved the grading of the avenue—thought it beneficial to the property and was active in promoting it, or that she fully approved of every thing that he was doing in regard to it—how could it be otherwise, when he was acting as her agent and in a matter so nearly touching her interest; this inference seems to me to be irresistible, although neither of them in their conversation spoke of signing any particular instrument.

But it is not necessary for the Defendants to shew by any other evidence than the proceeding of the Commissioner—that Bond had the authority in question. It is for the Complainants

to contradict it, and take upon themselves the burthen of shewing that he had not, for if I am wrong in the position which I have endeavored to establish by the case in 21st Barbour, that the determination of the Commissioner to grade is final and conclusive upon every jurisdictional fact existing in "pais," and that Bond had authority to sign the application, was a fact of that character, yet it cannot be denied that such determination or judgment is "prima facie" evidence of the existence of such a fact; for every judgment supposes and is evidence of every fact without which it could not have been properly pronounced. This principle is sanctioned in Henderson's case, and if so, there does not appear to be anything so certain and definite in Bonds's deposition as to overthrow it, especially when the effect might be to destroy the entire proceeding, and leave North Avenue without the political protection of being a graded street and the Contractor uncompensated for his labor and expense in performing the work.

Effect of the City Commissioner's Decision.

If then it be established that a majority of the owners of front feet upon North Avenue appear to have desired that part of it graded, which was graded, upon presentation to the City Commissioner of such application, he acquired jurisdiction over the subject, and his acts in the exercise of that jurisdiction, will not be reviewed or reversed, no matter how illegal or irregular he may have acted, coming into consideration as they do collaterally. The Court over those proceedings have no appellate jurisdiction, and will not set them aside for any irregularities. In addition to the authorities cited in the Brief, 4th Point, letter C—see 6th E. R. W. Cases, p. 87.

Right of Appeal—its Effect.

Where a right of appeal is given from a judgment, or proceedings at law, by statute, there a Court of Equity will never interfere by injunction, as a measure of relief to a party complaining of a violation of his rights, by the inferior or special tribunal. Now it is impossible to conceive anything more

clearly and expressly given, than is the right of appeal by the 4th section of the Act of 1856, chapter 164. Whatever may be doubtful in the construction of that Act, it is certain that a right of appeal is secured to the owners of lots assessed. When, therefore, the warrant issued, (see page 17 Record,) assessing the amount set opposite to the names of each person named in the warrant, he or she might have appealed to the Criminal Court of Baltimore, or the Circuit Court of Baltimore County; upon such an appeal justice would have been done to *both* parties. The injunction, if it should be perpetuated, will leave to the Contractor no remedy whatever. A total loss and a ruined man.

It is true that the section in question is silent as to the mode in which the appeal is to be taken, but whenever a right or privilege is conceded by statute, Courts of justice will supply all the means requisite to render the right or privilege available, and will labor to secure to the party the full enjoyment of the right which has been granted to him.

If any, the injury done to the property holders in this case was inflicted by the judgment of the Commissioner in levying the amount set opposite to their names, in the warrant to the Collector, (see page 17,) and assessing the property of each therewith.

Of this judgment all the property-holders had notice, and a bill of the amount was sent to each one of them—see deposition of Robert C. Barnes, page 149. Besides this notice was publicly and regularly given in pursuance of law, a copy of which is annexed as an exhibit, A B, filed with Complainants Bill—see 4th page of Record—also the advertisements filed, proved under the Commissioner, page 19.

Thus it is clear that the Complainant, and all others in the same predicament with him, had not only full legal but actual notice of the final judgment of the Commissioner, by which their property was bound for the expense of grading North Avenue. Why did they not appeal if any injustice had been done to them? Why did they not in a petition, either to the Circuit Court of Baltimore County or the Criminal Court of Baltimore, set forth their grievances and apply for redress?

Either of those tribunals was competent to have afforded it in the amplest manner, but at the same time they would have done justice to the Contractor, and this is what the Complainant did not want, and hence it is that no appeal was taken. But had a resort been made to that remedy, why could not the appellative tribunal have reversed and revised the decision of the Commissioner, if he was in error in assessing benefits or damages; or, if in his judgment, no damages were sustained by any of the property holders—in which case it is clear that he could have allowed none—and the legal intendment is, that if he had power to ascertain and assess damages, and has allowed none, it was because he found none to exist, and if so, though he might have been in error, it does not prove that he did not exercise the powers with which he was invested, but that he came to a wrong conclusion; which, so far from being incompatible with the right of appeal, is the very foundation or salient point of its existence. It cannot be said then that the Complainant was deprived of his right of appeal, because the City Commissioner did not ascertain the amount of damages, because it must be taken that, in his judgment, nobody was injured, and consequently there could be no damages, the amount of which were to be assessed; for it cannot be the true construction of the law that the Commissioner was directed by it to assess damages, when in fact none existed, and none could therefore be ascertained. It cannot be said that there was any omission on the part of the City authorities of anything to be done by them, which rendered an appeal by the property holders impracticable, or even inconvenient. The right of appeal was immediate and direct when the judgment of assessment was made, and the Bills delivered to the lot owners, no matter what antecedent irregularities may have been committed, if any, so far from taking away the right of appeal, the exercise of that right would have been thereby rendered successful; any injurious assessment of damages or benefits, or omission to assess damages, or even any irregularities, would have been the subjects of review and rectification in the appellate tribunal—this mode of redress for such injuries was provided for by

the statute—for the 4th section of the Act of 1856 extends the right of appeal as existing in the City of Baltimore, to those injured by the grading of North Avenue, as possessed *in similar* cases, by the people and lot owners in the City of Baltimore, that is, in cases where an appeal is allowed, and in such cases the City Courts are authorised "to alter, modify and correct the record of proceedings in all or any of its parts," as it "shall deem just and proper." 6 Gill's Rep. 402. What better remedy could the property holders on the North Avenue desire, than was thus afforded to them.

Now the Act of 1856, Ch. 164, gave this right of appeal in a full and ample manner—it was a statutory right, nothing that the Commissioner could do or leave undone, could deprive the lot owners of this right—nothing more was necessary to its existence than the judgment of the Commissioner assessing their property and fixing their liability with the amount of the judgment—and if they were not allowed damages, or burthened with too heavy benefits, his error would have been corrected.

Of the judgment by the Commissioner, they had each of them actual notice by the presentation to him by the bill for the amount assessed against him and his property, as also by the advertisements duly printed and published. They were warned then to take their appeal if they felt themselves aggrieved—but they did not appeal, they rejected the statutory remedy provided for them; and how is it possible that they can be rash enough to apply to a Court of Equity for its interposition in their behalf. See 6 Gill, 391; 6 G. and I., 298.

In order to enable the parties to appeal, nothing more was necessary than a knowledge of the assessment made by the judgment of the Commissioner, and if they did not appeal, then the judgment is as conclusive as if an appeal had been taken and the judgment affirmed. When a party claimed title to land, on which there was an attachment of which he had notice, though not *legally warned* as Garneshee, he failed to appear, and ~~made~~ moved the Court to quash the attachment, as he might have done in vindication of his interest—held that he could not afterwards impeach the validity of a sale made under

the attachment and assist his title against the purchaser. For he might have appeared in season and moved to quash the attachment, and did not do so, and was therefore bound by the judgment and sale under it.

Ranahan vs. O'Neil, 6 G. and I., 298; so here the parties might have appealed, and neglecting to do so, they are concluded and cannot, if otherwise, entitle to redress, successfully invoke the Equitable interposition of this Court.

ESTOPPEL.

In the oral argument of this cause it was insisted that the complainant was estopped from denying that a majority of owners did ~~not~~ sign the application to grade. 1st. Because the application itself asserts that the signers constituted a majority of the owners of front feet. 2d. Because the answer alleges and the evidence establishes that those of the owners who did not sign, nevertheless, having knowledge of the progress of the work of grading, and that they would be looked to for the payment of it, made no objection to its progress. Now taking into consideration that the question, whether a majority did or did not sign, may be, as it presents itself, a question of law and fact, and also jurisdictional in its character, and so far as it depends on facts, that they may be established by way of estoppel, as well as by direct proof, the question here is, what facts are the parties estopped from denying? In discussing this question, it is admitted that no Court will take jurisdiction by consent of parties, though all may join in the consent, nor will they take jurisdiction, where, upon the facts admitted, no jurisdiction in point of law exists, although both parties consent, nor will the Court permit the exercise of jurisdiction under the same circumstances by any inferior or special jurisdiction; where, upon the facts established by admission or otherwise, in *point* of *law*, no jurisdiction exists—but if facts are "prima facie" established, which call for the exercise of jurisdiction in an inferior tribunal, there the Court may or may not permit those facts to be disproved according to circumstances. The objection must be taken and proof offered in proper time, and so as not to prejudice other

parties, or else the party seeking to interpose the objection to the truth of the facts, will be estopped from denying them; for although a Court will not assume or permit the assumption by other inferior tribunals of jurisdiction by way of estoppel, yet they will not permit the facts, upon which it depends, to be controverted out of season, or where it would be inequitable and injurious to others.

For example, a citizen of Maryland files a bill in equity in the Circuit Court of the United States against a citizen of the same State, alleging however that the defendant is a citizen of Delaware. And the defendant answers generally to the merits of the bill, without pleading in abatement that he is a citizen of Maryland, he will not be allowed afterwards to contradict the allegation of citizenship and shew the true place of his residence, but will be estopped from so doing, although the effect is, that the Court thereby acquires jurisdiction, where upon the truth of the facts none existed.

Every tribunal, however inferior it may be in its constitution objects, and powers must have authority to decide upon the existence of the judicial facts which call for the exercise of its powers, otherwise it could not act at all, that decision may be final on presumptive and prima facie only. The jurisdiction of the Commissioner in this case attached when an application was made to him in writing by a majority in front feet of the owners of the land on that part of North Avenue which it was proposed to grade. On the reception of the application, and in pursuance of law, he advertised that he would consider and determine upon the application on the 5th June, 1856. By this advertisement all persons interested received warning to appear, might have appeared if they had seen fit, and objected to the grading, and for the want of the requisite majority demanding it, and examined witnesses to sustain their objection. But no objection was made, and the work proceeded to its conclusion, without the slightest whisper of dissent by any of the property holders, although as averred in the answer each of them knew he would be looked to by the contractor for his pay, and each of them knew the laws and ordinances by which he was made responsible, yet they remained silent, and

suffered the contractor to proceed under an expectation that he would be paid by them, and now come forward after they have received the benefit of his labor and expenditures with objections, which they could just as well have been urged "in liminie." And if they did not know that Bond, Lilly, and the Sisters of Charity of Mount Hope, and the Fricks and Peters, were unauthorized to sign the application for the owners, yet as each of them must have known that they would be looked to for payment, and it would be expected of them, as the consideration of the labor and expenditures of the contractor, they were bound to have made the enquiry as to the authority of those signing for others, and if they did not, will have all the knowledge to which such inquiries would have led, imputed to them, and will as a consequence be now estopped from alleging the truth. If the objection had been a legal one, and arose on the face of the proceedings, I admit that they would not be estopped, for every one is presumed to know the law, but the want of authority in this case depends upon a question of fact, and should have been ascertained at first, and having been decided on this evidence before the Commissioner, it is too late now to moot the question again.

I have made the above observations under the idea that it might be thought that the doctrine of estoppel could not be applied where the consequence would be to give the Court or inferior tribunal jurisdiction, when in truth none might exist, and to shew the distinction between where the question arises as matters of law and fact, where jurisdiction depends on questions of law arising on the face of the proceedings, all the facts being admitted there can be no estoppel, for both parties are presumed to know the law, and each acts at his own peril. But where the decision pronounced is the result of inquiries outside of the record, consisting of matters in "pais," there an estoppel, if there be any proper ground for it, will apply. As if the objection might and ought to have been taken at an earlier stage of the proceeding, and the party against whom it is urged, is prejudiced in a manner, which he would not have been, had the objection been taken in due time; to permit its use in such a case would be highly inequitable.

Without intending any regular argument in this case I submit the foregoing observations, to be taken in connection with the oral argument, and in answer to the notes of the Solicitors of the Appellee.

G. L. DULANY,

SOLICITOR FOR APPELLANT.

