THE NORTHERN CENTRAL RAILWAY CO.

VS.

THE MAYOR AND CITY COUNCIL OF BALTIMORE.

The Northern Central Railway Co.

vs.

The Mayor and City Council of Baltimore.

This cause comes up on an Appeal from the Circuit Court of Baltimore City, continuing pro forma the Injunction originally granted by that Court. (*Record*, 12.)

The Injunction, by its terms, (*Record*, 3,) prohibited the Northern Central Railway Company from constructing, grading, or laying with rails their (Tidewater) branch railroad or way, upon, along, or across certain streets in the city of Baltimore, or from altering the grade of any of said streets, or from proceeding with the work of building the said road, except with the consent, and under the supervision of the Mayor of the city of Baltimore and the City Commissioner.

The first question which arises, is as to the right of the city to an Injunction, at the stage of progress in the work of the Tidewater extension at which it was asked for.

The Bill (*Record*, 2), after setting out both the State and City legislation on the subject of the branch road to be carried by the Northern Central Railway Company to Tidewater, states that the company are now, and have for sometime past been in the act of grading the same and laying the rails thereon, through the city of Baltimore and along and on the streets thereof, without the consent of the Mayor of the said City and the City Commissioner, or under their supervision; and also states, that the Company have altered the grades of several streets which have heretofore been graded and paved, especially the grades of Lancaster, Harrison, and Patuxent streets, and the grades of many other streets whose grades

have been established, between Belair Avenue and the Canton Company's grounds, especially the grade of Fayette street, which the Company has threatened to raise four feet in height.

From these averments in the Bill, which are the only ones that disclose the actual progress of the work at the time the Injunction was applied for, it appears that no movement was made by the City when the grade of the lateral road was established, and before work on the grade so established had commenced. In the construction of a railway, as soon as the route is adopted, the establishment of a grade follows, and such establishment precedes all the work upon the grade so established. The establishment of the grade in a work of only a few miles length, necessarily requires the determination of the grade as a whole. It is not settled by fixing the grade first through White Acre, and then independently through Black Acre, but the whole ground to be traversed by the road, is brought at one glance under the engineer's eye. Such being the order of a Company's operations, it was the duty of the City to have intervened as soon as the grade of the lateral road was established, and before any work and expenditure on that grade had commenced. The Answer (*Record*, 7,) which is responsive on this point, avers that upwards of three hundred thousand dollars had been expended upon the branch road, before the service of the Injunction in this cause. But whether this averment be responsive or not as to the amount of the expenditure, the Bill itself shows that a considerable expenditure must have taken place, from the state of forwardness in construction which it discloses. With a large outlay therefore on the part of the Company, the City shows itself to have waited till a great advance had been made in the actual construction of the lateral road, and until the Company had become so committed to the route and grade adopted, as to be incapable of changing them without the sacrifice of every dollar that had been laid out. The mere adoption of the grade involved no expense, except the compensation of the engineer, who ascertained it, but the

moment the work went one step beyond such adoption, it proceeded with an hourly augmentary outlay. At how late a period after the adoption of the grade, the City interfered may be gathered from its own statements in the Record. The Bill declares, not merely that the Company is now, but has been "for *some time past*" in the act of grading and laying the rails. It further states, that the Company has altered the grades of three specified, and many other unnamed streets. It is plain therefore, that the grade adopted by the Company involved the excavation of, or embankment on, the streets so meddled with, and that that excavation and embankment had been made and completed, so that the surface of the road was ready for, and was actually receiving its rails. Notice therefore of the establishment of the grade of the branch road was given to the City, by the first excavation or embankment which attempted practically to carry out the grade established, and notice was also thereby given to the City that the established grade interfered with the streets. Then if ever, and before the Company was hopelessly committed to a particular line and grade, should the City have come forward, and its failure to do so, whether construed as laches or acquiescence, disentitles the City to the preventive aid of Chancery, as against a party who is to suffer great loss, if not irremediable injury by such laches or acquiescence.

