Filed June 7th 1865
Ct. of Appeals.

No. 14 Appeal Docket

9/8

$77.60

A. J. BOULDIN AND OTHERS, AND

SAMUEL ROGERS,

vs.

THE MAYOR & CITY COUNCIL

OF BALTIMORE.

IN SUPERIOR COURT

OF

BALTIMORE CITY.

BRIEF FOR COMPLAINANTS.

And Appellees.

A. J. BOULDIN and Others, and SAMUEL ROGERS,

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE.

IN SUPERIOR COURT OF BALTIMORE CITY.

BRIEF FOR COMPLAINANTS.

The substance of the Bill, Answer and most of the Evidence is stated in the Brief prepared by the counsel for the complainants for the argument of the case in the Court of Appeals when the case was carried there; the decision on the case thus presented will be found in

15 Maryland p. 18.

Such part of the evidence taken since the case came back from the Court of Appeals as is necessary for the proper elucidation of the questions argued in this supplementary Brief, will be stated as we discuss the various questions presented for the consideration of the Court.

The points for which we contend may be stated generally as follows:

1st. That on the 25th July, 1853, when the application to pave the Belair Avenue between Point Lane and North Avenue was presented to the City Commissioners, the said Belair Avenue was not a formally condemned street in the purview of the ordinance No. 15.—Revised Ordinances 1850; and that therefore under the 1st and 36 Sections of said ordinance, no jurisdiction could be vested in the City Commissioners to pave said avenue without the assent of the proprietors of ALL the ground fronting on the avenue between the points named; and that therefore the proceedings of the Commissioners in determining to pave said avenue were *coram non judice* and absolutely void.

2d. That even if the Belair Avenue between the points named, was a formally and legally condemned street within the meaning of said ordinance—No. 15 Rev. Ord., 1850—so that the assent of the owners of the MAJORITY of front feet binding thereon, was sufficient to vest jurisdiction in the City Commissioners to pave said street under said ordinance; yet that in this case the application presented to him on 25th July, 1853, and on which alone the determination to pave was made, was not signed by such majority of owners.

3d. That admitting that the Belair Avenue was a street in *such a sense* as under said ordinance—No. 15 Rev. Ord., 1850—could be paved on the application of a majority of owners, and admitting also that the application filed 25th July, 1853, was signed by such a majority, yet that in point of fact the Belair Avenue, as it existed at the time of such application, has never been paved at all; because subsequently, to wit, in December, 1853, the grade of the larger part of said street was altered contrary to law, and the Avenue as it existed on the 25th July, 1853, ceased to exist.

4th. That admitting all the three last propositions to be untenable, and the paving tax imposed on the property of the complainants to be in fact a valid lien thereon under said ordinance—No. 15 Rev. Ord., 1850—yet that the sale enjoined by the injunction originally issued in this case, was properly enjoined, because these had not been given the requisite notices made by said ordinance necessary preliminaries to such threatened sale.

We propose to discuss under these four points all the questions which seem to us to arise in this case.

FIRST POINT.

It is clear from an examination of sections 1 and 36 of No. 15 Rev. Ord., 1850, that the streets in the city of Baltimore are divided into two classes or categories so far as the paving of them is concerned; these classes are designated as "*opened*" streets, and secondly, "*formally condemned*" or "*condemned*" streets.

The owners of property binding on the one class, as well as on the other, have to pay for the paving whenever they are paved ; the city never pays.

If any piece or strip of ground is a "condemned street," then the owners of a majority of the ground fronting thereon may have it paved, and the dissenting minority must pay their share of the expense. But if any piece or strip of ground is an *opened* street, but not a *formally condemned* street, then the majority principle does not exist, and the paving can only be done with the assent of all and on their application.

The application to pave Belair Avenue between Point Lane and the North Avenue presented on 25th July, 1853, and on which all the paving proceedings were based, was not signed by all of the proprietors of ground binding on the same.

Unless therefore the Belair Avenue, in this part of it, was at that time, not only an opened street, but a *formally condemned* one in the sense in which those words are used in the said Ordinance No. 15, (sections 1 and 36,) it is plain that the proceedings of the City Commissioners in the matter were *coram non judice* and *void.*

Eschback vs. M. & C. C. of B., 18 Maryland 276.
Henderson vs. same, 8 Md. 352.
Holland vs. " 11 Md. 186.

The inquiry therefore is, was the Belair Avenue a formally condemned street of the city of Baltimore within the meaning of said ordinance?

To determine this question it is necessary to ascertain what is a "formally condemned" street of city of Baltimore.

Now the literal construction of the 36th section of this Ordinance would limit the terms "formally condemned street" to a street which had been condemned, that is, made a street, under the proceedings specified in Ordinance No. 17 Rev. Ord., 1850, which was passed under the authority given by Act 1838, ch. 226. Accordingly the Defendants in order to show that the Belair Avenue was a condemned street

rely in the first place on the Ordinance No. 61 of Ordinances of 1851, and the proceedings of the Commissioners for opening streets had thereunder, which said ordinance and proceedings they have given in evidence in this case.

We proceed therefore to examine this ground.

We direct attention in the first place to the Act of Assembly of the State from which this ordinance and all ordinances for opening and condemning streets derive their only efficacy.

This is the Act 1838, ch. 226.

Power is hereby given to the city to provide all the machinery and devise methods necessary first, to make streets, where none existed before; second, to widen those which should be in existence at any time; to straighten any that needed it; and also to close up any which the city should desire to close up.

It is clear, therefore, that to create a street of say 50 feet between two points, is a very different thing from widening to the width of 50 feet a street which already existed as a forty feet street; and also that to close up a street is very different from creating it, that is, in the language of the Act, *laying* it *out*. Bearing this in mind, we call attention to the PROVISO annexed to the first Section of this Act, the performance of the act therein required of the city being made expressly a condition precedent to the valid exercise of the powers granted.

This condition precedent is the giving by the city authorities at least sixty days' notice of *any* application which may be made for the passage of any ordinance to execute *any* of the powers vested in them by the act.

That the omission to give this notice sixty days prior to the passage of an ordinance to open, widen or close any street would make the ordinance, and all proceedings under it, a nullity cannot be an open question.