21½ Sides

Mayor & Co Commissioners

Baltimore

Porter

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Colfield

Mayor & City Council of Balt. vs Geo. U. Porter

The following observations are added to the Brief, in which I have already presented my views of the case with considerable fulness.

As stated upon the 1st page of the Brief, the city commissioner and city counsellor were of opinion that no authority was possessed by the city to grade the Avenue, prior to the passage of the act of 1856. On page 145 of the Record, Shannon says "that upon consultation with the city counsellor, he stated to me that the city could not hold the property lying in the county, and binding on the Avenue, without an act were first obtained from the Legislature, empowering the city to do so." But this opinion of the city counsellor does not go far enough. It would seem to imply that, before the act of 1856, the city might have graded the Avenue, and held the property on the Avenue, lying in the city. This is manifestly erroneous. Revis. Ord. 1850 No. 15. Sec. 34 gives the city commissioner power to grade a street in the city upon the application of the owners of a majority of front feet. Now if, as the city counsellor correctly declares, the city had under existing laws and ordinances, no authority to charge the property on the north side of the Avenue, in the county, it must be clear that the owners of that property could not charge others, by signing an application which would not charge themselves. The owners of the lots on the north side of the Avenue, having, therefore, no authority to sign the application at all, a majority of front feet could never have been obtained. The north side of the avenue being, as compared with the south side, an arc of the larger circle, it is mathematically certain that there are more front feet on the north than on the south side. This is also shown by the actual measurement of the surveyor. (Bryson's Ev. Rec. p 97).

From this it follows that, prior to the enactment of the law of March 1856. the city could acquire no power whatever (more than the county) over the subject of grading the Avenue - it could acquire no power to grade, and charge property either on the city or county side

The above observations are made to show how absolutely powerless the city was, without additional legislation. It is not known that this view is questioned; nor is it urged as very material to the case, because, whatever may have been the power of the city, under general laws and ordinances, prior to the act of 1856, when that act was passed making particular provision for the grading of North Avenue, it at once superseded antecedent legislation and prescribed the conditions and rules of procedure by which the city was thereafter to be bound.

The only question of this case, then, is has the act of 1856 been complied with?

The attention of the Court is respectfully and very earnestly invited to the authorities cited on the 5th page of the Brief, showing the rigor with which the corporation must, upon vital principles, be held to a strict compliance with the law which confers such important powers over the property of the citizen.

1st The proposition (in italics,) at the top of page 10th of the brief on the subject of ratification of an unauthorized signature, is understood to be admitted by the counsel for appellants: but if that proposition, covering the whole subject, is deemed open to doubt, the court is requested to observe that the principle of law (mentioned on the same page of the Brief, and fully sustained by the authorities cited) "that if a party does not profess to act as agent there can be no ratification" applies with peculiar and conclusive force to the signature of Bond.

Bond declares that at the time of signing the application, he had no authority to sign for his mother and the others interested, and in fact he does not sign for them. There was, therefore,

in his signature nothing for them to approve or reject. If the defendants instead of failing, had succeeded in proving that Bond's co-tenants had knowledge of his signing his own name, without expressing at the time or afterwards their disapproval, it would have been nothing to the purpose. Bond did not profess to bind them, and his act was therefore, of no consequence to them — there was nothing to ratify.

This principle applies also to the signature of Frick, and McHose Listers of Church.

2d The objection taken by defendants that the parties who signed the application are estopped from relying upon the want of a majority of front feet, has been considered in the Brief, page 20, where it is said "The rule is that the acts of a corporation unauthorized by its charter, though assented to by the person dealing with the corporation, bind no one" and authorities are cited fully supporting the doctrine. It is admitted that two cases cited in defendants Brief 28 Gd 393 45 Md 152 control this doctrine so far as to hold that a party applying for an injunction will not be permitted to avail himself of it, under circumstances which render his position and application revolting to the conscience of a court of Equity. In the cases alluded to the parties dishonestly invoked the aid of a court of Equity to undo their own deliberate acts. Those cases might possibly be some authority in this case for refusing to let the parties who signed the application, avail themselves of the want of a majority of front feet, if the act of signing, or the evidence in the case showed that they solicited the grading to be done whether the application were signed by a majority or not. But there is no ground for supposing that the signers, any more than others, were willing to promote or acquiesce in such usurpation of power by the city officials

The attempt to apply the Doctrine of estoppel to those who did not sign the application is not noticed in complainants Brief, and, with all respect for learned counsel, is not thought to be entitled to serious notice. In the case in 11 Md R 186 the same point was raised, but the court seemingly passed it by as not deserving consideration. As regards the owners who refused to sign the application to grade, the determination by the city authorities to perform the work is, by necessary presumption, a hostile proceeding. The grading is not done with their assent, but against it: their refusal to sign the application is due notice to the city Commissioner of their intention to exact a rigid compli= =ance with the laws. How, then, can it be seriously contended that they are obliged to mark the steps, and supervise the acts and proceedings of the commissioner, and make due protest when those acts are irregular and unauthorized by law?

3d On the 18th page of the Brief it is insisted that the 4th section of the act of 1856 is conclusive in favor of complainants in= =terpretation. "What meaning shall we attach to similar cases?" If those words refer (as they clearly do) to cases in which benefits and damages are ascertained and assessed, then our construc= =tion is correct, and an ascertainment of benefits and damages was required by the law. If on the other hand those words refer (as the defendants must contend) to cases of grading and paving streets in the city of Balto, then, as ~~there~~ there is no appeal provided in such cases, the section is a mockery, and leaves without an appeal the parties to whom it pretended to give it.

4th Tunnelling is not embraced within the definition and ordinary meaning of the word grading. To grade a road is to reduce its line to certain levels, or degrees of inclination by excavating and filling in earth where these are respectively required. Sometimes, in grading, tunnelling may be convenient, as it was in this case, by draining certain lots by means of tunnels under the avenue, instead of by ditches conducting the water in a different direction. At other times a tunnel may become incidentally necessary to render the work solid and permanent, as it would have been in this case, if the grading had been carried, according to the contract, across Jones' Falls to the Falls Turnpike. But at last, the necessity for masonry work in a particular case of grading is but an accidental circumstance, and does not necessarily enter into the idea or definition of grading. Tunnelling is, in reality, nothing more nor less than bridging: and if the owners of property on the avenue are responsible, in any aspect of this case, for the cost of the masonry work with which they have been charged, there is no reason why they could not have been required to pay (under the pretext of its being a part of the expense of grading) the immense expense of constructing a costly bridge over Jones' Falls. But the evidence shows that it has not been the custom of the City to include the cost of tunnelling in their assessment for grading. So far, then, as the assessment, in this case, covers the cost of the masonry work, it is clearly void, and as the authorities

cited upon this point, show that a sale of property for taxes, partly illegal, will be set aside, the injunction in this case ought to be perpetuated, until the cost of the masonry shall have been eliminated from the assessment.

5th The last point of complainant's Brief insists that if the complainant had a right of appeal, then because of that right, the order below, continuing the injunction, ought to be affirmed.

If a right of appeal existed, it must be regulated by Revis. Ords. 1850. No 17. Secs. 8. 9. 10. As will be seen by reference to those sections, the proper steps to terminate that right of appeal have never been taken by the city authorities. It was accordingly asserted by the defendants solicitors, in the Court below that our right of appeal still exists. If this be so, then the order continuing the injunction must be affirmed, because it is clear that the right to sell does not arise until the right to appeal terminates

G. O. Mallard

for Appellee.

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Filed 15 aug 1861

COURT OF APPEALS.

JUNE TERM, 1861.

MAYOR & CITY COUNCIL OF BALTIMORE, *vs* PORTER.

Argument for Appellee.

In 1852, the Mayor and City Council of Baltimore, by ordinance No. 16 of that year "believing (as stated in the preamble) that the opening and condemnation of North Avenue as a public highway, between Pennsylvania Avenue and York Avenue, would be a great public improvement, and result advantageously to the community," ordained that it should be condemned between those points, under the power vested in the city by the Act of 1838, ch. 226, and the General Ordinance of April 30, 1850, (Rev. Ord. No. 17,) passed "to provide for the exercise of these powers." A glance at "Poppleton's Plat" will exhibit the location of this Avenue; and the necessity for its being opened as a public highway. The Pennsylvania Avenue, the Falls Road, (Cathedral street,) and the York Avenue, the three great thoroughfares from the city into the county, Northward, had become closely built up, within and even beyond the city limits, while the spaces between them remained yet unimproved by city streets. Direct communication between the outward points of these thoroughfares was obstructed by Jones' Falls and by the want of some connecting cross street or Avenue; and persons wishing to pass between the termini of York Avenue and Pennsylvania Avenue, were compelled to make a circuit through the city, which increased the distance of the route more than a

mile. The *public* convenience, therefore, clearly demanded the opening of North Avenue; and under the power vested in the city by the Act of 1838, (without the necessity of any *private* application) to open and condemn any street, "which, in their opinion, the public welfare and convenience might require," all proper proceedings for this purpose were taken under the Ordinance No. 16 of 1852; and the bed of the Avenue became public property between the points named.

This proceeding, however, which had no other effect than to vest the "right of way" in the public, fell short of meeting their wants and convenience, so long as, from the nature of the ground, the proposed highway remained impassable and useless. It must be borne in mind, (and this the evidence sufficiently discloses,) that the course of the North Avenue, except at its points of intersection with the three thoroughfares above named, was through a region of small farms and country-seats, yet distant from the city streets and grading; and over a broken and uneven surface of country, traversed by streams, and obstructed by iceponds. The cost of construction of such an Avenue, involved considerations, not applicable at all to the case of grading and paving an ordinary city street. The proceeding in the latter case, under the City Ordinances (Rev. Ord. 1850 Nov. 15) was simple enough. On the application of a majority of front feet the City Commissioner graded and paved the street by contract when opened or conveyed: and charged the cost rateably per front foot on the whole line of the improvement, on the assumption that all the property, being rendered equally accessible as building lots, was equally improved in value, by the grading and paving. But to apply such a system to the case of the Avenue was obviously both impracticable and improper. In the first place, the property on its North side *was in Baltimore County*: and the city had no power, under then existing laws of the State, to assess or levy a grading or paving tax in the county. There was power, under the Act of 1838, to provide for levying upon property *adjacent* to the city, a tax for *benefits* arising out of the *condemnation* of any street within the city: but that was upon the theory, that such property, might in some cases, be *benefited*, and to the exact extent of the benefit it ought, on proper principles of compensation, to pay for

the improvement. But no Act of Assembly had hitherto vested any such taxing power for the costs of grading and paving: for however reasonable might be an assessment which affected equally both sides of a city street, such a tax would have been unequal and improper, when applied alike to a city and a county front: the former being valued by a different standard, subject to a different system of general taxation, and enjoying or suffering, as might be, the benefits or disadvantages of a municipal control, of which the county front was deprived. But beside the want of power in the city to levy any tax at all upon the county fronts, it would have been obviously improper and unjust to apply to this case, the system or principles of assessment, whereby the grading and paving of the city streets was paid for. This was an Avenue of 100 feet in width. It required for its proper construction expensive embankments, excavations, tunnels and bridges, and a substantial road bed; and was likely therefore, to cost ten times as much as the making of an ordinary city street: while its distance from city improvements, except at certain isolated points, would deprive the adjoining property of the customary increase in value, and equally distributed advantages conferred upon city lots, by grading and paving in front of them. The uneven character of the country, over which the Avenue was to be made, rendered it necessary, for its construction upon an easy grade, to pass certain lots upon a level with them, others upon an embankment of some 20 feet above them, others through an excavation of as many feet below their level, and this necessity of its construction, while it would obviously benefit the adjoining lots, (if at all) in varying and unequal degrees at different points, would also have the effect of inflicting positive injury and damage, in the certain reduction of value of a portion of the property. Now, the theory upon which the grading and paving of city streets was done and paid for, precluded the idea of the *public* being interested in, or any *damage* to private property being caused by the proceeding. The opening (i. e. condemnation) of the bed of the street was treated as purely and entirely a matter of *public* convenience: as the act of 1838 proceeded upon the recognized principle, that private property was not to be taken or injured, *except* for public requirements, and then only upon just compen-

sation for the damages being ascertained and made. But the grading and paving of the street, (when *opened*) proceeded always upon the theory that the property holders on the immediate line of the street, and not the public, were the parties for whose benefit the work was done: and practically and legally, the contract for the work was always entered into, on their assumption or obligation to pay for it, in proportion to the number of front feet they owned upon the street. The construction of North Avenue, on the other hand, had become, for the reasons above stated, a matter of pressing *public* convenience and requirement. Though for some years condemned, as a public highway, it continued for want of authority to grade it, to be useless and impracticable for that purpose. It became necessary therefore, to provide a law under which it could be constructed; and to frame that law upon the theory that it was a *public* work, and not a private undertaking; and that provision must be made, in order to render the law constitutional, for the payment of whatever damages to private property the public necessities might involve.