The principle involved in this objection is one of long standing, and well settled in Courts of equity. A plaintiff who has lain by, and suffered a defendant to expend largely upon an undertaking, before he applies for an Injunction to stop it, will be told he comes too late.

1 *Scranton*, 252. *Kings Lynn vs. Pemberton.*
18 *Vesey*, 515. *Birmingham Canal Co. vs. Lloyd.*
(*Sumner's note, p.* 517.)

And the application of this principle to parties dealing with Railway companies, is fully established by the cases cited in the Appellant's brief.

In the view thus far taken, we have confined ourselves exclusively to the statements of the Bill, but the Answer (*Record*, 7, 8) is responsive as to the question of notice. It avers, that the City had full and timely notice of the plans adopted for locating, grading and constructing the railway, before the Company proceeded to make its large expenditures on the work, and that it failed to make the objections before such expenditure.

Upon the whole, whether looking at the Bill or Answer, or both together, it is manifest, that the City has suffered the Company to proceed so far without objection as to preclude itself from interference at the present stage of the work.

2.—But passing from the point of laches or acquiescence, the great question of the case is the power of the City to pass the ordinance, for the violation of which the Bill seeks the aid of Chancery by way of prevention.

The Tidewater Extension Act—the Act of 1853, ch. 191—was a Supplement to the original Charter (1827, ch. 72) of the Baltimore and Susquehanna Railroad Company. That Supplement authorized the Company to construct a lateral road from its main stem to tidewater, and gave it for that purpose all the powers, rights, and privileges, which it possessed under its original Charter and the supplements thereto. By the 6th section of this Act, it was to have no force or effect until it had been accepted by the Company. This the Bill avers (*Record*, 1) to have taken place. But there was another proviso, which was embodied in the first section, in these words: "That the assent of the Mayor and City Council of Baltimore shall be first had and obtained before any part of said branch railroad shall be constructed within the limits of said city." The case turns upon the construction to be given to these words.

The City, on the 20th June, 1854, passed an ordinance entitled "An Ordinance to authorize the Baltimore and Susquehanna Railroad to extend their road to Tidewater." This ordinance (which, by agreement, is to be read from the printed

Book, (*Record*, 12) contains fourteen sections. The first is in the following words: "Permission is hereby given to the B. & S. R. R. Company to extend their road to Tidewater, as authorized under the Act of Assembly of 1853, chapter 191, entitled 'An Act to amend the Act to incorporate the Baltimore and Susquehanna Railroad Company.'" Had the ordinance ended here, there would have been no difficulty. The subsequent sections are relied on by the City, as binding the Company to certain terms and conditions of which it has a right to enforce the specific performance. We shall briefly explain which of the subsequent sections are supposed to warrant the action claimed by the City. The 14th and last is merely a repeal of all inconsistent ordinances. The 13th gives to the Northern Central Railway Company in case it should come in existence the privileges of the ordinance. They may both therefore be laid out of view, as may also the 12th, which declares the ordinance to be null and void, in case of non-compliance with the 8th section. The 11th merely provides for laying a track through certain specified streets, to connect with the branch railroad. The 10th gives power for the construction of wharves, &c., at the terminus of the road at Tidewater. The 9th section prohibits unequal tolls on the branch road. The 8th fixes the terminus of the branch road. The 7th section declares that the laying of the track shall be under the supervision of the Mayor and City Commissioner. The 6th requires the City Commissioner to establish the grade of all the streets crossed by the railway, at the cost of the Railway Company. The 5th reserves the right to pass ordinances for enforcing the repair of all tracks of the Company in the City. The 4th reserves to the City the right of connection, by railway tracks, with the main stem and its branches. The 3rd authorizes the use of locomotive engines in the City, but reserves the right to regulate their speed. The 2d prescribes how the branch road shall be constructed, that is to say, by tunnels in certain portions thereof, and authorizes such grades and curves with the consent of the Mayor and City Commissioner, as are suitable for locomotives,

provided that no street already graded and paved shall be interfered with, except under the direction of the Mayor and City Commissioner.