1 Gill & J., p. 196, 7, 8.
18 Md., p. 284.
10 Gill & J., 283.
5 Gill, 398.

The claim is, that the Ordinance No. 61, of 1851, was intended to condemn, and the proceedings thereunder did condemn, the whole *fifty* feet, which is the width of the Belair avenue as laid down on Poppleton's Plat, and to which width it was paved by the proceedings in this case.

The evidence in the cause shows that as far back as the year 1793, a public county road or highway was laid out under the Act of 1791, ch. 70, from the Falls of Gunpowder to Baltimore town, and was called and known as the Belair road, that this road was forty feet wide, and when first laid out came up to Baltimore town at a street in the town which was then called Bridge street. That subsequently, by the act of 1816, ch. 209, the limits of the city of Baltimore were extended so as to bring within the city limits that part of the Belair road lying between the points now known as Point Lane and the North Avenue; and the Belair Avenue between said points, as laid down on Poppleton's Plat, (which was made under the act of 1817, ch. 148,) was co-incident with the said Belair Road, so far as the forty feet of the latter was concerned, the Belair *Avenue*, as laid down on said plat, being laid off for a *fifty* feet avenue.

We contend that unless the said forty feet of the said Belair Avenue, to wit, that which was the Belair Road, was at the time of the passage of the ordinance No. 61, of 1851, already a *condemned* street, that it is not now a condemned street; because the only notice given under the requirements of the act of 1838, ch. 226, was a notice that application would be made to the Mayor and City Council to *widen* Belair Avenue. This notice was in these words:

"Notice is hereby given that application will be made to the Mayor and City Council to *widen* Belair avenue, or North Gay street, as laid down on Poppleton's Plat, from Point lane to the North avenue. Also, to *open* Washington street from, &c."

It was under this notice that the Ordinance No. 61, of 1851, was passed. It is clear, therefore, that under the proviso to the first section of Act of 1838, ch. 226, the only Ordi-

nance that could validly be passed under this notice was an Ordinance to *widen* the Belair Avenue, and, of course, in order to widen a street, that which is to be widened must exist as a condemned street of *some* dimensions.

As we have before said, the widening of a street which already exists is something radically different from creating a street which before had no existence at all. Take, for illustration, any two streets in the city both of which are laid down on Poppleton's Plat, both forty feet wide as there laid down, one of which is not only laid down on this plat, but has also been regularly condemned under the said Ordinance No. 17, Revised Ordinances of 1850, and the other only laid down on the plat and not existing as a condemned street; that is to say, with the title to the bed of the street not vested in the city but in individuals. (See 5 Maryland 314.)

Suppose now it is desired to make the forty feet condemned street a 50 feet street, what under the Proviso to the Act 1838, ch. 226, would be the necessary notice? Clearly it would be a notice that an application to widen this street would be made to the city; and under the ordinance passed in pursuance of this notice the proceedings would be such as would condemn, that is, secure the right and title to, the extra *ten* feet. But now suppose it is desired to make the 40 feet *uncondemned* street a fifty feet condemned street; what would be the required notice in that case? Is it not clear that a notice only to *widen* this street would be radically deficient as the foundation of an ordinance to condemn not only the extra *ten* feet but also the whole original forty feet? The Act of 1838 declares that the notice shall declare the object to be secured by the proposed Ordinance; argument is not needed to show that a notice that application will be made to widen a *forty* feet street so as to make it a fifty feet street, does not declare that the object to be secured by the proposed Ordinance is, (not to widen a forty feet street into a fifty feet street, but) to condemn a fifty feet street; the *notice* is simply that ten feet will be condemned, while the Ordinance would condemn fifty feet.

See also 1 Gill & J. p. 197. propositions 10 to 13.

We think it too clear for further argument, therefore, that even if the Ordinance No. 61, of 1851, had professed to condemn the forty feet of the Belair Avenue which had before existed as the Belair Road, the Ordinance would have been a nullity and void.

But it is clear that the Ordinance does not profess to authorize anything but the condemnation of the ten feet which was to be added to the forty feet occupied by the Belair road in order to make the fifty feet which was the width of the Belair Avenue as laid down on Poppleton's Plat.

The language is "to widen and condemn it *to* the width of which it is laid down on Poppleton's Plat;" it is not said *of* the width; and if it had been intended to condemn the forty feet as well as the ten feet, all use of the word "widen" would have been superfluous and inapt; the language would simply have been "open and condemn Belair Avenue as laid down on Poppleton's Plat."

Nor did the Street Commissioners profess or pretend when acting under this Ordinance to more than condemn the *ten* feet; the Book of their proceedings and their condemnation Plat filed in the cause all show this.

1st. The Commissioners on, 28th October, 1852, directed the Surveyor to furnish them plats for *widening* Belair Avenue.

2d. Their Record states that on the 10th March, 1853, they completed their "estimates of the damages, benefits and expenses for *widening* Belair Avenue."

3d. This same Record of their proceedings shows that their published notices which by law they were required to give to all interested are headed "*widening* of Belair Avenue," and state that persons assessed for *widening* said Avenue must pay, &c.; and that they had returned their "estimates for *widening* said avenue," &c.

Their Plats show the same.

Unless, therefore, the forty feet of the Belair Avenue, which *existed as* the Belair Road made under the act of 1791, ch. 70, was a formally condemned street of the city of Baltimore at

the time of the passage of the Ordinance No. 61, of 1851, it is clear that it was not made so under the said Ordinance; and that therefore on the 25th July, 1853, the Belair Avenue was not a street which could be paved by the assent of the owners of a majority of front feet.

The inquiry then comes, was the said forty feet Belair Road a condemned street of the city of Baltimore at the time, and independent, of the passage of Ordinance No. 61, of 1851?

We call attention again to the fact that the inquiry here is not whether the said Belair Road was not at that time an opened, travelled highway or road, nor whether it was or was not an open, travelled street; the inquiry is, whether it was a *formally condemned* street in contra-distinction to an *opened* street? (See Ordinance No. 15, Revised Ordinances 1850, sections 1 and 36.)

We have shown that the said Belair Road was not a formally condemned street in the strict and literal meaning of the terms as used in the said 36th sec. of Ordinance No. 15.