Such was the state of the facts and the law, (and an examination of the Record will show that the facts have been in no respect overstated) which made it necessary for the city to procure the passage of the Act of 1856, ch. 164. They furnish a proper key to its construction, which "is to be gathered from the occasion and necessity of the law; being the causes which moved the Legislature to enact it." (Dwarris on Stat. vol. 9, Law L. marg. page 694.) By its title, which, though no part of the law, may be used, with the law, in collecting the intention of the makers, (Dwarris 654) it professes especially to provide "for the grading and paving of North Avenue;" and being further entitled as "a Supplement to the Act of 1838, ch. 226," which relates to opening and not to grading, &c., it may fairly be assumed that the primary object of the law, was to put the grading and paving of that Avenue, on the same ground with the subject matter of opening streets, as covered by that act: to wit, as a matter in which the "*public* welfare and convenience" and not private interest was concerned, and requiring therefore, the delegation to the city (as is explicitly done by the Act of 1838) of the State's right of eminent domain over

private property for public uses, on the condition of just compensation for all injury caused by its exercise.

The first section of the act, by its express terms, confirms that view of the Legislative intention. Upon the application of a majority of owners of front feet for the grading or paving of any part of the Avenue, the city "is authorised to allow the same, if in their opinion, consistent with the public good." These words are primarily significant and important. The right subsequently given "to provide for ascertaining what amount of damage or benefit will be caused thereby for which owners of land ought to be compensated or pay a compensation," could only be vested in the city, upon the ground that the proceeding was for the *public* good. Under our organic law, the Legislature could not allow damage to be caused to private property, in subservience of merely private interests and purposes. Therefore, inasmuch as the law itself did not, directly or by implication, declare the grading and paving of North Avenue to be a public work, it required the City Corporation to determine that question; and properly vested in them the power to allow the same, and thereby cause the damage that might be done to private property, *only*, on the condition of their forming and expressing the opinion that the public good demanded it. Hence arise two conclusions: 1. That the Legislature, in declaring the public good to be the foundation of their grant of power, indicated clearly their intention to provide for a case of injury to private rights, and compensation for such injury. 2. That such injury was not to be inflicted, unless the public good required it; and unless the Mayor and City Council of Baltimore, being made the exclusive judges of that necessity, should so determine and declare. The Appellant's argument on this point (Brief page 3, II letter A,) that "it does not matter that the Mayor and City Council did not express any opinion that the grading of the Avenue was for the public good; because the provision of the law to that effect was introduced *solely for the benefit of the public*: and the objection can only be urged by those who represent the interests of the community at large, the injury being not particular, but general in its character," proceeds upon a total misconception of the scope of the law, and the character of the objection. It is difficult to under-

stand how a provision should be "solely for the benefit of the public," which would *prevent* the work from being done, unless the Mayor and City Council of Baltimore determined to allow it; and how, the *only* persons having a right to object to the work being done, are those who are *benefited* by it; while it is quite easy of comprehension, that the provision was "solely for the benefit of the *private individual*," in giving him the right to claim that his property should not be injured, unless the Mayor and City Council of Baltimore should declare that the public good required it, and should also make provision for justly compensating him for such injury.

The next following words in the first section confirm the views so far taken. The Mayor and City Council shall have full power and authority "to provide for ascertaining whether any and what amount of benefit or damage will be caused thereby to the owners of land on each side of North Avenue, both in the city and county, for which said owner or owners should be compensated or ought to pay a compensation by reason of the grading or paving, or both, as aforesaid." These words being nearly an exact transcript of a similar provision in 1838, ch. 226, furnish conclusive evidence of the legislative intention, that the proceedings under the act of 1856 were to conform to the principles and practice regulating the "opening" of city streets. Looking, therefore, at the circumstances which made the act necessary, its title, and the first enacting clause *up to this point*, it is clear, beyond dispute, that no proceeding for the grading and paving of this Avenue was intended to be authorised by this Act, except on the condition that the Mayor and City Council of Baltimore should declare it to be required by the public good, and should also provide for ascertaining what benefit and damage would be caused thereby, for which owners of adjoining property should pay or be paid.

The only difficulty (if there be any) in giving a sensible and thoroughly consistent construction to all parts of this act, grows out of the language of the last clause of the first section. The words are, "and to provide for assessing and levying on the property of persons benefited within the same limits, the expenses which may be incurred in the grading or paving, or both, of said North Avenue, or any part thereof as aforesaid, in the

same manner as is now provided by existing laws and ordinances for the grading and paving of streets in the city of Baltimore." The existing laws and ordinances, at that time, were the 18th section of 1817, ch. 168, and General Ordinance No. 15 of Rev. Ord. of 1850, (not 1858 as the Appellant's Brief incorrectly states.) The old acts of 1782, ch. 17, 1791, ch. 59, and 1797, ch. 54, had provided for a system, whereby the paving (including of course, as a prerequisite, the proper grading,) of the city streets was to be paid for, not by a rateable tax on the property paved, but by special taxes on "districts benefited." and a general paving fund raised by taxes on carriages, wagons, billiard tables, &c., &c. The 18th section of 1817, ch. 168, simply provided that the Mayor and City Council should not be authorized to pave, without the assent, in writing, of a majority of front owners on the street; but that act made no provision for the mode in which the paving expenses were to be assessed and levied. That was done by Rev. Ord. No. 15 of 1850, which provided for the payment of paving charges by a tax rateably charged per front foot *on the property paved*; and it is somewhat singular that the power of the city to impose an arbitrary tax in that way should never have been hitherto questioned, as unauthorized by any Act of Assembly, and in direct conflict with the principles of taxation asserted on pages 380 and 381 of The Mayor, &c. *vs.* Moore & Johnson, 6 Harr. & Johns., to which attention is particularly called as touching directly this case. The ordinance further provides for the collection of the tax, (sect. 9) by suit in the name of the Mayor and City Council, (sect. 7,) by distress upon the lot, (sect. 37,) by sale of the property. Now the Legislature had provided (1856, c. 164, s. 1.) 1. For *allowing* the work to be done. 2. For *ascertaining* the benefits and damages from the work, which owners of property ought to pay or be paid for. The third thing to be done was to provide for the payment of those damages, and the cost of the work; and that they did by requiring the expenses to be assessed, "and levied on the property of persons benefited in the same manner as provided by existing laws and ordinances, &c." The object here was simply the imposition and collection of the tax. The *ascertainment* of the amount, i. e. the fixing the amounts and proportions of the tax, which owners of prop-

erty were to pay or be paid, as the case might be, was fully provided for by the previous clause; and it only remained to give power to impose and collect the tax so ascertained and fixed. That was sufficiently done by providing for its being assessed (i. e. imposed) and levied (i. e. collected) "in the same manner," &c., &c. That is by suit, or by distress, or by sale of the property, according to the ascertainment or fixing of the amount under the previous clause.

This is obviously the only reasonable and sensible construction that can be put upon the latter clause of this section. The monstrous and forced meaning for which the Appellants contend, makes the words "in the same manner, &c." apply to the entire section, instead of to the immediately antecedent words, according to the true rule of grammatical construction. The effect of this construction, (which of itself furnishes a sufficient objection to it) is to render futile, nugatory, and unavailing, all the preceding significant provisions of the section. It was not the benefits and damages that were to be *ascertained* in the same manner, &c.; but the expenses which were to be *assessed and levied*, in the same manner, &c. And when we consider that the true meaning of the word "assess" is to "impose," to "charge with a certain sum as a due share," and of the word "levy" to "raise," to "collect," to "gather," (vide Worcester's Dict.) and not to "ascertain," to "inquire into," to "estimate," it becomes obvious that the construction we contend for is not simply required for the purpose of giving a sensible meaning and effect to all the clauses in the section, but justified and made necessary by the true signification of the words used. And this view of the Act, which gives vitality to *all* its provisions, exhibits also the thoughtful consideration with which its framers blended into one system all the necessary and important elements of the Acts and Ordinances having reference both to the "condemnation" and the "grading and paving" of streets. The first provision in the Act, requiring the application of a majority, &c., was obviously, inserted merely for the purpose of conformity to the 18th section of 1817, ch. 168; the following provisions, being absolutely necessary to the constitutional validity of the Act, were framed upon the plan of 1838, ch. 226, and the last clause in the section was based upon the provisions

of Rev. Ord. No. 15 of 1850, having reference to the collection of the tax when ascertained, by the thereby prescribed remedies, of suit, distress and sale.

On the other hand, the construction for which the Appellants are forced to contend amounts to this: that the "casus omissus" for which the Legislature intended to act, was only the want of power to impose and collect the usual grading tax on the county line of the Avenue. That the meaning and intention of the Act was simply to transfer the city system to the county: and that its true construction, *ignoring and omitting all other passages as superfluous and irreconcileable with such intention*, is "that the Mayor and City Council of Baltimore shall have full power and authority to grade and pave North Avenue, in the same manner as now provided, &c., &c." This is the scope of their whole argument, and for the purposes of their case, it must necessarily be so. For it is admitted, that the City Commissioner did proceed in this case, precisely as he would have done under Rev. Ord. No. 15 of 1850, in the case of an ordinary city street or alley: and in order to justify his proceedings, and establish the right claimed to sell the property for non-payment of the tax, it is necessary to maintain a construction of the Act, which renders its reference to the Act of 1838, ch. 226, and the explicit adoption of its provisions, nugatory and void.

I propose to consider the various grounds upon which this construction is insisted upon. It is said, in the first place, that no specific provision is made by the law, for the payment of damages to property injured: and that no harm has been done therefore, by the admitted failure to ascertain their amount. This view is taken, on the ground that the assessment and levy provided for is of "expenses" only, and not of "damages" *eo nomine*. The counsel, who opened the argument, did not pursue the objection to this extent. He admitted that, according to his view of the Act, it *was* necessary, that there should be an ascertainment of benefits and damages, for the reason that the act justified an assessment of the expenses "only upon property benefited." And that the object in providing for such an ascertainment was not that the *damages* should be paid, inasmuch as the law provided only for the payment of *expenses*: but only that the assessment should *not* be made upon such

property as should be ascertained to be damaged. It seems ot have been overlooked, that this view of the Act falls far short of justifying the proceedings of the Commissioner under it; for considering that the tax was levied by him *without* any such ascertainment, and equally upon property damaged and benefited, it is clear that this was in direct violation of the construction contended for. It was probably also overlooked, that this admission furnishes a sufficient answer to the point made in the Appellant's Brief, in which the absence of any provision for payment of damages, *eo nomine*, is relied upon as fully justifying the Commissioner in strictly following the City Ord. of 1850, and disregarding the Act of 1856 altogether. But the answer to the objection is this: the first section requires an ascertainment of the amount of damages "*for which the owners ought to be compensated.*" The fourth section provides for an appeal "*from any assessment of damages.*" The first section provides for *payment* of the "expenses" of the work. That expense is made up of the cost of the grading, and the amount of damages done by it: and is to be assessed "upon the property benefited." Is it reasonable to suppose, that the Legislature, while it clearly contemplated the occurrence of damages, which "*ought to be paid for*," and provided for an appeal for the benefit of parties dissatisfied with the estimate of damages, meant to exclude the idea of the damages being "paid for," because they used the word "expenses" only? If any doubt existed as to the scope of the word, the whole purview of the Act would require it to be so construed, as to include everything that "ought to be paid for" by reason of the paving and grading. It may be added, that if the Act is to be held to make no provision for the payment of damages, it is unconstitutional and void: and on that ground, if on no other, there was no authority in the City Commissioner to do the work, or levy the tax, at all.