From the brief review thus given of the ordinance, it will appear, that the 2d, 6th and 7th are the only sections which profess to restrain the Company's action in regard to crossing, or interfering with the grades of streets, and these are the sections specified in the Bill as violated, or about to be violated.

The question is, whether the City had a right, by way of ordinance, to insist on the Company's observance of these, the 2d, 6th and 7th sections, as the conditions of its assent to the passage of the lateral road through the city. The enquiry depends, altogether, upon the language of the Act of 1853. By virtue of its general municipal powers, it had no authority whatever to interfere directly, or indirectly, with the construction of any public improvement. The paramount authority of the Legislature is exclusive on such subjects, except where it may choose, as it has done in this instance, to allow the local authorities to be consulted. We must look therefore, to the extent of the legislative authorization to ascertain the city's authority in the premises. So regarded, the question is very simple. There is no trace of any terms or conditions in the letter of the Act. The City is authorized to express its assent, if it pleases, which necessarily implies that it may withhold such assent. But it is an assent pure and simple, not qualified or conditional, which is allowed by the Legislature. The point before the municipal authorities was only, whether they would allow the construction of the lateral road, or not.

This view, derived srom the words of the Act as to the assent, is strengthened by every consideration derived from the residue of the law. When the first part of the 1st section had authorized the lateral road, it proceeded to invest the Company with all the power for its construction and management which it had derived under its original Charter for the construction and management of the main stem itself. There

was no purpose, on the part of the Ligislature, that the main stem should be constructed under one set of powers, and the lateral road under another. One and the same set of powers was to suffice for both. Now it is too manifest to need dwelling on, that in the construction and management of the main stem, the City neither had, nor was intended to have, any power of interference. The construction of course involves, as its first step, the selection of the route and the settlement of the grade. These, by the original Charter were exclusively committed, as must necessarily be the case, to the discretion of the Company, to be exercised through its engineers. The same power to select the route, and settle the grade of the lateral road, is vested in the Company which it possessed in regard to the main stem as to these particulars. It was inconsistent, therefore, with the powers expressly given by the Legislature to the Company, in respect to the lateral road, that the City should dictate to the Company as to route, grade or manner of construction. The Legislature itself had not interfered on these points, with the Company's discretion, either as to the main stem or elsewhere.

If the City be authorized to impose terms and conditions upon the Company, there is no restriction as to the character of those terms and conditions. It may demand and enforce what it pleases, and such seems to have been, in fact, the City's construction of its power. By the 8th section of the ordinance, it fixes what the Act of Assembly had left unfixed, to wit: the terminus of the lateral railroad; and by the 9th section it legislates upon the subject of the Company's charges for transportation. It would be going very far, to say that where the Legistature had left the terminus at Tidewater to the exercise of the Company's best judgment, it could yield that judgment to the dictation of the City, but it would be going farther still, to affirm that the City could exercise any authority whatever over the rates of charge by the Company, the power to allow any charges at all, and, of course, to alter those charges, being vested, exclusively, in the Legislature.

It may be urged that the municipality is the guardian of the streets, which are the City's highways, and that, therefore, a power to prescribe conditions as to them might be properly exercisable. It will be observed, that the 2nd section of the ordinance does not limit itself to preventing interference with the level of graded streets, but includes, also, the determination of what curves shall be allowed, and where tunnels shall be constructed. Passing by this observation, however, the 4th section of the Act of 1853 plainly shows that not even with regard to the streets was it intended that the City should exercise any right of imposing terms. That section vests the City with power to construct, or authorize individuals to construct, switches along the streets connecting with the lateral road. If the Legislature itself imposed upon the Company a condition as regards the City's streets, and their connection with the branch road, two things are manifest, one that no other conditions were allowable, and the other that it alone could impose conditions. It is quite impossible, if the City had the large discretion now claimed for it, that this 4th section would have found a place in the Act. The City possessing an unlimited power to impose conditions, could have prescribed this particular one, and, upon every sound principle of construction, the Act, by this section, negatives the power claimed to go beyond it.