The question is whether there is anything to show that it was a formally condemned street within any other construction which may properly be put on this Ordinance.

Supposing, then, that a street may be, within the purview of this ordinance, a "formally condemned street," as the result of some facts relating to it other than the institution and perfecting of the proceedings pointed out by Ordinance No. 17, let us inquire what other facts will make a piece of ground a "formally condemned street."

In order to determine this question it is only necessary to ascertain what are the characterizing and constituent elements of a "formally condemned street" in the city of Baltimore.

We refer first to the legislation of the State on this subject.

The Act of 1817, ch. 168, is the Act under which Poppleton's plat was made. The 16th and 17th sections of this act provide the proceedings for condemning land for streets and

making them. Any sections, therefore, of this act which declares what shall be the title of the city over the land covered by streets thus laid out, of course, throw much light on the question we are now considering.

The 9th and 10th sections provide for vesting in the city the bed of Jones' Falls, and for making streets along its banks, and gives power to the city to purchase land for this latter purpose; and in case of inability to purchase, gives the power to condemn the same, and it is expressly declared in the 10th section that on payment of the money adjudged to be due to the proprietors of land so condemned, such property shall be vested in the city in *fee simple* for said purposes—that is, for streets.

Again. The Act 1824, ch. 105, declares, that the Turnpike Road Companies may cede the bed of their roads to the city; and that such cessions shall be by deed executed, acknowledged, &c., in the same way that deeds are required to be executed, &c., to pass Real Estate; and *when* so ceded, they are to become public streets and subject to the Ordinances of the city.

Again. The Act 1844, ch. 224, and the Act 1843, ch. 309, and the Act 1853, ch. 260, provide for the extension and erection of markets and market places in the city of Baltimore which also involve, as necessary accompaniments, the streets which skirt these markets. (See 5 Gill & J., 369, 370.

The 2d section, Act 1843, ch. 309, provides that in condemning the ground the Commissioners shall in all respects proceed as do the Commissioners for opening streets.

And the 3d section declares that when the damages are paid or tendered, then the title to the property so condemned shall become and be vested in the city in *fee simple*.

See also Act 1853, ch. 260.

The like legislation is to be seen in 2d vol. Code, (city of Baltimore, section 860;) thereby it is declared, that in order to make certain streets, running into the North Avenue, public streets, so that the city should pay for the paving of

said avenue in front of said streets, the property holders owning these then unopened streets should convey them to the city by a deed in *fee simple*. And the 20th and 21st sections of Ordinance No. 17, Rev. Ord., 1850, make same provision generally.

These citations suffice to show that the Legislature of Maryland intended that the Mayor and City Council of Baltimore should have the complete and entire title to the ground covered by the streets of the city of Baltimore, so that they might exercise all the control over them necessary in so large a city; that they might lay pipes of all kinds, gas, water, &c., through them.

These citations refer, of course, to particular streets; but it will be held that all the streets in the city are to be held by the same title, unless the contrary is made to appear; as it cannot be supposed that it was intended that the jurisdiction of the city and its title should be one thing as to some of its streets, and another thing as to others.

But we need not resort to our own interpretations of these acts to show that the Mayor and City Council has the absolute and complete title to the ground covered by a formally condemned street.

The following authorities show this interpretation to be correct:

5 Gill & J., 374.
5 Maryland, 314.
19 Md., 369, McLellan *vs.* Graves.
18 Md., 276.

We refer also to several cases in the New York Reports, because an examination of them shows that the same system of condemnation there prevails; and it is in these cases distinctly held, that in order to render a street that has even been fully marked out, and in fact opened on the ground, (that is, used as a street,) a street in law and technically, the fee must in some way be vested in the city.

1 Wend. 262. 2 Wend. 472.
8 Wend. 77, 85, 103.

This is also the effect of the decision in 5 Md., 314.

These cases are cited and approved of on kindred points in the cases of—

Alexander *et al. vs.* M. & C. C. of Baltimore. 5 Gill 383.

White *vs.* Flanigan. 1 Md., 540.

We contend, therefore, that before any street can be considered as a "formally condemned street," within the purview of the Ord. No. 15, Rev. 1850, the title to the bed of that street must have by some means been taken out of the original individual proprietors thereof, and vested in the city absolutely and in fee, in trust of course for the public and for public purposes.

Was such the case with the Belair Road on 25th July, 1853?

This Road was laid out under the Act 1791, ch. 70.

The title of this Act is, "An Act to straighten and amend the *Public Roads* of Harford county and for other purposes."

The 15th section directs that another public road shall be laid out from the Falls of Gunpowder to Baltimore town, previous parts of the Act having declared that a road should be laid out to said Falls from Belair in Harford county.

The 11th section provides for paying damages to the owners of lands through which this road was to pass; and the damages to be paid were to be those which the owners should sustain by reason of carrying said *road* over said lands, and they were also to consider the benefit, advantage and convenience by reason of the *road* going over their land.

The Belair Road was made as provided for by this Act, and a return and plat was filed in Baltimore County Court in 1793, which are in evidence in this cause.

The Belair Road thus made was a public county road, or highway, leading from Belair to Baltimore town; the proprietors of the ground over which it passed received no other compensation than the difference (if any) between the damages which they sustained and the benefit they derived by *this county road* leading *to town*, going over the land.

Let us now see what rights in and over the soil thus occupied by the road were taken from them by its construction, and what remained in them.

It is clearly established that their *fee simple title to the soil* under the bed of the road was unaffected by the establishment of this road; its establishment gave to the *public* only the easement of a right of passage over it as a public road for their vehicles, &c.

3 Bland, 67.
1 Wend, 262.
8 Wend, 85, 103.
2 Wend, 472.

The status of the Belair Road, and of the rights of those owning the ground bounding thereon, being thus established and defined, must always remain the same till changed by some valid public law, or by the Act of the said co-terminous proprietors.

Unless therefore some act of the parties, or some valid public law can be shown to have changed this status; this status remains, and the proprietor who holds land bounded on the said Belair Road, owns the absolute fee to the middle of the road, subject only to the easement by said Act of 1791, ch. 70 created, the character of which we have above adverted to.

