Proof

No. 13 Special
Docket ~~for~~
April term
1865

Strike off
1/2 Doz Extra
Copies of this
Brief for use
of Mr Machen

for opening argument.

The complainants could not have found an illegal act in the court of law, upon which to ground their bill in equity.

A.

No. 13.—Special Docket.

IN THE COURT OF APPEALS OF MARYLAND,

APRIL TERM, 1865.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, Appellant,

vs.

VICTOR CLUNET & OTHERS, Appellees.

Appeal from the ~~Superior~~ Court ~~for~~ Baltimore city. of Circuit

---

APPELLANTS' BRIEF.

This is an appeal from an order of the Circuit court of Baltimore city, granting an injunction.

The bill of the appellee, filed 6th February, 1865, shows that the Mayor and City Council of Baltimore, having passed the ordinance of 5th May, 1864, entitled, "An ordinance to open a street in continuation of Holliday street, from Baltimore street to Second street;" the Appeal Tax court constituted by the ordinence of 1861, No. 18, approved 28th February, 1861, commissioners for opening streets, proceeded, in obedience to said first mentioned ordinance, and according to the course prescribed in the ordinance of 1858, No. 15, to ascertain and estimate the damages and expense to be occasioned by the opening of the said extension of Holliday street, as directed to be opened, and to assess three-fourths of the amount thereof, upon the ground and improvements benefitted by the opening of the street, in proportion to the value of the benefits received by the respective owners thereof. It is not pretended that after the completion of the said valuation of damages, estimate of expenses and assessment of damages and expenses, the Appeal Tax court omitted in any respect to perform the duties specified in the 8th

section of the said ordinance of 1858. And, although the complainants aver, that inadequate damages have been allowed to some of them, and too large an estimate placed upon the benefits to accrue to others, it is evident that these are questions to be determined by a jury on an appeal taken in the regular way, and cannot enter into the consideration of a court of equity, upon an application for an injunction. Appeals had in fact been taken, and at the time of granting the injunction, the proceedings were pending on appeal in the Criminal court of Baltimore city, as appears from the sheriff's return.

To justify the interference of equity it is contended, on the part of the complainants, that the ordinance of 1864, was in excess of the powers of the Mayor and City Council, and that any action thereunder, looking to the condemnation of the property of the complainants, is unwarranted by law. The several grounds of objection assigned in the bill, are the following, viz:

1. That the provision contained in the 7th section of the ordinance of 1858, No. 15, giving the right to the owner of any house or lot, a part of which it is necessary to take for the street, to require, if he choose, that he shall be compensated for the whole, the city in such case selling the part not required, at public auction, and applying the proceeds to the re-imbursement *pro tanta* of the money so paid for the whole, is illegal; and consequently, that in as much as in the present case, the owners of some lots required in part for the street have elected to give up the whole, the entire proceedings are vitiated.
2. The provision in the 4th section of the ordinance of 1864, that from any damages which might be awarded thereunder to Wm. W. McClellan or Catharine M. Raborg, should be deducted, the amount of certain orders which had been received by the city in payment of the assessment upon them, under the repealed ordinance of 1858, No. 59. And the following proviso contained in the 5th section of the ordinance of 1864: "The said ordinance shall not take effect until the City Counsellor shall certify to the said judges of the Appeal Tax court, that the parties, (relators,) in the mandamus cases lately pending in the Court of Appeals of the State of Maryland, regarding an ordinance repealing that entitled, "An ordinance to repeal the ordinance entitled, 'An ordinance to widen Holliday street, between Baltimore and Fayette streets, and to open a street in continuation of Holliday street, from the south side of Baltimore street to Exchange place, and to

change the name of Commerce street to Holliday street,' approved October 21st, 1858, and any other cases against the city growing out of the repeal of said ordinance, have in consideration of the passage of this ordinance, and of the improvement being about to be made, which is hereby ordained, release to the Mayor and City Council of Baltimore, all claims for any damages in relation to said appeal, or to any matter embraced in the petition for the mandamus aforesaid, in said cases, and have withdrawn all appeals in the said cases entered to the Supreme court of the United States; and also that Wm. W. McClellan and Catharine M. Raborg, or their representatives, have given their written assent to the provisions of the fourth section of this ordinance."