In the next place it is insisted that the provisions of the act, looking to the ascertainment and payment of damages done by the grading, are void, because the right to grade or regrade the streets on any level the public convenience may require, is a matter of necessary municipal power and discretion, to the exercise of which all city property is subject; and that any injury caused by the reasonable exercise of such power is therefore

"damnum absque injuria." Authorities are referred to, which seem to sanction that doctrine, as applicable to some other city charters. But the answer is, that no such rule has ever been established in reference to the city of Baltimore; and that on the contrary, repeated legislation, general and special, on the subject, fully recognizes the constitutional right of the party whose property is injured by the establishment of a new or alteration of an old grade, to require compensation for his damage. There is virtually no difference, except in degree, between depriving an owner of the beneficial use of his property and taking away the property itself. The public good, in either case, can alone justify the injury; and the just rule of compensation, in both cases, is the same.

Vide Gardner *vs.* Trustees Newburgh, 2 Johns. ch. 162.

Boston and Roxbury Milldam *vs.* Neuman, 12 Pick. 482.

On this principle of the recognition of responsibility for "consequential damages," all the legislation in reference to the grading of our city streets is founded. This is perfectly clear from 1809, ch. 131, s. 5 and 13, 1811, ch. 138, s. 10, 1817, ch. 71, s. 3, 1818, ch. 198, s. 1, 2, 3, 1821, ch. 252, s. 2 and 3. These (especially 1809 and 1811) and other acts "in pari materia" treat the establishment of a grade, and the actual grading as matters of *public* and not *private* concern, and expressly provide compensation to all injured parties. A like rule, though the damage is consequential only, is established by 1838, ch. 226, in reference to *closing* streets once opened. It is obvious, therefore, that 1856, ch. 164 was framed with especial reference to all former precedents in this State in similar cases; and if the legislative meaning and intention on this point is clear, certainly its *power* cannot be successfuly questioned.

It is in the next place seriously urged that granting "damages" in such cases to be properly allowable, the presumption is, that they have already been ascertained and paid under the proceedings for the "opening and condemnation" of the Avenue; and that the act in providing for their being paid a second time is void. The answer to this view of the case is twofold. 1. That, in point of fact, upon the condemnation of the Avenue, no assessment or estimate was made of the benefits and damages that would arise out of its being graded. 2. That no intend-

ment of law can be allowed, that such an estimate was made, for the reason that the laws and ordinances under which the Commissioners acted *gave them no power* to make it.

1. It was not made in fact. There is no exact proof of the nature of the proceedings by the Commissioners other than is furnished by the extract (Defs. Exhibit X, p. 162,) of the assessment in the case of Mrs. Bond. She owned property in and on the Avenue; and the "damages" awarded her are shown to be "*the value of the ground lying in the bed of the Avenue, and the cost of removing the fences off the lot.*" No inquiry was made into the damages likely to arise thereafter by the grading, and could not be made for the reason that it does not appear that the grade was *established.* The law does not require that to be done before the street is condemned, and without it no estimate could be made, for the simple reason that lots which would be benefited by one grade, would be injured by another. For instance, the application in this case was to grade from Pennsylvania Avenue to Falls Road. The grading in fact was to the Northern Central Railroad, which point is near the Falls Road, but on a grade 30 feet above it. (Rec. p. 98.) Now, if the grade had been, as applied for, from Pennsylvania Avenue to the Falls Road, lots in the neighborhood of that road, which are now 20 or 30 feet below the level of North Avenue, would have been nearly upon a level with it, and therefore much less damaged than they are. The Record is full of testimony showing clearly that at the time of condemnation, the sole damages estimated were the value of the ground taken for the bed of the Avenue. Refer for example to the case of B. Horn (p. 64.) His property, prior to the grading, was worth $3,000. The grading has left it from 15 to 20 feet below the level of the Avenue, and utterly *destroyed* its value, for the reason that it would cost $3,000 to fill it up to that level; and yet the grading tax imposed on it was $4,000! Being asked (p. 66) what he was allowed for damages on the condemnation, he says—nothing. The benefits exceeded the damages (for the bed of the Avenue) about $200. "They took my land, and I had to pay about $200 besides." The record is crowded with evidence of this extraordinary character. It would be a gross and monstrous perversion of the facts, to assume that the damages, that might subsequently be

caused by the grading, were taken into consideration, in any way, at the time of condemnation.

2. But it is also clear, that the Commissioners for condemnation had no authority to ascertain and assess damages other than the value of the ground *in the bed of the Avenue*; and therefore, no presumption of law arises (as in Chesapeake and Ohio Canal *vs.* Grove 11 G. & J. 398) on the ground that it was their "right and province" to make any further estimate. A minute reference to the laws and ordinances touching this matter is necessary to the demonstration of this point. The Act of 1838, ch. 226, authorized the city "to provide" in cases of opening streets, for ascertaining and assessing both damages and benefits to lots within "*or adjacent to the city.*" The ordinance "to provide for the exercise of this power" in force at the time North Avenue was condemned, was No. 17, Rev. Ord. 1850, (*not* 1858.) That ordinance (unlike that of 1858) fell short of providing for the exercise of the entire power granted by 1838, ch. 226: because by section 6, it covered only the case of lots *within* the city, not of those *adjacent*. Special Ord. No. 16 of 1852 required the Commissioners, in condemning North Avenue, to proceed strictly under the powers and provisions of Rev. Ord. No. 17 of 1850. And it was not discovered, until while the condemnation was being made, that it could not be effectually done for want of power in the Commissioners *to assess benefits in the county.* The bed of the Avenue was *wholly* in the city. (The statement in the Briefs to the contrary is a mistake, as Poppleton's Plat will show.) The value of that bed, *within the city*, had been ascertained and allowed as damages: but, how were the benefits to be ascertained and assessed *in the county?* This made it necessary to pass Special Ord. No. 75 of 1854: to which the Court's attention is particularly called. The preamble declares the want of power in the Commissioners to levy *benefits* in the county: and supplies it by authorizing them to assess the property on the North line of the Avenue, and adjacent thereto, if, in their opinion, it will be *benefited* by the opening. Under this Ord. therefore, which is the source of their power, it was the "right and province" of the Commissioners to assess benefits, *but not damages*, in the county: and it is clear therefore, that, as prior to the Act of 1856, ch. 164, there

had existed no power to ascertain and provide for the payment of *damages* to county property that might arise in any way from the opening of North Avenue, no presumption of law can exist in favor of any such allowance having been previously made. This distinguishes the case entirely from that of Chesapeake and Ohio Canal *vs* Grove. And this further important distinction may be added: that if any presumptions of law in favor of a prior settlement of damages could be shown to exist, they are sufficiently rebutted by the Legislative declaration in the Act of 1856, that damages "by reason of the grading, for which owners ought to be compensated" was a proper subject matter of ascertainment and payment.

It must also be observed, that all the objections made by the Appellants to our construction of the Act, though they assume various shapes, cover only the question whether the *damages* are by the Act ascertainable and payable, and proper to be ascertained and paid. They do not touch the point of legislative meaning and intention in reference to the ascertaining "*what amount, if any, of benefits*" may be caused by the grading, and the assessment of the expenses only "upon lots benefited; and the significant provision made for an *appeal* from the assessment *both* of benefits and damages. It is necessary to blot out these provisions also from the Act, and to render them, by some process of construction, ineffectual and unmeaning, in order to legalize the extraordinary proceedings of the Commissioner in assessing alike, property benefited and damaged, without regard to any provisions of law except those of Rev. Ord. No. 15 of 1850; which, it is admitted, gave no power for the grading and laying taxes for the grading of North Avenue at all. Now the Record of the testimony (which cannot be detailed here, but which will of course be examined by the Court) establishes beyond contradiction, that, *in fact*, the property on the line of this Avenue has been most unequally affected by the grading. Some of it has been benefited; but those benefits have been most unequally distributed, some lots being decidedly improved in value, others very little. A great portion of it has been seriously injured: and some parts damaged to such an extent, as to be absolutely valueless. This may seem to be a strong statement: but without a careful examination of this Record, it

would hardly be credible, that so monstrous an injustice could be perpetrated, under the pretence of its being sanctioned by law, as the destruction, without any compensation, of the value of private property, by the construction of a public improvement, and the subsequent attempt to levy an enormous tax upon that property, to pay the cost of the construction. Take these facts into view, in connection with, and as bearing upon, the proper construction of the Act in question, and let it be answered whether the reasonable and just interpretation of the views of the Legislature, "ut res magis valeat quam pereat" be that this great public work was to be done and paid for by a running tax, per front foot, upon all property, equally, whether benefited or damaged—or whether the damages inflicted were to be measured and paid for, and the entire cost of the work, assessed only upon property benefited, and that in a just ratio to the extent of such benefits, when ascertained.

Assuming the construction of the Act of 1856, for which we contend, to be correct, it remains for us to point out wherein the proceedings by the City Commissioner were unauthorized and void, for want of conformity to its provisions. The Appellee's Brief and the authorities referred to, are considered as establishing, that the city had no power to grade the Avenue and impose a tax on property for its cost, except by virtue of the Act of 1856. That *the power to sell* the complainants' lots must be found in that Act. That the power so delegated by the Legislature must be strictly pursued: and can be executed in no other way, than that prescribed by the Act itself.

1. In the first place, it is not denied that "the application, in writing, of a majority in front feet of the owners of the land fronting on that part of the Avenue to be graded" was indispensable. The only question, under that head, is whether there was such a majority or not.

That subject is treated at large between pages 6 and 15 of our Brief. There are, however, one or two further points that may be referred to. One-half the difference between the termini named in the *application* is 6026 ft. 11 inches. The correctness of those numbers is *established* by the City Surveyor, and not disputed. The attempt made in the Appellant's Brief to deduct the number of feet on the cross streets and the width of the

Northern Central Railroad and the distance between that Road and the Falls Road, is utterly unsupported by any thing to be found either in the law or the evidence. In the same manner the report of the City Surveyor (relied on by the Commissioner p. 146, Ans'rs to 11, 12, 13, 14, 15 Int's to Shannon,) exhibits the number of front feet ascertained by him to belong to the parties signing the application to be 6112 ft. 6 in. (Appellant's Brief, p. 8.) The correctness of this ascertainment is not disputed by the Appellants, except in reference to *two parties*, Meakin and Lester. They assume to add to the Surveyor's estimate the number of feet claimed by those parties in the *application.* But this is in face of the uncontroverted fact that the South line of the Avenue (except as to 246 ft. of Lester's lot,) did not reach up to their property, but only to a line in the bed of the "Old Road" on which their lots fronted. The "Old Road" was *assessed* by the Commissioner for the tax on those fronts *and sold;* and there is not a scintilla of evidence to justify the violent assumption that Meakin and Lester had title in *any* part of the bed of the "Old Road." The Appellants must therefore be held to have made out, *at the best*, only a case of application by owners of 6358 ft. 6 inches; being 331 ft. 7 in. more than a majority.

Now, beside deductions for the parties whose signatures are assailed in our Brief, it must be noticed that though the surveyor puts down the Bond property at 1,579 feet, that amount must clearly be reduced by 364 feet; inasmuch as we have proved (p. 47, ans'r 2) that Bond "owned no property in the city —that it lies entirely in the county." There has not been even an *attempt* to disprove this. The 364 feet *in the city*, therefore put down to Bond by the surveyor must belong to some one else: and if so, that alone *destroys* the majority claimed. So William King, who signed for 75 feet, and Thomas Kensett & Co., who signed for 150 feet, own nothing at all according to Bryson's statement; and there has also been no attempt to disprove that. And it reduces the appellants' statement by 225 feet more.

The Brief refers fully to the cases mainly assailed by us, "Mt. Hope Sisters of Charity," "H. L. Bond," "E. H. Merrill, per Alonzo Lilly." To what is remarked in reference to the first, it need only be added, that the Act of 1816, ch. 95,

and the deeds to the property (used by consent at the trial below) show the title to be in the corporation of "the Sisters of Charity of St. Joseph's." That is our proof. They do not show on the other hand, a signature of the *name* of that corporation at all; or a signature *by any officer or agent of the corporation, authorized by virtue of her office or the nature of her agency, or by virtue of any special agency for that purpose,* to bind the corporation. The attempt to imply the original assent of the corporation *in writing,* from a subsequent payment of the tax bill (even if *that be proved,* which we deny) is sufficiently answered in the Brief.