The proof shows that the deeds of the complainants bind their property, sought to be sold for this paving tax, on the Belair Road.

(See deeds to the complainants.)

It follows therefore in the absence of any such act or law, that the Belair Road was not a "formally condemned" street, within the meaning of the Ordinance No. 15, Rev. Ord. 1850, and that therefore the paving proceedings are void and *coram non judice*.

1. No act of Assembly of the kind named is pretended to exist; nor would it have been valid, unless provision had in it been made for paying to these co-terminous proprietors the value of the bed of the road thus appropriated.

The fee remaining in them could not be divested or taken for public use except by making compensation.

5 Md., 314. 7 Md., 500. 19 Md., 352.

2. We are at a loss to imagine what act of the parties can be relied on as amounting to a transfer to the city of Baltimore either the fee in the ground covered by the bed of the road, or any right, control or power whatever over the same.

It is contended, we believe, that the user of this road by the public ever since it was made a public road in 1793 amounts in law to such a surrender by the proprietors of the ground to the city of Baltimore of the absolute dominion over, and property in, the ground covered by the said road.

Let us see how this stands.

As we have before seen, the Act of 1816, ch. 209, brought this part of the Belair Road, now the subject of discussion, within the city limits ; it simply extended the limits of the city over a large section of ground, (many acres,) included in which there happened to be this part of this road ; this road was not even mentioned in the act ; it came therefore into the city unaffected as to its status, and the status of those, whose property it was subject to the easement before mentioned.

The Commissioners under the Act of 1817, ch. 248, marked out in their plan of the city an avenue, called Belair Avenue, which was to be fifty feet wide, the lines of this proposed and delineated avenue embracing the forty feet of the Belair Road.

Now it is not denied that the proof shows that that public which from 1793 had been using the Belair Road in their journeys to and from the city continued to use it after the passage of the Extension Act of 1816.

The simple fact is that people continued to travel over it after it got in the city limits as they had done before.

This they had the right to do under the Act of 1791, ch. 70, and no one could say them nay. How then can such a user be held as evidence of an intent on the part of the owners of the ground binding thereon to surrender and grant to the city of Baltimore, the *corporation*, the right and title to the ground covered by this road ?

Adverse possession for a certain length of time is held to be evidence on which we may found a presumption of a grant; but this is because the possession is inconsistent with title in the party possessed against. But here the use of this highway was the right of the public under the act of 1791, ch. 70. It required no assent from the proprietors of the ground, and therefore that user is not indicative of the giving up of any right of such proprietors.

But even if the Belair road never had existed there, and the ground was admitted to have been used ever since the street was laid down on Poppleton's Plat in 1817, this would not make the street so opened and used a "condemned street" within the ordinance No. 15, of 1850. The laying down of streets on that Plat, and the preparation of them so that they may be traveled as dirt roads, does not make them streets of the city of Baltimore in the technical and true sense of the word; the user of such prepared and delineated streets, for no matter how long, divests no right of the individual proprietors of the soil, and vests no title in the city; and this is so simply because the Ordinances of the city and legislation of the State having drawn the distinction between streets delineated and opened, and streets condemned, that is between streets in fact and streets in law, no one can found upon the permissive user of streets delineated on the plan and actually opened and unpaved, any presumption of the surrender of the rights of soil by the proprietor or any intention to forego his right to the value of the ground which the street covers whenever the city goes to work under its Ordinances to condemn the said ground for this street.

Revised Ordinances 1850, Ordinances Nos. 15 and 17.

5 Md., 314.
7 Md., 510.
18 Md., 276.

This being true, then, even if this part of the Belair *Road* ceased to exist when the city limits were extended, the consequence was that the Belair *Avenue* was like any other street laid down on Poppleton's Plat; and its being opened

in fact and used divested none of the rights of the proprietors of ground binding thereon, which remained just as if no road or street was ever laid out.

The argument here lays in a nut-shell. If the Belair Road ceased to exist when the Extension Act was passed, then the easement created under the Act of 1791, ch. 70, ceased to exist; and the fee was in the proprietors, unencumbered by the easment.

Angell on Highways, 326.

If it did not cease to exist, then it remained the Belair Road on 25th July, 1853, and was therefore not a condemned street.

That ground which has been designated as a street on the city plan, and opened in fact on the ground, is not nevertheless a street in law till condemned or in some way the fee has been vested in the city, is clear from the following authorities; and that its dedication as a street does not vest the requisite title in the city, or take the fee out of the original proprietors. See—

5 Maryland., 314.
18 Wend., 105.
1 Wend., 262.
11 Wend., 487.
2 Wend., 472.

If user of the Belair Avenue, as laid down on Poppleton's Plat, vested in the city all that was necessary to be vested in it to make it a condemned street, where was the necessity of the condemnation authorized by Ord. No. 61 of 1851? If used, the user would be held co-extensive with the dimensions of the avenue as laid down on the Plat, which was the 50 feet.

We submit therefore that on all of the foregoing grounds the Belair Avenue was not on 25th July, 1853, a formally condemned street within the meaning of ordinance No. 15, Revised Ordinance, 1850, and could not therefore be paved on the majority principle.

1st general point—(*continued.*)

2dly. We contend that for another reason the Belair Avenue was not a condemned street of the city of Baltimore on the 25th July, 1853, and this independently of all the grounds heretofore urged.

Let us now admit, *ex gratia argumenti*, that it was only necessary to condemn the extra ten feet on the southeast side of the Belair Road, so as to make a condemned 50 feet avenue, as laid down on Poppleton's Plat. We contend that even this 10 feet was not in law condemned and made a part of the street.

The Plat (B.) filed by the defendants shows that binding on the Belair Avenue was a lot of about 800 feet, which on said Plat is designated as belonging to Charles Rogers.

Charles Rogers testifies that he owned no ground on the avenue; nor is there any evidence offered to contradict this assertion.

The complainant filed three deeds, dated, one 7th September, 1846, and one 19th December, 1849, and the other 3d March, 1848, which together embrace and describe the above-mentioned 800 feet. These deeds convey the said ground to Samuel Rogers in trust for Caroline Rogers for her sole and separate use, and free from the control of any husband she might have.