Another cogent argument on this branch of the case is derived from the provisions of the Act of 1853, ch. 252. This Act was passed fourteen days after the Act authorizing the lateral road, and it prescribes in its first section, that the lateral road in passing over the Baltimore and Yorktown turnpike, the Baltimore and Harford turnpike and the Belair road, shall pass under or over these roads, and not over the surface thereof. As this Act is one *in pari materia*, it is to be construed in connection with the Act of 1853, ch. 191, and the first observation which suggests itself, is that where the Legislature meant to fetter the Company in regard to grades, it does so by its own express command. But another and more important observation is the conflict between the express

directions of the Act of 1853, ch. 252, and the provisions of the 2nd section of the Ordinance. The Act as already stated provided that the lateral road should not pass over the surface of the Belair road, while the section just adverted to of the ordinance requires that the road shall cross "Bel Air Avenue on the level of the grade of said Avenue." Bel Air Avenue is the Belair road.

The sum of the whole is, that while the Ciiy might have refused its assent to the passage of the lateral road through its limits, yet when it did assent the Company came into the City armed with unfettered powers in regard to the lateral road, as it had been in regard to the main stem, to determine what grades and curves were necessary, and what should be the mode and manner of construction. The first section of the ordinance therefore, is the only one which can be deemed valid.

3.—If, however, the City is master of the situation, it is only so by virtue of the Act of 1853, ch. 191, and the validity of its proceedings must depend upon that Act.

Now the power to give or withhold an assent is, by the first section of the Act, conferred *upon the Mayor and City Council of Baltimore*. When, therefore, the City passed the first section of the Ordinance, giving permission, that permission emanated from the body named in the Act. But when, in the second section, and the seventh, the consent of the *Mayor and City Commissioner* is required, before the Company can cross the streets with the lateral road, it is no longer the assent of the Corporation that is demanded, but the consent of certain municipal officers. No authority was given to *them*, by the Act of Assembly. *They* are not named in it, and there is nothing to show that they were contemplated. The State Legislature may possibly have considered the local legislature as a fit depository of the power to arrest or turn aside a great public improvement, but such a discretion can only be exercised by those who are specially entrusted with

it. They have no right to pass over to others what is given exclusively to themselves.

Delegatus non potest delegare.

And this view of the case strengthens the considerations hereinbefore expressed. What was contemplated by the Legislature was a legislative act on the part of the municipality, confined simply to the determination of the question, whether it would be for the City's interest that the lateral road should pass through it, or outside its limits. If satisfied that the City's welfare would be promoted by excluding the road, they were to refuse; if otherwise, they were to give their assent to its passage across the corporation territory. Every other question was meant to be settled by the Legislature itself, and, if the City suffered the road to enter its boundaries, it came as it would have come had the Legislature itself, without other intervention authorized it to go to Tidewater.

J. MASON CAMPBELL,
For the N. C. R. W. Company.

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Filed June 16, 1863

THE NORTHERN CENTRAL R. CO.

VS.

MAYOR & C. C. OF BALTIMORE.

BRIEF FOR APPELLANT.

N. C. Railway Co.	Appeal from Order of
vs.	Circuit Court for Baltimore City
M. & C. C. of Balto.	continuing an Injunction.

APPELLANT'S BRIEF.

The Appellant is a Corporation formed under the Act of 1854, chapter 250, by the consolidation of four Companies, of which the Baltimore and Susquehanna Rail Road Company was one; and is expressly clothed with all the corporate powers and privileges conferred on the B. and S. R. R. Co., by its Charter and Supplements.