In reference to the signature of "H. L. Bond," it may be added, that he does not *profess* to sign *as agent,* and disclaims any authority so to sign for any body. His signature therefore clearly only binds his own reversionary one-ninth undivided interest—and that is not sufficient. And in reference to the signature of "E. H. Merrill," per "Alonzo Lilly," it may be remarked that the whole question turns upon the letter (p. 44, Exhibit A. Lilly, No. 2,) and the answer of A. Lilly (p. 113, 48th cross int.) that "he had no authority to sign, except what was given by that letter." The authority was to "sign any document to make the grading all in one job, or one contract, from Hookstown Road to *York Avenue*—i. e. to co-operate with Bond, &c., in *the measure.*" That is plain. The attempt made to show that "York Avenue" meant "Falls Road" has utterly failed, because it is obvious that Merrill never meant to consent to anything else but "one contract to York Avenue." That was the terminus of the "condemnation." To make it short of that point was to make an imperfect work, and one of doubtful advantage to any parties. To make it through was to render Jones' Falls passable, and if "in one job or contract," to make it much less expensive to property holders *West* of the Falls. All this appears at large in the evidence. But (page 166) all evidence to contradict and vary this letter of instruction is *excepted to.* And there is no ambiguity to explain, for "*the* measure" referred to is obviously, on the face of the letter, the making to the *York Avenue* in *one* job, contract, &c.

There are *no* exceptions to evidence by the Appellants save those on page 164: and of them, it is only necessary to notice,

that to the testimony of Bond and others *by reason of interest*: and that, requiring proof, *by deed or will proved*, to countervail the prima facie evidence of ownership on the Commissioners return. To the first it may be answered, that although *some* of the witnesses referred to may have an interest in the *question* to be decided, none of them have any interest in the *event of this cause*. See the cases put in S. 389, vol. 1 Greenleaf's evidence. To the second, that by agreement, to be found in the Record, certified copies of the will of Dr. Birckhead, the deed to the "Sisters of Charity of St. Joseph's," the will of Peters and all documents touching titles referred to in the evidence, were used at the trial below, and are ready to be produced on this trial, if required. It was not contended below, and so far, it is not disputed here, that the character of those titles has been correctly stated. This agreement was simply to avoid unnecessary additions to an already heavy Record.

In reference to a point understood to have been added to the Appellant's printed Brief, that all the evidence touching the signatures of any other parties, than Bond, Lester, and Peters is inadmissible, because there is no averment in the bill charging invalidity in any other signatures, it must be remarked, that, if so unexpected an objection could be sustained, it would only have the effect of defeating, what all parties to this controversy must certainly desire, its speedy determination. But there is really no ground, upon which the decision of these points can properly be postponed.

No such exception to the evidence was made below: and the case was heard and determined by the inferior Court, without objection by any party, just as if the validity of *every* signature to the application, had been assailed by the averments in the bill. And it must be remembered, (see Appellants' Brief, p. 2,) that *ten* other bills were submitted to the Court with this, all raising the question of the validity of the tax and the attempted sale, but all varying in their averments, on this and other points: and those cases are now still dependent upon this. If therefore, it be the meaning of the Appellants, to obstruct the determination by this Court, at this time, of *all* the questions that fairly arise upon this evidence, (which was expressly taken to apply to *all* the cases,) it will be necessary that the Records in all the other

cases shall be brought up, in order that the true character and extent of the allegations in the various bills may be considered.

2. In the second place we contend that before the city authorities could acquire power to allow the grading, they were required to declare, by ordinance, (which is the only mode whereby the Corporation could exercise the power delegated to it) that "in their opinion the work was consistent with the public good." And it is answered, to this, that the ordinance passed December 9, 1859, (Record p. 15,) while these proceedings were pending was a sufficient execution of the power. The passage of this ordinance sufficiently indicates that the action of the Mayor and City Council, on this point, was judged necessary; but if the position assumed be correct, that the power must be "strictly pursued," this Ordinance should have been passed *before* the work was "allowed" to be done. It can have no retroactive efficacy. As the Legislature expressed no "opinion" that the work was demanded by the public good, they required and authorised the city to determine that question. (6 Gill 400, Meth. Church *vs.* Mayor and City Council.) As the necessary foundation of the power to assess "benefits and damages," it should have been established by the previous finding of the city that the case was one of *public* necessity or requirement.

3. In the third place, we contend that the powers delegated by the Act should have been strictly pursued by the passage of an ordinance by the city, providing for the ascertainment of benefits and damages, &c. This was never done. The Appellant contends that it was done by Rev. Ord. No. 15 of 1858. (See his Brief, p. 4, letter A.) But the error, on that head, has been already exposed; and the difference between the ordinances of 1850 and 1858 fully explained. The reasoning in the case of the Mayor and City Council of Baltimore *vs.* Howard, 11 H. & J., 388, upon the distinction between the "grant of a 'power,'" and the grant of authority "to provide for the exercise 'of a power'" is conclusive on this point; that an Ordinance by the city for this purpose, *expressly* under the act of 1856, was absolutely necessary. The language of this Act is similar to that of 1838, ch. 226. The city passed its Ordinance (No. 17, 1850,) to provide *in part* for the exercise of the power delegated by the Act of 1838, and provided its machinery of Commissioners, and

their proceedings with a right of appeal to a jury, &c., without which latter, the machinery would have been constitutionally inoperative, to condemn private property for public uses. It would seem to be conclusive, on the authorities cited in the Brief to this point, that a like provision, by ordinance, was indispensably necessary under the act of 1856. Without such, there were no recognized city agents or authorities who had power in the particular case to assess "benefits and damages;" and if for no other reason the ordinance was necessary in order to provide for the constitutional right of appeal to a jury.

4. In the fourth place, whether the ordinance to provide for ascertaining, &c. was indispensable or not, it is beyond dispute, (if our construction of the Act be correct,) that in some manner, the "benefits and damages" were to be ascertained. This is not denied. The only mode in which the Appellants meet this difficulty, is by seeking to render nugatory and unavailable all the clauses in the Act touching this subject matter. Their argument on this head has already been considered. The facts and evidence referred to on pages 2 and 3 of our Brief, establish conclusively that there never was any ascertainment or even inquiry on this most important point. The proceedings by the City Commissioner were precisely in accordance with the system applicable to ordinary streets; and the answer puts the case, by way of defence, on that very ground. The proofs confessedly establish also, that there were many cases of extraordinary hardship and damage: and that the benefits, if any, were most unequally distributed along the whole line. How is it possible, in view of the plain provisions of the law, that it was to be ascertained what property was benefited and what damaged, and "that the expenses of the work were to be assessed and levied on the property *benefited*," to justify the proceedings of the Commissioner who assessed and levied alike, upon property benefited and damaged? In this respect then, also, the Act was not "strictly pursued"—but flagrantly violated.

5. In the fifth place, we object to the tax imposed upon our lots, for the masonry work of culverts constructed under the bed of the Avenue, to carry off the streams running through the country, over which the Avenue passed.

The answer to this point in Appellant's Brief, p. 10, is that

the charge amounted to only 11 or 12 *thousand* dollars! The sum may be thought inconsiderable: but still, the city had no power to sell the lots to pay it. The proceedings were by the City Commissioner under the "grading" ordinances. Those gave no authority to impose the tax—*the cost of such work had been uniformly, in all prior cases, paid by the city*, and did not come within the legal or ordinary signification of the word "grading." For proofs on this point, see our Brief p. 18 letter m.

6. In the sixth place, (touching still the power of sale claimed by the city,) as the assessment and levy (i. e. collection) of the tax was to be according to existing ordinances, &c., the remedies for grading *alone* (which in this case) are to be found in Rev. Ord. 1850, No. 15, s. 35. That gives the power to collect from the owner, and makes the tax *a lien upon the lot;* but grants to the city no power of sale. That power is only to be found in s. 37, and arises *after the paving has been done.* The tax in this case, therefore, even if otherwise rightfully imposed, created only a lien upon the property until the Avenue is paved, and then, for the first time, will arise the power in the city to sell. The object of this arrangement is obvious. "Grading and paving" are ordinarily contracted for together; and the tax in such case is one. If done, as may be, under separate contracts, the tax is divided; and though each when assessed becomes a lien upon the property, there can be no sale until both are due and unpaid.

7. In the seventh place. By sect. 35, Rev. Ord. No. 15, 1850, the *previous* approbation of the Mayor is made necessary before the City Commissioner can proceed to contract for grading, &c. There is no proof that this was obtained. (See the endorsements, Rec. p. 15.) This was necessary under the Defendant's construction of the Act, and the want of it rendered the Commissioner's proceedings void.

Vide Brief, p. 19, letter (N.)

8. In the last place, over and above all other objections to this most extraordinary and inconsiderate assumption of authority by the City Commissioner, there is a fatal error in his proceeding, in the non-conformity of the work to the application and the contract. The application, by property holders, is for the grading of the Avenue between Pennsylvania Avenue and *the*

Falls Turnpike Road. (Deft's Exhibit B, Rec. p. 14.) The *contract* (Rec. p. 14,) is also for doing the work between those points. But what is singular and inexplicable, the advertisement by the Commissioner required by sect. 35, Rev. Ord. No. 15, 1850, is for proposals to do the work between Pennsylvania Avenue and the *Northern Central Railroad* (Rec. p. 16,) and the specifications offered by him to bidders (Rec. p. 37,) also designate the latter point as the terminus. In point of fact, *the grading never was done to the Falls Turnpike Road, but only to the Northern Central Railroad.* (Bryson, 5th Int., p. 98.) And yet (Vide Rec., p. 20,) the City Collector in his advertisement of sale (to restrain which this Injunction was granted) announces the assessment for which he claims to sell, to be for grading North Avenue, between Pennsylvania Avenue and *the Falls Turnpike Road.* This state of facts is fully admitted by the Appellant's Brief, and the only explanation offered, is that to be found in the inconceivable carelessness or ignorance displayed in the City Commissioner's answer to the 19th cross Int. (Rec. p. 147,) where he says, that "the law calls for the grading *upon the Northern Central Railroad to Pennsylvania Avenue*, and I made the *contract!* according to the law." This answer will perhaps furnish the Court with a key which may explain the persistent series of blunders committed in every stage of this anomalous proceeding.

Now, if the extent of this objection were simply, that the work applied for and contracted to be done, had not yet been completed, and that the grading between the Northern Central Railroad and the Falls Turnpike Road yet remained to be done, it would still furnish a sufficient reason for enjoining the City from collecting the tax, until the contract should be fully performed. But the objection is of a more serious nature. The fact is, that as the Avenue is now graded, *it never can be graded to the Falls Turnpike Road at all.* The application of the property holders can never be complied with, except by an entire change of the grade of the Avenue: for the Falls Turnpike Road, which runs nearly parallel to the Northern Central Railroad at the distance of a square (about 300 feet) East of it, is upon a grade of nearly 30 feet below it: and the City Surveyor says (8 Int. p. 98) "I do not think you could pass between those points,

unless you could find a *climbing horse.* The descent is at an angle of about 33 degrees." Now the evidence shows that the Falls Turnpike Road is a public thoroughfare, and that Pennsylvania Avenue is the same. The Northern Central Railroad is merely a Railway bed, laid upon an embankment 30 feet above the level of the Falls Road and the surrounding country at that point: and the ancient highway (the "Old Road" as it is called in the Record,) passed from the Falls Turnpike through an archway *under* the bed of the Railway, along the course of the North Avenue, a short distance Westwardly. It is clear therefore, that in order to gratify the application of the property holders, the City Commissioner, (if he had any power to act at all) should have adopted for the North Avenue, the grade of the "Old Road" so as to pass *under* and not *over* the Railway embankment: and under an ignorant and utterly unauthorized construction of his powers and duty, he has not only failed to comply with the application of the property holders, who sought to connect two thoroughfares, the Pennsylvania Avenue and the Falls Road, but he has executed a different work, and at an enormously increased cost, which, in its present state, is of no use, either to the property holders or to the public, as it connects no thoroughfares, but terminates on the edge of a steep precipice, at an angle of 33 degrees, distant some 300 feet from the terminus proposed.