The deeds are *prima facie* evidence of title according to their import in this case, wherein no one else sets up claim to the land. And moreover, Charles Rogers, the husband of Caroline Rogers, testifies that he has resided on this land for some twenty years, and that he does not own it; which is sufficient, in connection with the deeds, to show title in Caroline Rogers, his wife. The answer of the defendant also admits that these deeds embrace this property.

The evidence further shows (see Return of Commissioners for Opening Streets, Blue Book,) that there was allowed for damages sustained by this land in the widening of said avenue, that is in the taking of said extra ten feet, the sum of $166.02; there was also assessed to said land for benefits the sum of $161.43.

The evidence of Thompson and of W. S. Bryan shows that, in point of fact, this sum of $166 allowed for damages was never paid to Caroline Rogers or to her Trustee, nor invested for them, or either of them ; but that $161.43 of it was paid by the city to W. S. Bryan as attorney for B. A. Lavender, who had paid to the city the $161.43 assessed for benefits to said Rogers' Land. Lavender, after paying this to the city, sued Charles Rogers personally in Court Common Pleas for this amount, and Charles Rogers defeated the suit by pleading as a set off that there had been allowed him for damages $166.02 ; after this suit so ended, the city paid the attorney of Lavender this $161.43.

Now we contend that neither Caroline Rogers nor her Trustee have any concern whatever with any or all of these transactions ; Charles Rogers had no more right to deal with the city, nor the city to deal with him, in relation to the said assessments, than any stranger ; and Caroline Rogers is not to be affected or prejudiced thereby.

This being so let us see how the case stands. By the 13th Section of Ord. No. 17, (1850,) when Lavender paid the benefit assessment on this lot the city had no further lien on the same for it.

By the 12th section of same ordinance, passed in obedience to the requirements of 1838, ch. 226, the city is prohibited from opening any part of a street over the ground of any person entitled to damages without the consent in writing of such person, until these damages are paid or the amount invested in city stock.

Now neither of these pre-requisites were complied with.

It follows that no title vested in the city.

19 Maryland, 351.

The Belair Avenue was therefore never a condemned street between Point Lane and the North Avenue ; because being a unit, if any part was wanting in condemnation, the whole did not exist.

It will be observed also that even if Charles Rogers was the owner of the ground he was not paid in full the damages ;

and the want of payment of a part is as much a defect as if the whole was not paid.

3dly. We contend that the Belair Avenue was not a condemned street on 25th July, 1853, because the record of proceedings of the Commissioners for opening streets, as filed by the Defendants, shows that the proceedings were altogether irregular, and there was an omission of fundamental and jurisdictional preliminaries prescribed by law for the action of the Commissioners.

1st. The 2d section of Ord. No. 17, (1850,) provides that before the Commissioners have jurisdiction in any case they shall take an oath therein prescribed, which the 3d section says shall be recorded in a book to be provided for the recording of their proceedings in the case upon which they are about to act; and the evidence of their having taken it is declared to be the certificate of the Magistrate before whom they take it.

The 4th section declares that the Clerk shall keep a record of the proceedings of the Commissioners, and his own oath shall be therein recorded.

The book filed in this case by the defendants as containing the proceedings relating to the opening and condemning of said street, contains no copy of the oath and no certificate of the Magistrate.

In law, therefore, the presumption is, that the oath was not taken, because that which the law prescribes as the only evidence that it was taken, is wholly wanting. The taking of this oath being a preliminary necessary to give them jurisdiction, their whole proceedings are void.

1 Gill & J., 1968.
18 Md., 2989.
10 Gill & J., 283.

The 6th section also provides that the Commissioners shall give 30 days' notice of the time and place of their first meeting under the Ordinance, on which day they *shall* meet.

Now the record of their proceedings shows that they did not meet on the day appointed, which was 30th November, 1852, and they did not meet till 12th February, 1853.

No one, therefore, was bound to take notice of what was afterwards done, because they had no jurisdiction in the premises.

That this book so filed by the Defendant is the book of the record of their proceedings, and therefore the one in which the oath should be found, is abundantly evident from an inspection of the book itself, which contains a full record of all they did from the beginning to the end.

It is also apparent, and conclusively so from other evidence in the case.

The Defendent filed in the case a book of the proceedings of the Commissioners had in 1851 for widening this avenue under the same Ordinance No. 61, of 1851. These proceedings being carried by appeal to the Criminal Court, were QUASHED.

Now this book is similar in all respects in what it contains to the book containing the proceedings of the Commissioners had in 1852 and which is the book now under discussion.

The 9th section of Ordinance No. 17, says that on an appeal to the Criminal Court, there shall be sent up by the Register to said Court the "Record of the proceedings of the Commissioners in the case;" and that the Criminal Court shall enter what it does in "the Book containing the Record of the Proceedings of the Commissioners."

Now it is this book that was sent to the Criminal Court by the Register and in which what the Criminal Court did is entered.

This shows the book now in dispute to be the Record spoken of in 2d section.

The court will also see that this book contains the statement mentioned in sec. 8 of Ord. No. 17; and also contains a record of their whole proceedings; on page 2 there is their attestation to their record of their proceedings and in which they declare that the statement mentioned in section 8 was also returned, which statement then follows, and is separate and attested on the last page by their signatures.

See, also, sec. 19, which makes it their duty to return all their proceedings to the Register.

We contend also that when they returned their first proceedings under Ord. No. 61 of 1851, they were *functus officii*.

This is apparent. The Ord. No. 61 said they should proceed according to Ord. No. 17, Rev. Ord., 1850. This takes up the proceedings in any case from the beginning, and carries them step by step to the end, and in 19 sec. directs them to file all their books and papers with the Register ; here their functions cease, and they lose jurisdiction and control. It is then with the Criminal Court and Court of Appeals ; and the court is ordered not to quash for any defects.

Where do the Commissioners get authority to commence again? They have gone through their course and filed in the office of Register, as a record, all their proceedings ; it is just as much then beyond their control, as a case carried from one court to the higher court ; the lower court cannot proceed again without a procedendo ; and here there is no procedendo from Criminal Court, and none contemplated, and no power to grant any. If the Criminal Court could grant none, how can the Commissioners act themselves independent of one?