These enactments, it was charged, were an improper attempt on the part of the Mayor and City Council to combine with the opening of the new street, the collateral object of the settlement of old claims, and were also unlawful by reason of making the going into effect of the ordinance conditional upon the assent of certain individuals.

3. It was charged that the ordinance was not demanded by public convenience or necessity.

4. The ordinance of 1858, No. 15, regulating the method of procedure in opening streets, provided in its 9th section that any person dissatisfied with the assessment of damages or benefits might appeal to the Criminal court of Baltimore. The Act of Assembly 1853, ch. 451, had provided that the Superior court for Baltimore city ~~shall~~ have and exercise concurrent jurisdiction with the Criminal court of Baltimore, in appeals from the decisions of any commissioners or other persons, appointed in virtue of any ordinance, to ascertain the damage which will be caused, or the benefit which will accrue to the owners or possessors of grounds or improvements, by locating, opening, extending, widening, straightening or closing up in whole or in part, any street, square, lane or alley, within the city of Baltimore. And the Code of Public Local Law, Art. 4, sec. 837, authorized the Mayor and City Council to provide for granting appeals to the Criminal court of Baltimore, or the Superior court of Baltimore city, from the decisions of any commissioners, &c., in street cases. And it is complained that the Mayor and City Council, in the ordinance of 1864, in connection with the

should

make no paragraph here

ordinance of 1858, No. 15, have sought to deprive the complainants of the right of selection between the two appellate tribunals, which is supposed to be guaranteed to them by the Act of 1853, and the Code of Public Local Law.

5. Finally, it is charged, that the Act of 1838, ch. 226, giving powers to the city of Baltimore respecting the opening of streets was repealed by the adoption of the Code, and that subsequently to the passage of the Code, the Mayor and City Council possessed no power to pass any ordinance which did not contain a provision for an appeal to either of the said courts, at the election of the party supposing himself to be aggrieved.

Space of 1 line

Upon the said bill an order was passed the 6th day of February, 1865, granting an injunction according to the prayer thereof, prohibiting the Mayor and City Council of Baltimore, its officers, agents and servants, "from proceeding to enforce the said ordinance, entitled, 'An ordinance to open a street in continuation of Holliday street from Baltimore street to Second street,' and from taking any further steps or proceedings thereunder for the opening of such street until the further order of this court."

On the 17th of February, 1865, the Mayor and City Council of Baltimore, having filed their answer, [*Record, pp.* 8 – 11,] appealed to this court.

On behalf of the appellant it is submitted:

I. That no reasonable objection lies to the provision contained in the 7th section of the ordinance of 1858, No. 15, which is made the first ground for the application for an injunction. Where an entire lot is required, the city takes the whole, and pays for the whole. Where a part only is used, an estimate must be made of the damages to be caused by the taking of that part, and, if it be rightly made, the value of the residue will be the difference between the value of the whole and the sum thus allowed for damages. But, as the market value of an existing entire lot, can be got at with more certainty than the damages which will be occasioned by the occupation of a part, the option is given the owner to require that the whole shall be taken off his hands, it being then left to the city to ascertain the proportion between the damages caused by the taking of part, and the

value of the residue, in the best possible mode, viz: a sale of such residue at public auction. What it brings, being credited against the whole price paid the owner, leaves the exact amount of damages sustained by the lot, and really paid.

II. The proviso ingrafted upon the ordinance of 1864, might reasonably have been complained of by Wm. W. McClellan and Miss Raborg, but affected no body else. It was perhaps void. It may be that the Mayor and City Council having determined that public convenience required the opening of the street, had no right to make the enjoyment of the improvement dependent upon any collateral condition whatsoever. But the question is merely speculative. The suits *were* dismissed, the releases executed, and the written assent given. Whether therefore the proviso was good or bad, valid or invalid, was immaterial at the time of the institution of the proceedings in question.