One of those Supplements (1853 ch. 191), authorized the extension of the B. and S. R. R. Co. to tide water, provided the City's assent should be had before its construction within the City limits. This assent was given by an ordinance [No. 55] passed June 20, 1854, containing 14 sections. The 1st section gives a simple and unconditional permission to the Company to extend its road to tide water, as authorized by the Act of 1853; and the others contain provisions as to the construction of the track, its maintenance, terminus, rates of charge, &c. Of these remaining sections, the Bill of the City particularizes the 2nd, 6th, and 7th as violated, and on the ground of such violation claimed the Injunction which the Court below granted, and continued till final hearing.

The Appellant contends for the dissolution of the Injunction:

1.—Because the Act of 1853 gave no power to the City except simply to give or refuse its assent, and invested it with no authority to assent upon conditions.

If therefore any of the sections from the 2nd to the last can be construed as conditions, (which may be

doubted as to all but the 8th and 12th,) they are unauthorized by the Act and void. Such conditions as are imposed by the 2nd, 6th and 7th sections, are in fact repugnant to the provisions of the Act of 1853 ch. 191, and also the Act of 1853 ch. 252.

2.—Because even if the Act of 1853 ch. 191, allows the Municipal Council to exercise a discretion as to the terms on which a great State improvement shall pass through the City, that discretion cannot be transferred as the 2nd section attempts, to the Mayor and City Commissioner.

3.—The City's laches in allowing the Appellant to go on without objection in working at great expense upon the grade adopted by it, is a bar to the Court's interference by an Injunction.

1 *Railway Case*, 68, 256.
2 *Id.* 210.

T. S. ALEXANDER,
J. MASON CAMPBELL,
Appellant's Solicitors.

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Filed June 29, 1863

Appeal from the Circuit Court for Baltimore City,

JUNE TERM, 1863.

THE NORTHERN CENTRAL RAILWAY COMPANY

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE.

STATEMENT AND POINTS OF COUNSEL FOR APPELLEE.

The Bill shews that the defendant, now the appellant, to the great injury and inconvenience of the appellee, had altered the grade of certain specified streets, in the city of Baltimore, which had theretofore been graded and paved, and also the grades of other streets, between specified points, mentioned in said Bill; and had threatened to raise the grade of Fayette street four feet in height in the construction of a branch railway of said appellant; and that although warned and required not to proceed in such unlawful construction, the appellant refused to cease or suspend its operations in the premises; and the Bill avers the injury to be irreparable. The Bill alleges that the appellant claimed authority to do the acts aforesaid under the act of 1853, cap. 191, and under an ordinance of the city of Baltimore, approved 20th June, 1854; and shews, by certain averments, that the authority claimed, and the acts done, were not sanctioned by said act and said ordinance.

The Bill shews a clear case of purpresture, and the injunction, thereby prayed, was granted.

The answer and amended answer, taken together, (pages 5 and 11,) admit the averments of fact alleged in the Bill, but insist that, upon the true construction of said act of Assembly, and said ordinance, the appellant

way "over such route, and with such grade or grades, as the said Company, in the exercise of its discretion, might or should deem expedient." The answer, also, introduces new matter, not responsive to the Bill, based on the act of 1854, chapter 260 ; and on an ordinance of the city, approved June, 1854, and avers that in consequence of said last-mentioned act and said ordinance, the appellant, at large expense, had extended its main line to Sunbury, having accomplished this part of its undertaking, had entered upon the grading and construction of said branch railway, and had therein expended upwards of $300,000 before the issuing of the injunction. The answer also relies on alleged knowledge and acquiescence on the part of the appellees of and in the acts of the appellant, in locating, grading and constructing said branch railway.

And whilst disclaiming any obligation on its part to regard the restraining ordinances of appellee, yet it states its readiness "to listen to, and adopt, any suggestions which may be made by the complainant, or its officers, with a view to the construction of said branch railroad, in a manner which shall be at once satisfactory to the complainant and convenient of use" to appellant. Other defences are suggested in the answer ; but, upon the motion to dissolve the injunctiou, they were not open for consideration.