If just because the first proceedings were set aside by the Criminal Court, the Commissioners can go on again anew, why might they not, without such action of the court, take on themselves to declare their first proceedings irregular without waiting for the action of the Court? Surely they get no jurisdiction from the act of the Court.

The 19th sec. of Ord. No. 17 is conclusive on this question.

SECOND POINT—(See p. of this Brief.

The application of 25 July, 1853, was signed by the professing owners of 5,480 feet.

The plats and evidence of Martinet shows that the whole number of feet on Belair avenue, between Point lane and North avenue, is 9,534 feet; a majority, therefore, is 4,768 feet.

The application therefore, represented an excess of 712 feet.

If it can be shown, therefore, that 713 feet of the 5,480 professed to be signed for were not in fact and law signed for on said application, then it will result that this application was not signed by a majority, and that, therefore, the whole proceedings relating to the paving were *coram non judice* and void.

8 Md., 352.
11 Md., 186.
15 Md., 19.

This application was signed by F. L. Hilberg, F. Hilberg, F. Henkelman and W. Leach, as jointly owning 1,505 feet.

The evidence shows that of this 1,505 feet 265 feet was owned by F. L. Hilberg, having been purchased some time previously from the owners of a burial ground, which this 265 feet formerly was. The evidence also shows that the remaining 1,240 feet was purchased and owned as follows:

John H. B. Latrobe, as trustee, appointed by the Superior Court of Baltimore city, in the equity case of Murray *vs.* Murray, and in which case some of the parties were infants, sold the said 1,240 feet of ground on the 10th July, 1852, under the decree in the case in the usual form, and which decree provided that no deed should be given to the purchaser until all the purchase money was paid. The trustee reported this sale to the Court, stating as the purchaser William Leach. The last installment of the purchase money, being over $5,000, was paid to the trustee on the 16th February, 1854, and the deed made on that day to Leach, who, on the 21st February, 1854, together with one George W. Holmes, conveyed the same to F. L. Hilberg, F. Hilberg and F. Henkelman, in which deed it was recited that the purchase money had been in fact paid by the grantees in this 2d deed, and that Holmes had had an equitable interest in the same by virtue of a contract between Leach and himself for an interest in it.

The evidence of Hilberg and Henkelman also shows that Leach was directed to bid in this property at the sale for the

two Hilbergs, Henkelman and George W. Holmes; that Holmes had subsequently to the said sale sold out his interest in the same to his other co-purchasers, and that this sale of his interest was anterior to the 25th July, 1853, when the application to pave was presented.

We contend, 1st. That on 25th July, 1853, the purchase money not having been paid to the trustee, the purchasers had no right to sign the application to pave. That they were not owners in the meaning of the Acts of Assembly of Maryland and Ordinances of the city relating to paving streets; that the word "owner," therein, means only the holder of the fee simple estate, except in the cases specially enumerated in the Act of 1833, ch. 40.

See 11th Maryland, p. 186.

Ord. No. 15, (Rev. 1850,) sec. 5, makes the tax assessed for paving streets a lien on the property binding thereon. The 38th section declares said tax shall be a lien on said property, taking precedence of *all other liens*, except other taxes already laid, and binding on each and all interests in said property.

If, therefore, the purchaser from a trustee in equity, who has not paid the purchase money, may sign such an application, he has power to create a lien superior to the lien of the vendor; and that too in a case where it is expressly declared he shall have no legal title to the property, nor be armed with the muniments of title till he has paid the purchase money.

This property was the land of infants; now, before the law allows a mortgage or any incumbrance to be placed on their land it must appear that it is for their interest; but here is an incumbrance placed without any act of the Court at all; such a doctrine, we submit, can never be admitted in this State.

Again. We contend that Leach having purchased as the agent of Holmes as well as of the others, the title to the land, in fact, was in his principals, and therefore Holmes could not be divested except by a memorandum in writing under the

statute of frauds. We have therefore excepted to that portion of the testimony of Henkelman and Hilberg which goes to show that he had sold his interest to them before the application to pave was signed.

That he had, or was supposed to have, an interest in law in February, 1854, is shown by his joining in the deed heretofore referred to.

His name was not signed to the application.

If this 1,240 feet was not in fact signed for there was no majority.

The application to pave was also signed by Joseph T. Mears, by his attorney, B. A. Lavender, for 615 feet.

Mears purchased this land of Hinkley, trustee in case of Spalding *vs.* Spalding, on the 13th of December, 1852, and did not pay all the purchase money till after June, 1854, a large part being then unpaid His deed bears date November 13, 1854.

The same considerations above adverted to apply to this signature.

The application is signed for 336 feet by "A. L. Boggs, Treasurer."

The evidence shows that Boggs owned no ground on the avenue, and that the 336 feet was owned by the Second Presbyterian Church, of which he was Treasurer, which paid the paving tax assessed to this 336 feet.

It is not shown that Boggs had any authority to sign for the Church, nor is the treasurer of a corporation that officer that has power to bind it without an authority from it to him.

We contend that where a person signs who owns no ground himself there is no presumption that he had authority to sign for the owner, and if his signature is to be held to be the signature of the owner, it must be shown that he had authority.

The said application is also signed for 584 feet by "Frederick Rodewald, by H. Von Kapf, attorney."

This 584 feet is the ground described in the deed from the Universalist Church to Frederick Rodewald in trust for Eliza M. Rodewald, wife of Henry Rodewald.

(See deed.)

The trust is in these words: "For the sole and separate use and behoof of the said Eliza M. Rodewald, free from the power, control, &c., of her husband, with full power and faculty in her at any time hereafter to sell and convey said ground as she may think fit, or to dispose of the same by last will; and in case she should die without executing either of these powers, then in trust for her heirs."

We contend that he was a dry legal trustee with no power to sign this application.

Hill on Trustees, 461, 569.

Ware *vs.* Richardson, 3 Md., 505.

Now, even supposing Mrs. Eliza Rodewald did assent to the paving of this avenue, yet her signature is not to the paper, which must be signed by the owners of a majority of feet. A defective paper cannot be cured by showing that some one assented whose signature is not attached.

15 Md., 19.

It is well settled that no ratification of an invalid signature can avail.