Assuming that the City Commissioner had authority (without reference to the Act of 1856,) to grade part of this Avenue, and impose a tax for the work, that power he derived from Rev. Ord. No. 15, of 1850; and he was bound strictly to pursue the mode prescribed by that ordinance for the execution of the power. His was a specially limited jurisdiction, and his proceedings, unless they were in strict conformity with the provisions of the Ordinance, were void. (Swann *vs.* The Mayor, &c., 8 Gill, 154.) Section 35 requires him, in grading contracts, to be governed in all respects by the provisions in reference to paving. Section 11 requires him to advertise for proposals agreeably to the extent and location of the work applied for, &c., &c. His advertisement (p. 16) and the proposal (p. 13) of Slater, the contractor, whose proposal was accepted (p. 15) were for the doing of a different work from that applied for; (p. 14,) and the work as

done by Slater, and accepted by the Commissioner, was different from that contracted for. These irregularities (shown already to have been not formal merely, but substantial and most serious in their results,) avoid the whole proceeding, and render the tax illegal.

It remains only to consider two objections urged by the Appellants to our right to an injunction, even granting that our views of the law of 1856, and of the acts of the City Commissioner, are correct.

1. It is said that the proper, and *only* remedy for the grievance of which we complain, was by an *appeal*. The main question is, had we at any time a right of appeal? The 4th sect. of the act of 1856 provides, "That the *same* right of appeal from *any assessment of benefit or damage*, &c., shall be *granted* to any owners, &c., as is now *provided under existing laws*, in Baltimore city or county, *in similar cases*. From the proceedings of the *City Commissioner*, in grading and paving, &c., there was *no* right of appeal under existing laws. From those of the *Street Commissioners*, in assessing benefits and damages on the opening of streets, there *was* a right of appeal provided under Rev. Ord. of 1850 No. 17, passed to provide for the exercise of the powers vested in the city by the act of 1838, ch. 226, to which 1856 is the supplement. Sect. 6 requires certain notice by advertisement, of their meeting for the purpose of ascertaining *benefits and damages*. Sect. 8 requires the estimate when made by them to be deposited with the *City Register*, and notice thereof to be given by advertisement, and also notice of their meeting on a certain day, to hear objections to the estimate, and to review and correct the same, and when altered, to re-deposit the estimate with the Register. And sect. 9 requires the *Register*, within five days after such return, to advertise a notice to all persons interested, that they may appeal, *within* 30 *days*, to the City Court in Baltimore; wherein the assessment of *benefits and damages*, may be reviewed by the Court and a Jury, whose decision shall be final.

Now, whether we consider the act of 1856 as of itself *granting* the appeal, or as merely authorizing the city to provide for the exercise of the right, it is equally clear, that from the proceedings of the *City Commissioner* we never had *any privilege of ap-*

peal. It was obviously not the meaning of the act of 1856, that the *City Commissioner* should undertake this proceeding at all, unless under some special City Ordinance, delegating to him the power,—because (if for no other reason) the act granted an appeal, such as existed "from *assessments of benefits and damages* in *similar cases;*" and the City Ordinances had not invested the City Commissioner with any power to assess benefits and damages in any case,—nor had they provided an appeal from *any* of the proceedings, which, by virtue of his office, he was authorized to take. If, therefore, the act is to be considered as *of itself* providing all that was necessary to an appeal, its construction must be, treating it as a snpplement to 1838, ch. 226, that the "similar cases" referred to were proceedings by the *Street Commissioners*, under Rev. Ord. 17 of 1850: as these City Officers were empowered to assess benefits and damages, and an appeal (as before explained) had been provided from their proceedings. In this view of the act, *whether there was an application by a majority of property holders or not*, the City Commissioner had no *jurisdiction* to act in the matter at all: and his proceedings are *entirely* void: as much so, as if the City Surveyor, the City Register, or any other officer had so undertaken to overstep the limits of his official power and duty. The property holders did not even address their application "to the City Commissioner." (Bond, p. 57.) And because the proceeding was entirely void,—there was no appeal from it: and the only remedy of the Complainants against an unauthorized sale of their property, was by injunction, or by treating the sale as void, and resisting the claims of any purchaser. But even further—granting, for the argument's sake, that the City Commissioner was the proper officer to conduct proceedings under the Act of 1856—because by virtue of his office, he had power to make contracts for grading and paving, still, inasmuch as that Act granted the *same* appeal 'from any assessment of benefit or damage,' as is provided under existing laws in '*similar cases:*' it is clear that the City Commissioner should: 1, have made an estimate of benefits and damages, which he never did and 2, that he should have deposited his return with the Register, and that the Register should have advertised 'the notice of a right of appeal within 30 days, &c.,' '*as provided in similar*

cases,' which also he never did. How then can it be said, in any view of the case, that there was either a right of appeal or anything to appeal from? We were, in fact, as alleged in the bill, *deprived* of our right of appeal.

The Appellants seek to distinguish this from the case of Holland and the Mayor and City Council, upon the ground that there was no right of appeal in that case. But the appeal provided by the Act of 1856 was not from the Act of the city or the City Commissioner in allowing the grading and paving to be done. That presented a question of *power;* dependent upon the application of a 'majority' and without which the exercise of the power was void, whether attempted by an ordinance; or by a city officer, without one. The appeal was to be from any assessment of benefit or damage and *upon that alone.* If no such assessment was ever made, there was nothing to appeal from: and none of the other irregularities in the proceeding, to which we now object, were subjects of appeal at all.

These considerations also forcibly confirm the views heretofore taken in regard to the absolute necessity of a City Ordinance for the purpose of carrying the Act of 1856 fully and properly into effect; and of the entire nullity of the proceedings which were attempted, without one.

2. It is objected that the property holders who stood by and saw the work of grading going on without objection, are precluded from taking advantage of the want of authority in the Commissioner to do the work, and tax the property, as he has done, for the cost; and that the parties who signed the application are estopped from denying that it was signed by a 'majority' of owners. The latter point is considered at large in our Brief ps 20 &21. It is proper to add, that although Porter signed the application, a large proportion of the Complainants in the other Bills, (dependent upon this Appeal) did not sign: and it is difficult to understand how the proceedings could be void, as to those who did not sign, yet good and operative to create a lawful tax upon the property of those who did sign. What might be the effect in another form of proceeding of the "misrepresentation" treating it as such, it is not worth while to consider; but the signature cannot properly be looked upon either in the light of an estoppel in pais, which would prevent the

signer from denying that there was a majority, or as an unconditional assent to the work being done, which could not under any circumstances be withdrawn. As an estoppel it certainly could not operate further, than to preclude the party from averring that he did not own the property and the number of feet, for which he signed. It is a vote intended to make up a majority; and properly considered, it is not a representation of any thing intended to influence the Commissioner or which did influence him in fact. His evidence and that of Quincy and the City Surveyor shows that it was looked upon simply as the application of certain parties, the state of whose titles, and the size and location of whose property it was the practice and duty of the city officers to look into. Treated as evidencing assent merely, it cannot give the Commissioner *jurisdiction;* for it is an assent, conditioned upon the obtaining of signers sufficient to constitute a majority; and not an admission of a certain state of facts, which if true would give the jurisdiction. The nature of the proceeding requires that the authority to sell the whole property taxed should be perfect. It cannot be valid as to one, and void as to another.

This objection extends only to the defect in the Commissioner's proceedings for want of the application of a sufficient number of owners. The other covers more ground; for if valid, all those who actually knew, or had constructive notice that the North Avenue was being graded, are estopped from contending that the proceedings are unlawful, because they did not interpose by injunction until the tax was levied, and their property threatened with sale. The objection might be disposed of by simply stating that there is no evidence that the Complainant, or any party to any of the other bills, had actual knowledge of the progress of the work; and no public notice appearing to have been given, other than the advertisement of the Commissioner for bidders; parties interested, could be affected (if at all) with constructive notice of the contents of that advertisement alone. But granting that the property holders generally knew that the city was constructing this Avenue; was there, prior to the assessment of the grading tax, and the attempted sale of their lots, any notice to them, or any of them, that there was to be no assess m t of benefits and damages under the act of 1856, no appeal from such

an assessment, no passage of a city ordinance to provide for securing to them the rights and privileges expressly conferred by that Act? What reason had any of them for supposing that when the work was done, it was the intention of the city, or its officers, to disregard the plain provisions of that Act, and impose an enormous rateable tax per front foot on all the property, without inquiring whether it was lessened or improved in value by the grading? It is obvious, from the testimony of many of the owners, that they expected to "be compensated," and not "to pay a compensation," in consideration of the injury done them; and it is impossible to suppose, that some of the parties interested, if they stood by and witnessed the gradual destruction of the value and usefulness of their property, could have anticipated so glaring an injustice, as an attempt to make them pay part of the cost of such destruction. It seems to be supposed that the contractors are the only fair and honest parties to this controversy; and that its object is to defeat their just claims by inequitable defences. But the question is not, whether they are to be paid, but whether these Complainants are to pay them? The city had no power, except under the Act of 1856 to do the work; and no authority, except in strict pursuance of the provisions of that Act, to enforce payment for it. The mode of payment prescribed, and the only constitutional mode, was by a levy "upon property benefited" to the extent of its improved value; and no property holder, up to the time of the assessment, expected to be charged for more. The Act also made provision for compensating parties injured, whose claims, as much as those of the contractors, are entitled to favorable consideration; and they had a right to expect just compensation. Surely until those reasonable expectations were defeated, there was neither motive, justification, nor equitable grounds for interfering, by injunction, with the proceedings by the city and its officers.

In this review of the case, little or no reference has been made to authorities for positions taken. Those, together with some points not needing greater amplification, are fully set out in the brief.

It is believed to be the desire of all parties to these appeals, that all the points presented by the evidence, and necessary to a final determination of the controversy, should be passed upon by the Court.

WM. F. FRICK, *for Appellees.*

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GEORGE U. PORTER

vs.

THE MAYOR & CITY COUNCIL OF BALTIMORE & WM. T. VALIANT, CITY COLLECTOR.

Court of Appeals,

Dec'r Term, 1860.

SPECIAL DOCKET, No.

THE above is an Appeal from an Order of the Judge of the Circuit Court for Baltimore City, passed on the second day of June, 1860, *continuing* the Injunction, granted to the Complainant on 30th September, 1858, (Rec. p. 5,) until the final hearing (*Id.* 167.) The Bill (Rec. 1–4) sets forth, substantially, that the Complainant was the owner of two lots (therein particularly described) situated in the City of Baltimore, and binding upon the North Avenue; a street or avenue, extending around the said City; the *northern* portion of which was in the *County;* and the *southern* portion *within the City limits.* It then goes on to allege that these lots were advertised for sale by Mr. Valiant, the City Collector, to meet an assessment which had been levied upon them for the grading of the said Avenue. There is an admission in the Bill that the work was actually done by a certain Wm. Slater, and there is no allegation that it is defective, or improperly performed in any respect. But the Complainant, as the ground for his Injunction, avers that the provisions of the Act of 1856, ch. 164, (which Act authorized the grading of the Avenue,) had not been complied with, and that the law had been violated in many material respects, which are particularly specified.

These will not be stated here because they are cited and considered in a subsequent part of the Brief. See Post point ii. subdivis. 1, 2, 3, 4, 5, 6 and 7.

The Injunction issued, as prayed on 30th September, 1858, (Rec. p. 5;) and the answer (Rec. 7–12) of the Defendants (after several continuances of the cause by the Court) was filed, and a motion to dissolve entered by the clerk, on the twentieth January, 1859, (*Id.* 32.) The averments of the answer are specially referred

to in connection with the statement of points, and, therefore, will not now be abridged.

Upon 12th February exceptions to the answer were filed by the Complainant's solicitor, (Rec. 32, 33,) but they were afterwards withdrawn. (*Id.* 164–165.) A commission to take testimony was issued, *by agreement*, to Frederick Pinckney, Esq. and was returned by him on the eighteenth day of June. (Rec. p. 35.) During the progress of the case several exceptions to testimony were filed by the solicitors of the Defendants. These will be found in the Record, (pp. 163 and 164.)

Upon the 28th May, 1856, the application to grade was *received* by the commissioners; he *determined* to grade on 5th July; advertised for proposals on the 9th of the same month, and on the 21st *received* proposals and *awarded* the contract to W. Slater, Carroll's Island, Baltimore County.

Articles of agreement were entered into with the contractor on 4th August; the work was commenced somewhere in November, 1856, and was "not quite completed" up to the last of August, 1857. (Rec. pp. 14, 15. *Id.* p. 120. Ans. to 3d interrogatory.) The *assessments* upon the property holders for the work of grading, (including the city,) amounted in the whole to one hundred and three thousand six hundred and thirteen dollars and forty-four cents. (Rec. pp. 17 and 18. *Id.* 93.)