In no case could it affect the validity of the Ordinance itself.

III. The third ground on which the bill is placed, viz: that public convenience or necessity does not call for the street,—is plainly outside of the proper cognisance of a court of equity. To the discretion of the Mayor and City Council alone, the law confides the decision of the question of the propriety of opening any street.

2 Code, Art. 4 sect. 837; 1838, ch. 226, sect. 1.

(1.) IV. By the 837th section of Article 4 of the Code of Public Local Law, the Mayor and City Council of Baltimore are authorized to provide for granting appeals to the Criminal court of Baltimore, *or* the Superior court of Baltimore city. The ordinrnce of 1864, No. 68, by its 2nd section adopted and

value of the residue, in the best possible mode, viz: a sale of such residue at public auction. What it brings, being credited against the whole price paid the owner, leaves the exact amount of damages sustained by the lot, and really paid.

II. The proviso ingrafted upon the ordinance of 1864, might reasonably have been complained of by Wm. W. McClellan and Miss Rabore, but affected no body else. It was perhaps void. It may be that the Mayor and City Council having determined that public convenience required the opening of the street, had no right to make the enjoyment of the improvement dependent upon any collateral condition whatsoever. But the question is merely speculative. The suits were dismissed, the releases executed, and the written assent given. Whether therefore the proviso was good or bad, valid or invalid, was immaterial at the time of the institution of the proceedings in question.

In no case could it affect the validity of the ordinance or suit.

III. The third ground on which the bill is placed, viz: that public convenience or necessity does not call for the street,—is plainly outside of the proper cognisance of a court of equity. To the discretion of the Mayor and City Council alone, the law confides the decision of the question of the propriety of opening any street.

2 Code, Art. 4 sect. 837; 1838, ch. 286, sect. 1.

IV. By the 837th section of Article 4 of the Code of Public Local Law, the Mayor and City Council of Baltimore are authorized to provide for granting appeals to the Criminal court of Baltimore, or the Superior court of Baltimore city. The ordinance of 1864, No. 68, by its 2nd section adopted and

incorporated the provisions of the ordinance of 1858, framed under the Act of 1838, ch. 226, with which the Code agrees in every essential particular in all that relates to the proceedings down to the time for taking appeals.

It could not have been the intention of the Legislature that appeals relating to the same street should be pending in two courts at the same time. The consideration which forbid such unseemly clashing in ordinary litigation apply with ten fold force to the case of the opening of a street, with its complex adjustments of damages and benefits. The power of selection between the tribunals must be exercised by somebody. Every one of the numerous individuals whose interests are involved may appeal. Who shall determine the court in which the cause of all shall be decided? To concede the privilege to the party who may spring first, is to encourage a race of litigation, where public policy rather calls for repose, and acquiescence in the fair conclusions of the tribunal of original jurisdiction.

It is opposed to all usage, in this State at least, to give to litigant parties a choice of appellate tribunals. The condition of the dockets of the respective courts, or other circumstances of a general character, may make it more convenient to carry appeals in street cases to the Superior court rather than to the Criminal court, or to the Criminal court rather than the Superior court. A power therefore is conferred on the Mayor and City Council to provide by ordinance for appeal to the one or the other. This, we submit, is the natural and reasonable construction of the clause under consideration. And it is the construction which ever since the passage of the Act of 1853, ch. 451, has been uniformly acted on and received without question.

There is therefore nothing in the fourth ground on which the application for the injunction was based. And the fifth ground seems to be but another form of stating the same matter.

Here insert new matter marked

A.