8 Md., 352.

And it is very questionable whether even Mrs. Eliza Rodewald could have signed this application.

4 Md., Ch. Dec. 68, 414.

If the ground represented by the signatures of Boggs (336) and Rodewald is struck off, then there was no majority.

THIRD POINT.

The grade of Belair Avenue for a considerable portion of it between Point Lane and North Avenue was established in January, 1851. It was changed on 19th December, 1853, on

the application of those professing to own a majority of front feet between Choptank street and Ann street, between which points the grade was to be changed.

We do not deny that this application was signed by a majority, provided Hilberg, Henkelman and Hilberg had authority to sign; which question we have already discussed under our second POINT.

The law requiring the assent of a majority is the Act 1829, ch. 114.

We only add here that it seems monstrous that before paying the purchase money, a purchaser should be allowed to change the whole aspect and condition of the property, which is done when the grade of a street is changed materially.

If the grade was improperly changed after the application to pave, then no application to pave the street as it stood when it was paved was made; because it was altogether a different street when paved from what it was when the application was presented.

FOURTH POINT.

This point may be briefly stated.

It only goes to show that the injunction originally granted was properly granted, and that the sale so enjoined was wrongly threatened.

It goes on the concession that all the other points made by us are untenable.

It would go only therefore to the question of costs. The point is this—

By the 22d section of Ordinance No. 11 of Rev. Ord., 1850, it is made the duty of the Collector before he sells land for taxes to give a preliminary notice of four weeks; and by the 24th section he may *after* the expiration of this notice advertise the land for sale, if the taxes are not paid.

The Ordinance No. 10, of 1855, section 8, makes it the duty of the Auditor to collect all accounts for taxes which shall have been standing for a year; and in the collection of the same he is to proceed in the same manner as is provided by Ordinance for the regulation of the City Collector.

The Auditor in this case omitted to give the preliminary notice required by section 22d of Ordinance No. 11, Rev. Ord., 1850; and therefore the advertisement of sale shown in the complainant's Exhibit A. J. B., No. 1, was properly enjoined by the Court on the filing of this Bill.

The case of Samuel Rogers, Trustee of Caroline Rogers, *vs.* The Mayor and City Council of Baltimore is submitted to the Court also on this Brief, it having been agreed that all the evidence taken in the one case should be read in and apply to the other.

BERNARD CARTER,
R. J. BOULDIN,
For Complainants.

And Appellee.

No. 14.—Special Docket.

IN THE COURT OF APPEALS OF MARYLAND,

APRIL TERM, 1865.

MAYOR & CITY COUNCIL OF BALTIMORE, et als.,

vs.

BOULDIN, et als.

Appeal from the Superior Court of Baltimore City.

STATEMENT OF APPELLANTS.

The appellees who were complainants below, set forth in their bill certain charges; and, upon the footing of said charges, they pray for a perpetual injunction.

As a matter of course, founding his claim to the interposition of the court upon certain allegations, he must establish those allegations by proof; and any allegations not proven will be disregarded by the court, in pronouncing their decree. It is well to bear in mind this principle throughout the argument.

The opinion of the court below was, that Bel Air Avenue could not be considered a condemned street. By the terms of Ordinance No. 61, January Session 1861, the commissioners "are directed to *widen and condemn North Gay street or Bel Air Avenue, to the width of which it is laid down on Poppleton's map,*" We shall contend, that this was sufficient authority to make the avenue to the aforesaid width a street of the city of Baltimore, and that the action of the commissioners made it such a street. And that even if the commissioners committed an error in assessing damages for only ten feet in width of ground on the avenue, such error is immaterial

in this proceeding. But if it were important to sustain the opinion of the commissioners, it would be easy to show that the other forty feet had already been condemned as fully as they were capable of condemnation by any proceeding, and that it is erroneous to suppose, as the Superior court did, that a street in the city of Baltimore cannot be condemned without vesting the fee in the city.

[We file as part of our statement the brief used at the argument in the Superior court.]

First. The first charge in the bill is, that Bel Air Avenue has never been regularly or formally condemned as a public street. This charge, like all others in the bill, is explicitly denied in the answer, which is put in under oath, to meet the requirements of the decision of the Court of Appeals in 16 Md.

(*a.*) Defendants' Exhibit Z, No. 1, (admitted in evidence by agreement of counsel,) shows the notice that was given in two of the daily newspapers in the city of Baltimore, as required by the Act of 1838, ch. 226. In pursuance of this notice, Ordinance No. 61 was passed at January Session 1851, and approved June 12th, 1851. The notice was sufficiently comprehensive, and the Ordinance expressly provided for *widening and condemning.* Both notice and Ordinance evidently contemplated, in widening the avenue to the extent laid down on Poppleton's plat, that every thing was to be done necessary to make the widening effectual in law; and the obvious intent and object was that Bel Air Avenue should legally become a street to that width.

(*b.*) The Act of 1838, ch. 226, (expounded in Moale vs. Mayor, in 5th Maryland,) gives to the city council full discretion in opening streets, restricting them to no particular lines, consequently they have a right to open a street over what had once been a road.

(*c.*) If, therefore, Bel Air Avenue was not already a street to the extent of its original width, it became so by the proceedings under the Ordinance, if they were valid in other respects.

(*d.*) The commissioners made a return which was quashed on appeal to the Criminal court; they then made a second return from which no appeal was taken. The effect of this second return, thus standing unimpeached, is to condemn all the ground requiring condemnation in Bel Air Avenue from Point Lane to North Avenue, to the width laid down on Poppleton's plat.

(*e.*) It is said that the commissioners assessed damages for only ten feet of ground on the avenue, assuming that the residue had already been condemned, and was already a street; whereas, they ought to have assessed damages also, for the benefit of the owners

of the bed of the avenue, as it was previous to the widening; that they still held the fee in that ground, and that it could not become a street until that fee was divested out of them, and vested in the city, and that this could be done only by assessing them damages for said fee, which, it is said, ought to have been nominal.

In the first place, it may be answered, that if the owners of the fee in the bed of the avenue, or any other persons, were aggrieved by the assessment of the damages, they ought to have appealed to the Criminal court (as permitted by section 9, of Ordinance No 17, Revised Ordinances of 1850, authorized by Act of 1838, ch. 226.) And, not having appealed, the assessment cannot be attacked in this collateral way.