There were ten other cases which stood upon the *same* or *similar* grounds as the one now before the Court, and agreements were entered into between the respective solicitors of all the parties, to the effect—

1st. That the answer filed to the Bill of George U. Porter should be regarded as an answer to the Bills of the other parties.

2d. That the testimony taken *under agreement*, by Frederick Pinkney, should be applicable to all the other cases.

3d. That all the other cases should be submitted upon the *motion to dissolve* entered in the case of George U. Porter. (Rec. p. 34. *Id.* p. 165.)

The following are the points of the Defendants:

I. There is some difficulty in ascertaining the true construction of the Act of 1856, ch. 164, sec. 1, (Revis. Ord's 1858, p. 671,) but the interpretation which best harmonizes the various enactments of the law, seems to be this: That the *legislative intention* was to apply to the grading of the North Avenue a system composed of a *combination* of the provisions of the Acts and Ordinances

relating to the grading *and opening* of streets in the City of Baltimore.

Laws relating to the opening of streets:

Act 1838, ch. 226; Revis. Ords. 1858, p. 477.

Ord. No. 15. *Id.* p. 57.

Laws relating to the grading of streets:

Act 1829, ch. 114. *Id.* 425.

Act 1837, ch. 300. *Id.* 464.

Ord. No. 13, secs. 35 and 36. *Id.* 53.

II. The grounds alleged in the Bill of Geo. U. Porter (Rec. p. 1–4) in support of the application for an Injunction, are:

1. That the Mayor and City Council of Baltimore did not, as required by the first section of the Act of 1856, express any opinion to the effect that the grading of the Avenue was consistent with the public good; nor take the matter at all into their consideration.

It will be contended:

a. That the provision of the law upon which this objection is founded was introduced solely for the benefit of the public. It can only be urged, therefore, by those who represent the interests of the community at large. The injury (if *any* exists) is not particular, but general, in its character.

b. The language of the Act is,

"That on the application in writing of a majority in front feet of the owners of the land, &c. &c. to the Mayor and City Council, &c. &c., *they* shall have full power and authority (*if in their opinion consistent with the public good*) to *allow* the same, &c. &c."

Such being the words of the law, it was not necessary for the municipal authorities to have directly declared, by the passage of an ordinance that the work contemplated was consistent with the public good. Any circumstance from which it might be inferred that such, in reality, was their judgment upon the matter, would be amply sufficient to satisfy the requirements of the Act. The assent or opinion of a corporation may be presumed, as well as that of on individual. But the facts that the grading of the Ave-

nue was done under the superintendence, and by the authority, of a city official, and that the Mayor and City Council *allowed* the same to be proceeded with, afford just grounds for the presumption that they regarded the undertaking as not detrimental to the interests of the community.

c. After the completion of the work an Ordinance *was* passed (Rec. p. 17) approving of the same as not inconsistent with the public good. This subsequent declaration is equivalent to a previous expression of opinion that the grading would not injuriously affect the interests of the City. No objection can be urged against the *validity* of the action of the corporate authorities. Every *retroactive* ordinance may be good which does not disturb vested rights. But in this predicament stands the one above mentioned; consequently it is a valid enactment.

2. That it was the duty of the Mayor and City Council to have provided for ascertaining whether any, and what amount of, benefit or damage would be sustained by the property-holders, by the grading of the Avenue.

a. The part of the Act of 1856, containing the clause in question, is borrowed almost verbatim from the Law of 1838, ch. 26, sect. 1, Revis. Ords. 1858, p. 477; to which, also, it is expressly made a supplement. But the City authorities had already passed an Ordinance, in conformity with the requirements of this latter Act, regulating the assessment of benefits and damages, not only in the case of lots situated in the City of Baltimore, but also where they were located *adjacent* thereto. See Ord. No. 15, Revis. Ords. 1858, p. 57; and same Ord. sect. 6, Id. p. 59.

There was no need, therefore, of any further action on the part of the Corporation, as the legislative purpose could be fully effectuated by the Ordinances already in existence.

3. That they neglected to provide for the assessing and levying on the property of persons benefitted, (the Bill does not say *what*, but the Act *designates*,) the "*expenses* which may be incurred in the grading or paving, or both, of said North Avenue or any part thereof."

a. The words of the clause are:

"And to provide for assessing and levying on the property of persons benefitted within the same limits, the expenses which may be incurred in the grading or paving, or both, of said North

Avenue, or any part thereof, *in the same manner as is now provided by existing laws, and Ordinances for the grading and paving of streets in the City of Baltimore.*"

It seems clear (looking to the purpose of the Act) that there was no need of any action on the part of the Mayor and City Council. The requisite machinery (*as designed* by the Legislature,) for the assessing and levying of the expenses of grading the Avenue had already been created by City Ordinances, and *is expressly recognised* by the *law itself.* There was nothing left but to apply this *precisely* as it existed in the City, to the County. This could be done as well without, as by the interposition of the Corporate authorities. It was, therefore, evidently never the intention of the Act to make the levying and assessing of the expenses altogether dependent upon the action of the Mayor and City Council. By referring to a perfect system already in existence as applicable to the Avenue, it *ipso facto* transfers that system and *makes* it *applicable* to the Avenue. It executes itself. Any other construction would make the Legislature insist upon that which could answer no purpose whatever, but, on the contrary, would be highly unreasonable.

4. That because of the neglect of the Mayor and City Council to make provision for the assessment of benefits and damages, the Complainant was deprived of the right of appeal given to him by the Act.

This point is considered in a subsequent part of the brief.—See Point iii. sub-division, (*d.*)

5. That the Avenue was not divided into sections, as required by the Act of 1856.

There is no proof to sustain the above allegation. But, on the contrary, the evidence shows that the demands of the law in this respect were fully complied with. Vide Shannon's testimony, Answer to 19th Cross-Interrogatory, Rec. p. 147. It was not relied upon by the Complainant's Counsel.—See Answer, Rec. 9.

6. That the contract to grade was fraudulently awarded to Slater, by Shannon, the City Commissioner.

There having been not the slightest proof of fraud or unfair dealing on the part either of Mr. Shannon or Slater, elicited on the testimony before the Commissioners, this ground was (very properly) abandoned by the Solicitors of the Complainant.

7. That a majority in front feet of the property-holders binding

upon the part of the Avenue to be graded, did not sign the application, as required by the Act of 1856.

a. The application designates the part of the Avenue to be graded as that which is comprised between *Pennsylvania Avenue* and the *Falls Turnpike Road.* (Rec. p. 14, Defdt's Exhibit B.)

The contract to grade, entered into between Slater and Shannon, calls for the same termini. (Rec. p. 14.)

But the work of grading was completed only as far as the *Northern Central Rail Road.* (Rec. 94.)

This happened because, according to the construction put upon the Act of 1856, ch. 164, sect. 2, by the City Commissioner, the *power* to grade the Avenue extended no farther than that point.

Shannon's Test. Rec. p. 147.

It will be contended that his view of the law was the correct one; and that if a *majority* in front feet of property-owners between Pennsylvania Avenue and the *Northern Central Rail Road,* signed the said application, *jurisdiction* was thereby vested in the City Commissioner.

b. The chief signatures about which there is a dispute, are

those of H. L. Bond, who signs for - - - -	ft. 1581.6
E. H. Merrill, pr. Alonzo Lilly, who signs for -	1292.
Mt. Hope Sisters of Charity, who sign for - -	1051.
James M. Lester, who signs for - - - -	454.
Wm. F. Frick, Chas. Frick, &c. who sign for -	204.
Jesse T. Peters, Ex'r, who signs for - - -	141.
And Samuel Meakin, who signs for - - -	227.

A. It will be contended that H. L. Bond had authority to sign the application as *general agent* of Dr. Bond's estate. (Answer, Rec. p. 4.)

The property for which Bond signed was held by his mother, who resided in New York for life. Remainder to nine others, of whom the said Bond was one.

Rec. pp. 47 and 59.

For the names and residences of the other remainder-men, see Rec. p. 59.

Of these, Thos. E. Bond, James B. Bond, Harriet Skidmore and Kate Bond, and H. L. Bond's mother, had knowledge that the Avenue was to be graded. Rec. pp. 59, 60.

That H. L. Bond was the *general agent* of the estate. Rec. p. 58. Answer to cross-interrogatories, 9, 10, 11 and 12. Also, *ibid,* 162 Defendant's exhibit X.

If not expressly so constituted by the parties, yet the City Commissioner and contractors were *justified* from the acts which he was permitted to do in believing that he was such an agent; in which event they would be liable for his signature, and the same would be valid.

Watkins *vs.* Vince, 2 Starkie, p. 368.

B. That Lilly was authorized to sign for Merrill.

Alonzo Lilly's testimony. Rec. p. 80 to 88.

Ans. to cross-interrog's, 1, 3, (*Ibid*, p. 80;) 8 (*Id.* p. 81;) 10 (p. 82;) 11, 13, 14 (*Id.*;) 15, 19 (83;) 22, 25 (84;) 26, 27 (85;) 31, 32, 33 (86;) 39 (87;) 44 (88;) 45 (112.)

Ans. to Interrogs. 3, 4 (113;) 5 (114;) 6, 7, 8 (*Ibid;*) 10 (126;) 13 (*Id.;*) 14 (*Id.;*) 15 (127.)

Nicholas Poplein's testimony. An. to Interrog. 4 (132.) An. to cross-interrog. 23 (132.)

C. That the signature "Mt. Hope Sisters of Charity" is valid.

J. H. Bevan's testimony. An. to cross-interrog. 1 (49;) 5 (*Id.*) to interrog. 10 (50;) 11 (52;) 12, 13 (*Id.*)

Sister Ann Eloysia's testimony. Ans. to Interrogs. 1, 2, 5 (128;) 6, 8, 9 (129;) to cross-interrogs. 9 (130;) 11 (131.)

D. James M. Lester's signature. Ans. to cross-interrogs. 1, 2, 4 (99;) 7 (100;) 2, 5 (110;) 7 (111.)

Answer, Rec. 9.

E. Frick's signature.

Ans. to interrog. 3 (61;) to cross-interrogs. 3, 4, 5 (62;) to 2 add'l interrog. (63.)

F. Jesse L. Peters.

Ans. to 11th cross-interrog. (56.)

G. Samuel Meakin's signature.

Rec. pp. 99 and 100.

(*c.*)

From Condemnation Plat, (agreed to be referred to, and used, Rec. 163,) the distance from

Pa. avenue to N. C. R. R. (Co. side,)	5,772.5 feet.
" " (City side,)	5,736.0 "
	11,508.5 feet.
From this subtract cross streets, ...	671.9 "
	10,836.6 feet.
One-half of which, ...	5,409.3 "

(*d.*)

Distance

From Pa. avenue to N. C. R. R. as per Table (*c.*)	11,508.5 feet.
" N. C. R. R. to Falls road (Co. side,) . .	271.0 "
" " " (City side,) . .	273.0 "
	12.052.5 "
From this substract the cross streets, ...	671.9 "
	11,380.6 "
One-half of which, ...	5,695.3 "

(*e*)

Number of feet contained in the application to grade. (See Rec. p. 14. Defdt's Exhibit B.)

Witness to the signatures.

Wm. King,	H. L. Bond,	ft. 1581.6
Wm. King,	Daniel Chase,	100.
Wm. Gunnison,	James M. Lester,	454.
Geo. Peters,	E. H. Merrill, pr. Alonzo Lilly,	1292.
Geo. Peters,	Wm. King,	75.
Wm. King,	J. B. Cannon,	50.
H. L. Bond,	Wm. F. Frick and Chas. Frick, Ed. W. Frick,	204.
Jos. H. Bevan,	Mt. Hope Sisters of Charity,	1051.
Wm. King,	Henry S. Placide,	100.
Wm. King,	Saml. Meakin,	227.
Geo. Peters,	Wm. Eden,	1349.
Wm. Gunnison,	Geo. U. Porter,	75.
Wm. King,	P. G. Sauerwein,	50.
Geo. Peters,	Geo. A. Heuisler,	17.
Geo. Peters,	Wm. Gunnison,	25.
Wm. Gunnison,	Jesse T. Peters, Exr.	141.
Wm. King,	Thos. Kensett & Co.	150.
Geo. Peters,	Saml. L. Peters,	25.
Geo. Peters,	Chas. Myers,	66.
Geo. Peters,	Jacob Fifer,	15.
		7047.6

Number of feet laid down on the Assessment Plat, as explained by Bryson, in his testimony. (See Rec. pp. 98 and 99.)