Space of 1 line

(2.) We have hitherto assumed, for the sake of argument, that the Act of 1853 ch. 451, and the corresponding enactment in the code, were valid exertions of legislative power. But the General Assembly could not constitutionally ~~confer~~ confer co-ordinate jurisdiction in street cases upon the Superior Court. Before the adoption of the Constitution of 1851, the jurisdiction to hear appeals in this class of cases was vested only in Baltimore City Court. The Constitution, in creating the Criminal Court of Baltimore, defined its jurisdiction thus: "Who shall have and exercise all the jurisdiction now exercised by Baltimore City Court." When therefore the same instrument, in establishing the Court of Common Pleas, and the Superior Court, is silent respecting appeals in cases of opening streets, and, after dividing between these two last mentioned courts the several species of jurisdiction which ~~had~~ previously belonged to the old County Court, declares in general terms, as to the Superior Court, that it should have jurisdiction "in all other civil cases which have not been heretofore assigned to the Court of Common Pleas," it seems a necessary inference that there was no intention to interfere with the jurisdiction ~~which had been~~ previously enjoyed by the City Court, and by the Constitution conferred upon the

Criminal Court. The general intent to avoid any overlapping of jurisdiction is evident, and the comprehensive clause at the end of the 11th section of Article 4 must be construed with reference to the general intent. That the Criminal Court has jurisdiction is clear, and is not disputed. Is it not equally clear that the framers of the Constitution never meant that part of its jurisdiction should be shared by the Superior Court. The Superior Court is carefully prohibited from trenching on the jurisdiction of the Court of Common Pleas. Why is it to be supposed that it should be at liberty to encroach upon that of the Criminal Court.

See Const. 1851 Art. 4. sec. 10, 11 and 13.

The point now advanced is not new. The objection that it was not competent to the Mayor and Ald. Council of Baltimore, under color of the Act of 1853, to confer the right to entertain an appeal from the Commissioners for opening streets, was taken in the case of Cecil Alley in 18 , and the decision of the Superior Court (Frick J.) against its own jurisdiction was acquiesced in. (Darlington vs. The Mayor and Ald. Council of Baltimore, Superior Ct. 1854.

Space equal to 1 line

incorporated the provisions of the ordinance of 1888, framed under the Act of 1888, ch. 229, with which the Code agrees in every essential particular in all that relates to the proceeding down to the time for taking appeals.

It could not have been the intention of the Legislature that appeals relating to the same street should be pending in two courts at the same time. The consideration which forbid such unseemly clashing in ordinary litigation apply with ten fold force to the case of the opening of a street, with its complex adjustments of damages and benefits. The power of selection between the tribunals must be exercised by somebody. Every one of the numerous individuals whose interests are involved may appeal. Who shall determine the court in which the cause of all shall be decided? To concede the privilege to the party who may spring first, is to encourage a race of litigation, where public policy rather calls for repose, and acquiescence in the fair conclusions of the tribunal of original jurisdiction.

It is opposed to all usage, in this State at least, to give to litigant parties a choice of appellate tribunals. The condition of the dockets of the respective courts, or other circumstances of a general character, may make it more convenient to carry appeals in street cases to the Superior court rather than to the Criminal court, or to the Criminal court rather than the Superior court. A power therefore is conferred on the Mayor and City Council to provide by ordinance for appeal to the one or the other. This, we submit, is the natural and reasonable construction of the clause under consideration. And it is the construction which ever since the passage of the Act of 1888, ch. 151, has been uniformly acted on and received without question.

There is therefore nothing in the fourth ground on which the application for the injunction was based. And the fifth ground seems to be but another form of stating the same matter.

V. The complainants could have found effectual and adequate relief in the court of law, upon appeal from the commissioners for opening streets.

JOHN CARSON,
ARTHUR W. MACHEN,
WM. SCHLEY,
For Appellant.

Chg 42: Extra 4 3/8

No. 13

34.40

Special Docket 2.00

$36.40

April term 1865

The Mayor and City Council of Baltimore

vs

Victor Clunet, next friend of Clara Clunet and others, Samuel H. B. Merryman, Geo. H. C. Neal, Chas. Thos. Sieco and others.