Exceptions were filed to the answer, in certain particulars ; and these exceptions were decided, upon argument. But the motion to dissolve was disposed of, by a pro forma decree, continuing the injunction ; and from that order the present appeal was taken.

The appellee insists, that the said injunction was rightfully continued ; and the counsel for the appellee will maintain in argument the following points :

1. At the time of the passage of the act of 1853, cap. 191, the appellant had completed the whole line of railway which it had been authorized to construct. Even if it had acquired, by purchase, the right of way, the expenditure of its corporate funds, in the construction of a branch railway, would have been an act *ultra vires*. Hence the necessity of a new grant of power to confer the corporate faculty of extending its railway beyond the previously established *termini* of its road. East Anglian Railways Co. *vs.* Eastern Counties Railway Co., 7 Eng. Law & Equity, 508.

But, so far as the proposed lateral branch railway should be located, *within the limits of the city of Baltimore*, the Legislature did not intend to confer, and the act did not confer, any right of *eminent domain*. The language of the act is clear and unambiguous : "provided, however, that the assent of the Mayor and City Council of Baltimore shall be first had and "became vested with full power and authority" to locate said branch rail-

obtained, before any part of said branch railroad or railroads shall be constructed within the limits of said city."

2. As the city had the right to withhold its assent entirely, it had, necessarily, the right to assent, upon such terms, under such conditions, and with such reservations, as a just regard for the interests and convenience of the public, in its judgment, required.

Mager *vs.* Grima, 8 Howard, 494.

3. The ordinance, approved 20th June, 1854, entitled "An ordinance to authorize the Baltimore and Susquehanna Railroad Company to extend their road to tide-water," gives permission to said Company to extend its road, as authorized by said act of Assembly; but, at the same time, and as parcel of said ordinance, prescribes the route, and expressly provides, "that no grade of any street, already graded and paved, shall be altered or interfered with, except under the direction of the Mayor and City Commissioner." And by the 7th section of said ordinance it is declared "that it is expressly understood, that the laying of the track, as provided for in this ordinance, through any or all of the streets above named, shall be under the supervision of the Mayor and City Commissioner." It is unnecessary to refer to other sections. It is very clear that the city authorities, wisely and prudently, intended to withhold the power from the Railroad Company to interfere with the grades of the streets, without the antecedent approval of its highest municipal functionary and the assent of its own proper officer, specially charged with the care of the streets, the City Commissioner. In expounding this ordinance, we are not to look at one part, disconnected from the residue; for this would be against the established canon, that *the intention* is to be regarded, and that the intention is to be gathered from the *whole instrument.*

4. The Bill alleges and the answer admits, an encroachment on the streets, in open violation of the ordinance—in total disregard of the rights of the appellee, as a municipal corporation—in contempt of the authority of the State, which expressly saved the rights of the city in the fullest manner, and thus protected, as it supposed, the rights of citizens, at whose expense the streets had been graded, and whose improvements had been made with reference to the established grades. It does seem to be, on the part of the appellant, a most extraordinary pretension, that it has right and law on its side.

5. The alleged acquiescence, &c. of the city authorities are of no avail. The *will* of the city is only to be manifested by its *corporate* acts. Mayor, &c. *vs.* Eshback, 18 Maryland, 282, 283. And even if it were a case where estoppel could be invoked upon final hearing upon proof of sufficient facts, yet there is a broad distinction between debarring a party from asserting a right, actually existing, and creating a right *de novo* in behalf of a party whose right is dependent on the performance of *a condition precedent*, and who admits, by the very objection, its non-performance.

The same remarks apply to the notion of an acquired right to commit further public nuisances, in the streets of Baltimore, on the plea of merit, in having expended a large sum of money in the commission of like nuisances to some extent already.

JOHN L. THOMAS, JR.,
City Counsellor.

WILLIAM SCHLEY,
For Appellee.