There is assessed to Dr. Bond on the county side, 1215 feet, and on the city side 364 feet. Total,	1579 feet.
To Daniel Chase,	100 feet.
To E. H. Merrill,	1172 feet 6 inches.
To William King, nothing at all, but to J. King and son,	50 feet.
To J. B. Cannon,	None.
To William Frick's heirs,	204 feet.
Mount Hope Property, (Dr. Stokes,)	1051 feet 6 inches.
To H. Placide,	102 feet.
To Samuel Meakin,	None.
To William Eden,	1345 feet 6 inches.
To George U. Porter,	100 feet.
To P. G. Sauerwein,	25 feet.
To George A. Heisler,	17 feet.
To William Gunnison,	25 feet.
To Jesse T. Peters, Executor, none; but in the name of Rieman and Warfield, Trustees, is	142 feet 6 inches.
To Thomas Kensett, Jr. none; but in the name of J. Kensett and Wheeler, is	150 feet.
To Samuel L. Peters,	25 feet.
To Charles Myers,	8 feet 6 inches.
To Jacob Fifer,	15 feet.
	6112 6

The number of feet upon the face of the application, then, is	7047.6 feet.
One-half of the whole number of feet between the termini designated in table (*c.*) is ft. 5409.3.	
Majority, ...	5410.3 feet.
Surplus over and above required majority, . . .	1637.3 "
Or, if we take the termini designated in table (*d*) .	7047.6 feet.
One-half whole number of feet is 5695.3.	
Majority, ...	5696.3 feet.
Surplus,	1351.3 feet.

(*g.*)

The number of feet ascertained by the Assessment Plat, ...	6112.6 feet.
Majority of feet between the termini designated in table (*c.*)	5410.3 feet.
Surplus, ...	702.3 feet.
Or, calculating according to table (*d.*)	6112.6 "
Majority, ...	5696.3 "
Surplus, ...	416.3 feet.

N. B. The signature of Lester (who signs for 454 feet) is altogether *omitted* in the assessment plat.

h. If the signatures of Bond, Mt. Hope Sisters of Charity *and* Lilly, *or* Lester, *or* Frick, *or* Meakin, are valid, there will be the requisite majority of feet, which ever of the preceding calculations may be adopted as the correct one.

If Lester had a right to sign for *only one hundred and fifty-seven* feet, we may reject the signatures—

Frick, who signs for, ...	204 feet.
Meakin, " "	227 "
Peters, " "	141 "
	572 feet.

The least favorable calculation to the Complainants is that contained in Table *g.*—

Where the surplus amounts only to . .	416.3 feet.
To this add, ...	157.0 "
	573.3 feet.
Subtract, ...	572.0 "
Majority, ...	1.3 feet.

The surplus of 416.3 feet is obtained without allowing for the width of the Northern Central Rail Road track, which is about seventy feet on each side, ... 416.3 feet.

Adding for width of track, ... 70.0 "

We would have a surplus of . . . . . 486.3 feet.

8. That the charge of masonry for culverts constructed in the work of grading the Avenue, were improperly and illegally assessed upon the property-holders. (Rec. 4.)

Answer, Id. p. 12.

The amount charged to each property-holder was nine dollars and three-tenths of a cent, including the cost of grading, tunneling, advertising expenses and surveyor's charges; and the three per cent. for collection by the City.

The cost of the *grading* per front foot was not ascertained, inasmuch as it was not estimated. It would, however, be about eight dollars per front foot for the *grading* alone.

The tunnelling would be about one dollar per front foot.—Quincy's Test. Ans. Interrog. 5, Rec. p. 93.

Now, the gross assessment amounted in the whole to $103,613.44.—*Id.* The amount assessed for *tunneling alone* then would be between eleven and twelve thousand dollars.

III. *a.* That the property-holders having stood by and seen the grading of the Avenue, cannot now object to paying for the same, on any grounds which they might have urged prior to the commencement or completion of the undertaking, on the equitable principle that he who, with a knowledge of his rights, or of the facts from which his rights arise, permits another to do or continue an act which he has power to forbid, is estopped from afterwards asserting those rights, to the detriment of that other.—Answer Rec. pp. 9 and 11.

Wendell *vs.* Van Rensselaer, 1 Johns. Chan. Reps. 344, p. 353.

Hall *vs.* Fisher, 9 Barb. 17, p. 30.

Parrott *vs.* Palmer, 3 Mylne & Keen's Reps. 632, p. 640.

Weber *vs.* the City of San Francisco et. al., 1 California Reps. 455.

Storrs *vs.* Barker, 6 Johns. Chan. Reps. 166.
Neptune Ins. Co. *vs.* Robinson, 1 G. & J. 256, p. 260.
Md. Savings Inst. *vs.* Schroeder, 8 G. & J. 93.
City Lowell *vs.* Hadley, 8 Met. 180, p. 190.

b. In the present case the property holders had ample knowledge of their rights, and of the progress of the work of grading.
Rec. p. 120 to 123, An. Interrog. 9. (Rec. p. 147.)

c. At any rate they were put upon inquiry, and this has always been regarded by Courts of Justice as equivalent to actual notice.
Price, &c. *vs.* McDonald et. al., 1 Md. 403, p. 415.
Ringgold *vs.* Bryan, 3 Md. Ch. Dec. 488, p. 493.
City of Balto. *vs.* White, 2 Gill, 444 & 458.

d. Where the law requires the publication of any proceeding, it imputes notice to all persons interested, and no evidence will be admitted to show that they had not knowledge of any fact, &c. which they might have known through the medium of the advertisement.
Meth. P. Church *vs.* Mayor & C. C. of Balto., 6 G. 391.

e. Notice to an agent, is notice to the principal.
Hovey *vs.* Blanchard, 13 N. Hampshire, 145.
Astor *vs.* Wells et. al. 4 Wheat. 466.

f. So far as those who signed the application to grade the Avenue are concerned, it is clear that they are absolutely estopped from taking the objection, that the requisite majority in front feet of property holders, did not append their signatures thereto.

1. All admissions or representations made by a party, or to be implied from his conduct, upon the faith of which another has

acted, or altered his condition, are conclusive as between the parties, whenever their denial, if permitted, would prove injurious to the interests of him who relied upon them.

Heane *vs.* Rogers, et. al. 9 Barn. & Cress. 577, p. 586.
Pickard *vs.* Sears, et. al. 6 Adolph & Ellis, 469, p. 474.
Gregg *vs.* Wells. 10 Ibid. 90, p. 97.
Strong *vs.* Ellsworth, 26 Vermt. 366, p. 373.
Roe *vs.* Jerome, 18 Connect. 138, p. 153.
Den. *ex.* Dem. Richman *vs.* Baldwin, 1 Zabriska, N. J. Reps. 395, p. 402.
Kingsley *vs.* Vernon, 4 Sandf. N. Y. Reps. p. 361.
Alexander *vs.* Walter, et. al. 8 Gill, 239.
McClellan & Wife *vs.* Kennedy, et. al. 8 Md. 230, p. 251.

2. Where the party gives active encouragement to another, by his representations or conduct, it is clear that the doctrine applies, *although he may have been ignorant of his rights*, and in the case of a statement did not know it to be true, or even if he believed the fact to be as asserted.

Wells *vs.* Pierce, 7 Foster, (N. H.) Reps. 503, p. 511.
Petrie *vs.* Feeler, 21 Wend., 172
1 Story's Eq. (1849,) Sect. 387.
Clabaugh *vs.* Byerly, 7 Gill, 384.
Kingsley *vs.* Vernon, 4 Sandf. (N. Y.) Reps. 361, p. 364.
1 Story's Eq. (1849,) Sect. 193.
1 Parson's Cont. (1860,) t. p. 55 & 56.
Amer. note to Pasley *vs.* Freeman, 2 Smith's lead. Cases, (ed. 1855,) t. p. 174, 175.

3. A party who makes representations upon the faith of which another is induced to alter his condition, is not only precluded from averring anything contrary thereto, but is liable to that other for all injuries which may result from his reliance upon those representations, should they turn out to be untrue.

IV. An Injunction will not be granted.

a. Where there has been laches, or acquiescence, or unfair dealing, on the part of the Complainant.

Grey *vs.* Ohio & Penna. R. R. Co. 1 Grant's Cases, p. 412.
Parrott *vs.* Palmer, 3 Mylne & Keen's, Reps. 632, p. 640.
Rockdale Canal Co. *vs.* King, 16 Beav. 630.
Binney's Case, 2 Bland, 103, 104.
Md. Savings Institution *vs.* Schroeder, 8 G. & J. 93.
Elysville Manf. Co. *vs.* Okisko Co., 5 Md. 152.
Ans. Interrogs. 5. (Rec. 114,) 15 (*Id.* 127,) 4, (*Id.* 132.)

b. The granting of the writ rests in the sound discretion of the Court, and it will never be allowed, except the case imperatively demands it.

Chesapeake & Ohio Canal Co. *vs.* Young, 3 Md. 480.
Gardner *vs.* Jenkins, 5 Md. 58.
Nusbaum et. al. *vs.* Stein et. al., 14 Md. p. 318.

c. Where the proceedings are merely irregular, and not absolutely void.

Livingstone *vs.* Holdenbeck et. al., 4 Barb. 9.
Ibid. 17.
Gardner *vs.* Jenkins, 5 Md. 58.

d. Where the party applying for the same might have had a remedy at law by appeal, or otherwise.

Gott *vs.* Carr, 6 G. & J. 309.
Glenn *vs.* Fowler, 8 G. & J. 340.
Dilly *vs.* Barnard, 8 G. & J. 360.
Meth. Prot. Church *vs.* Mayor & City Council of Balto. 2 Md. Ch. Decs. 78. Affirmed in 6 Gill, 391.
Alexander & Wilson *vs.* the Mayor & City Council Balto. 5 Gill, 383.
Richardson *vs.* same, 8 Id. 433.
Brumbaugh *vs.* Schnebly, 2 Md. p. 320.

G. L. DULANY,
COLEMAN YELLOTT,
H. K. DULANY,
Solicitors for Defendants.

No.

COURT OF APPEALS OF MARYLAND.

DECEMBER TERM, 1861.

MAYOR AND CITY COUNCIL OF BALTIMORE ats. GEO. U. PORTER.

Appeal from the Circuit Court for Balto. City.

Additional Brief on behalf of Appellants.

All the objections taken on the part of the appellee, to the proceedings of the corporation in regard to North Avenue, except the one which relies on the want of a majority of owners of front feet, appear on the face of the proceedings.

In respect to all the objections which so appear on the face of the proceedings, it will be contended, that a *certiorari* was the appropriate remedy, and that a court of equity had no jurisdiction.

Evans Practice, p. 383 to 389.
8th Gill Repts., p. 150.
1 Gill & Johns., p. 197.
16 Johnson Repts., p. 50.
15 Mary'd Repts., p. 197.

32
14
128
32
448

It is true that this objection, want of jurisdiction, was not taken in the court below, but the provision of the Code, (Art. V, sec. 27,) on this subject, which is substantially a repetition of the Act of 1841, does not apply except where causes are brought up on final hearing.

Holland's Case, 11th Maryl'd R., p. 194.
4th Gill & J., p. 438.

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14

As respects the objection that there was not a majority of owners of front feet making the application, Porter, the complainant below, was one of those signing the application, and in express words declared it to be the application of a majority. The work therefore was done with his

knowledge, because upon his application; and he stood by as the answer alleges, (Rec. 11,) and allowed it to be done without making the objection which is now relied upon to prevent payment. Such laches, if it may not be more fitly styled *mala fides*, is a bar to interference by injunction, which is never granted *ex debito justitiæ*, but always rests upon the sound discretion of the court.

1 Dorsey on Injunctions, p. 294.
2. Railway & Canal Cases, p. 136.
Holland's Cases, *ubi supra*.

J. MASON CAMPBELL,
GEO. H. WILLIAMS,
Atty's for Appellants.

Mayor & City Council of Baltimore. as Geo. U. Porter. } Appeal from the Circuit Court of Balto. City

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Supt. 4th Cir.

Mayor & City Council

vs

Porter

Appellants additional Brief

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J. Mason Campbell
Geo. H. Williams
Attys for appellants