Appellants Brief

Filed May 29. 1865

The Mayor and City Council of Baltimore
Appellant
vs
Victor Clement & others
Appellees

In the Court of Appeals
Special Docket
April T. 1865

This is an appeal from an order of the Circuit Court of Baltimore City granting an injunction.

The Bill of the appellees, filed 6th February 1865, ~~set forth~~ shows that the Mayor and City Council of Baltimore having passed the Ordinance of 5th May 1864, entitled "An ordinance to open a street in continuation of Holliday Street from Baltimore Street to Second Street" ~~~~ the ~~Judges of the~~ Appeal Tax Court, constituted by the ordinance of 1861 No 18, approved 28th February 1861, Commissioners for opening streets, proceeded, in obedience to said first mentioned ordinance, and according to the course prescribed in the ordinance of 1858 No 15, ~~and after due notice~~ to ascertain estimate the damages & expense to be occasioned by the opening of the said extension of Holliday Street ~~as therein provided~~ as directed to be opened, ~~having estimated~~ and to ~~apportion the amount thereof two thirds~~ assess three fourths of the amount thereof ~~upon the~~ upon the ground & improvements benefited by the opening of ~~the~~ street, in proportion to the value of the benefits received by the respective owners thereof. It is not pretended that after the completion of the said valuation of damages,

estimate of expenses & assessment of damages & expenses, the Appeal Tax Court omitted in any respect to perform the duties specified in the 8th section of the ~~Ordinance~~ said ordinance of 1858. And, although the complainants aver that inadequate damages ~~allow~~ have been allowed ~~them~~ to some of them, and ~~the benefits to~~ too large an estimate placed upon the benefits to accrue to others, ~~of them~~, it is evident that these are questions to be determined by a jury on an appeal taken in the regular way, and cannot enter into the consideration of a court of equity upon an application for an injunction. ~~Inquiries~~ Appeals had in fact been taken, and ~~the proceedings was before the~~ at the time of ~~the filing~~ of granting the injunction, the proceedings were pending on appeal in the Criminal Court of Baltimore City, as appears from the Sheriff's return.

To justify ~~As a ground for~~ the interference of Equity it is contended on the part of the Complainants, that the ordinance of 1864 was in excess of the powers of the Mayor and City Council, and that any action thereunder looking to the condemnation of the property of the complainants, ~~is an unwarrantable exercise of power~~ is unwarranted by law. The several grounds of objection assigned in the Bill, are the following, viz.

1. That the provision contained in the 7th section of the Ordinance of 1858 No 15 giving the right to the owner of any house or lot

a part of which ~~is necessary to be taken~~ it is necessary to take for the street, to require, if he choose, that he shall be compensated for the whole, the City in such case ~~paying him for the~~ selling the part not required at public auction, and applying the proceeds to the re-imbursement pro tanto of the ~~damages~~ money so paid for the whole, is illegal; and consequently, that inasmuch as in the present case ~~proceedings~~ ~~certain whole~~ the owners of ~~certain~~ some lots ~~per~~ required in part for the street have elected to ~~demand~~ give up the whole, the entire ~~whole~~ proceedings are vitiated.

2 ~~That~~ the ~~the~~ ~~A~~ provision in the 4th section of the ordinance of 1864, that from any damages which might be awarded thereunder to Wm. W. McClellan or Catharine M. Raborg, should be deducted the amount of certain orders, which had been received by the City in payment of the assessment upon them, under the ~~ordinance of 1858 No 59~~ ~~Ex~~ repealed ~~X~~ ordinance of 1858 No 59. And ~~the~~ ~~of~~ the ~~pro~~ following proviso ~~contained~~ contained in the 5th section of the ordinance of 1864,

"The said ordinance shall not take effect until the City Counsellor

[Here insert the proviso of the 5th section of Ord. 1864 No. 68.]

shall certify to the said proper of the Appeal Tax Court that the parties (relators) in the mandamus cases lately pending in the Court of Appeals of the State of Maryland regarding an ordinance repealing that entitled "An ordinance to repeal the ordinance entitled 'An ordinance to widen Holliday Street between Baltimore and Fayette Streets, and to open a street in continuation of Holliday Street, from the south side of Baltimore street to Exchange Place, and to change the name of Commerce street to Holliday Street" approved October 21, 1858, and any other cases against the city growing out of the repeal of said ordinance, have in consideration of the passage of this ordinance, and of the improvement being about to be made which is hereby ordained, release to the Mayor & City Council of Baltimore all claims for any damages in relation to said ~~Ap~~peal, or to any matter embraced in the petitions for the mandamus aforesaid in said cases, and have withdrawn all appeals in the said cases entered to the Supreme Court of the United States, and also that Wm W. McClellan and Catharine M. Raborg, or their representatives, have given their written assent to the provisions of the fourth section of this ordinance."

These enactments, it was charged, were an improper attempt on the part of the Mayor and City Council to combine with the opening of the new street the collateral object of the settlement of old claims, and were also unlawful by reason of making the going into effect of the ordinance conditional upon the assent of certain individuals.

3. It was charged that the ordinance was not demanded by public convenience or necessity.

4. The ordinance of 1858 No 15, ~~according to which~~ regulating the method of procedure in opening streets, provided in its 9th section that any person dissatisfied with the assessment of damages or benefits might appeal to the Criminal Court of Baltimore. The act of Assembly, 1853 ch. 451, had provided that the Superior Court for Baltimore City shall have and exercise concurrent jurisdiction with the Criminal court of Baltimore in appeals from the decisions of any commissioners or other persons, appointed in virtue of any ordinance to ascertain the damage which will be caused, or the benefit which will accrue to the owners or possessors of grounds, or improvements by locating, opening, extending, widening, straightening, or closing up in whole or in part, any street, square, lane or alley, within the City of Baltimore. And ~~the 837~~ the Code of Public Local Law Art. 4 sec. 837 authorized the Mayor and City Council to provide for granting appeals to the Criminal Court of Baltimore or the Superior

Court of Baltimore City from the decisions of any commissioners &c in street cases. And ~~it is charged that the Ordinance of 1864~~ it is complained that the Mayor and City Council, in the Ordinance of 1864, in connection with the Ordinance of 1858 no. ~~17~~ 15, have sought to deprive the complainants of the right of selection between the two appellate tribunals, which is supposed to be guaranteed to them by the act of 1853 and the Code of Public Local Law.

5. ~~It is charged that~~ Finally, it is charged that the Act of 1838 ch. 226 giving powers to the City of Baltimore respecting the opening of streets was repealed by the adoption of the Code, and that subsequently to the passage of the Code the Mayor & City Council possessed no power to pass any ordinance which did not contain a provision for an appeal to either of the said courts at the election of the party supposing himself to be aggrieved.

Upon the ~~Bill~~ said Bill an order was passed the 6th day of February 1865 granting an injunction according to the prayer thereof, "prohibiting the Mayor and City Council of Baltimore, its officers, agents and servants from proceeding to enforce the said ordinance

entitled "An ordinance to open a street in continuation of Holliday street from Baltimore street to Second street," and from taking any further steps or proceedings thereunder for the opening of such street until the further order of this court."

On the 17th of February 1865, the Mayor and City Council of Baltimore having ~~answered the~~ filed their answer, [Record pp 8–11] appealed to this Court.

On behalf of the appellant it is submitted

I. That no reasonable objection lies to the provision contained in the 7th section of the ordinance of 1858 No 15, which is made the first ground for the application for an injunction. Where an entire lot is required the City takes the whole, and pays for the whole. Where a part only is used an estimate must be made of the damages to be caused by the taking of that part, and, if it be rightly made, the value of the residue will be the difference between the ~~market~~ value of the whole and the sum thus

allowed for damages. But, as the market value of an existing entire lot can be got at with more certainty than the damages which will be occasioned by the ~~cutting off~~ occupation of a part, the ~~owner~~ option is given ~~t~~ the owner to require ~~that~~ that the whole shall be taken off his hands — it being then left to the City to ascertain the proportion between the damages caused by the taking of part and the value of the residue, in the best possible mode, viz. a sale of such residue at public auction. What it brings, being credited against the whole price paid the owner, leaves the exact amount of damages sustained by the lot, and really paid.

II. The proviso ingrafted upon the Ordinance of 1864, might reasonably have been complained of by Wm. W. McClellan and Miss Raborg, but affected no body else. ~~Possibly~~ It was perhaps void. ~~and inoperative~~. It may ~~was~~ be that the Mayor and City Council, having determined that ~~the~~ public convenience required the opening of the street, had no right to make the enjoyment of the improvement dependent upon any collateral condition whatsoever. But the question is ~~a~~ merely speculative. ~~and~~ The suits were dismissed, ~~and~~ the releases executed, and the written assent given. Whether therefore the proviso was good or bad, valid or invalid, ~~was of no import~~ was immaterial at the time ~~the~~ of the institution of the proceedings in question.

III. The third ground on which the bill is placed — viz. that public convenience or necessity does not ~~require the street~~ call for the street — is plainly outside of the proper cognisance of a court of equity. To the discretion of the Mayor and City Council alone, the law confides the the decision ~~of~~ the question of the propriety of opening any street. ~~If appeal court their determination could be called in dispute the court of chancery is not the appropriate tribunal~~

2 Code Art. 4 Sect. 837. 1838 ch. 226 sect. 1.

IV. By the 837th section of Article 4 of the Code of Public Local Law ~~and~~, the Mayor and City Council of Baltimore are authorised to provide for granting appeals to the Criminal Court of Baltimore ~~or~~ the Superior Court of Baltimore City. The ordinance of 1864 No. 68, ~~by the enactment contained in the its section section~~ by its 2nd section adopted ~~and incorporated~~ and incorporated the provisions of the ~~Act of 18~~ ordinance of 1858 ~~which was~~ framed ~~in agreement with~~ under the Act of 1838 ch. 226, ~~which is incorporate~~ with which the Code agrees in every essential particular in all that relates to the proceedings down to the time for taking appeals.

~~Now it~~ It could not have been the intention of the legislature that appeals ~~should be~~ relating to the same street should be pending ~~at the~~ in two courts at the same time. The considerations which forbid such unseemly clashing in ordinary litigation ~~cases~~ apply with ten fold force to the case of the opening of a street, with its complex adjustments of damages and benefits. The power of selection ~~to~~ between the tribunals must be exercised by some body. ~~Any person~~ Every one of the numerous individuals whose interests are involved may appeal. Who shall

determine the court in which the cause of all shall be decided? To concede the privilege to the party who may spring first, is to encourage a race of litigation, where public policy rather calls for repose & acquiescence in the fair conclusions of the tribunal of original jurisdiction.

It is opposed to all usage, in this State at least, to give to litigant parties a choice of appellate tribunals. The ~~state of public business or other circumstances of the~~ condition of the dockets of the respective courts, or other circumstances of a general character, may make it more convenient to carry appeals in steal cases to the Superior Court rather than to the Criminal Court, or to the Criminal Court rather than the Superior Court. A power therefore is conferred on the Mayor & City Council to provide by ordinance for appeal to the one or the other. This, we submit, is the natural and reasonable construction of the clause under consideration ~~in question~~. And it is the construction which ever since the passage of the act of 1853 ch. 451 has been ~~act~~ uniformly acted on and received without question. ~~We submit therefore~~

There is therefore nothing ~~no force~~ in the fourth ground on which the application for the injunction was based. And the fifth ground seems to be but another form of stating the same matter.

V. The complainants could have found effectual and adequate relief in the Court of Law, upon appeal from the Commissioners for opening streets.

John Carson
Arthur W. Machen
Wm. Schley
for Appellant