Methodist Church Case, 6 Gill, 400.

In the next place, the commissioners were right in considering the avenue as already a street. It was condemned as a public highway in 1793; it was brough within the limits of the city by the Act of 1816, ch. 209; it was laid down on Poppleton's plat, made in pursuance of Act 1817, ch. 168, section 12; and the testimony of witnesses shews that their personal recollection of its use as a highway, runs back to 1818. (Dawson's testimony, page 3 of the commission.) If it were possible to impeach the assessment of the commissioners at this time, (which is not the case,) the continuous use of this highway for public purposes for more than half a century, without objection from any quarter, would at least shew a dedication to the public; and in case of a dedication, the original owners by the express decision of the Court of Appeals, in Moale vs. Mayor, &c., 5 Maryland 322, are *not entitled to even nominal damages.* There is no difference between the rights of the original owners in the case of a street within the city, and any other public highway. In many cases the owners have conveyed the fee to the city by deed, and the same has been effected by special Acts of Assembly; and in the case of the North Avenue Boundary, they are authorized to do so, in consideration of the payment of the paving tax by the city, (2 Code, Art. 4, sec. 860;) but the city does not obtain the fee by the condemnation, which is regulated by the Act of 1838, ch. 226. There is a special statute relative to the streets in the city of New York, providing that the fee shall be vested in that city by the condemnation. The cases all shew that this is in derogation of the general rule of law.

10 Peters, 713, New Orleans vs. The United States.
10 Peters, 53, Harris, et al., vs. Ellicott.

(*f.*) The return of the commissioners shews that they strictly complied with the Ordinance. This return was deposited in the Register's office in obedience to Sec. 8, of Ordinance No. 17, Rev. Ord. 1850, and is very different from the record which they were required to keep by sections 3 and 4 of the same ordinance.

(*g.*) It is said that a sum should have been invested for the benefit of Caroline Rogers, and that for default of this, the opening of the street was unlawful.

Thompson's testimony, page 7, (commission, fourth remand,) leaves it unproved whether any money was invested for her or not. The commissioners assess no damages to be paid to her, and there is no competent evidence that she owned any land on the avenue. If she was aggrieved by the non-assessment of damages to her, she ought to have appealed, and the propriety of the decision of the commissioners on that head cannot now be inquired into.

Non-payment or non-investment of damages, cannot have the effect of annulling the condemnation.

(*h.*) The commissioners having failed in their first attempt to assess the damages, were right in proceeding with the second.

Bruyn vs. Graham, 1 Wendell, 370.

Second. The second charge in the bill is, that the application to pave was not signed by the majority of owners required by Act of 1817, ch. 168, sec. 18. The whole extent of ground paved was 9534 feet 2 inches; one half of this is 4767 feet 1 inch. The number of feet signed for in the second application is 5480, and B. R. Mears signed the first application for 615 feet, but did not sign the second. (Complainants' Exhibits X, No. 1, and X, No. 4.) As, however, the first application was before the commissioner at the time the paving was determined on, and as B. R. Mears had never withdrawn his assent, these 615 feet should be counted. This makes the number of feet represented by owners assenting to the paving 6095.

(*a.*) The first ownership attacked is that of Joseph T. Mears. Complainants' Exhibit A. B., No. 5, shews that Mears obtained

his deed from Hinkley, June 22d, 1854. But the same deed shews that the property was sold in 1847, to one Van Camp, by Hinkley as trustee, appointed by a court of equity, and in the same year the sale was finally ratified; and on the 13th day of December 1852, Mears acquired the title thus sold to Van Camp, and afterwards, when all the purchase money had been paid, obtains Hinkley's deed. This title represents 615 front feet. It related back to the sale when the purchase money was paid and deed executed.

Hunter vs. Hatton, 4 Gill, 115.

(*b.*) Von Kapff's signature is next attacked. His testimony shews that he was authorized by Frederick Rodewald, Mrs. E. M. Rodewald and her husband Henry Rodewald. It was not necessary that he should have been authorized in writing. This signature represented 584 feet. But Mrs. Rodewald's separate property fronts only 30 feet. (Vide Martenet's testimony.)

(*c.*) Wm. Leach is next objected to because he signed for the beds of Ann and John streets. (Complainants' Exhibit A. B., No. 4.) The commissioner's plat and the deed from Van Camp and wife to Leach, filed by defendants, shews that Leach owned the land on each side of these streets, and also the beds of the streets. He was, therefore, as much the owner of the beds of the streets, as of any other property which he possessed. And he would be entitled to full damages for it, if these streets should be opened.

Moale vs. Mayor, &c., 5 Md.

No person was entitled even to an easement in this ground. Ann street fronts on the avenue 98 feet, and John street 93 feet. (Dawson's second deposition.)

(*d.*) Boggs' signature is objected to. The first application to pave (Complt's Exhibit X, No. 1,) shews that he was the Treasurer of the Second Presbyterian Church. It is proved by Crichton's testimony that he was Treasurer, and it is admitted that the church paid the tax charged against their lot on Bel Air Avenue. Its number of front feet is 336. The death of Boggs is admitted. It was the duty of the commissioner to ascertain the authority of Boggs, and it is a fair presumption that he performed this duty. A jury would hold under the circumstances, that he had authority to sign.

(*e.*) Leach, Hilberg, Henkleman and Hilberg signed conjointly for 1505 feet. Of these feet, 1237 feet 6 inches are comprehended in the deed marked "Latrobe," (Martenet's testimony.) It is said that Holmes had some interest in this property at the time; the contrary, however, is shown by Henkleman's testimony, and by Leach, who was twice examined. The deed from Leach and Holmes to Henkleman and the Hilbergs, (executed after the application to pave,) is not competent to shew title in Holmes. The agreement of counsel with respect to Mr. Latrobe's statement, shews that Holmes never paid any of the purchase money, and that the sale was made and ratified long before the application to pave. The principle of Hunter vs. Hatton will apply to this signature.

(*f.*) The power of attorney from Mears to Lavender was not executed until after the first application, and it contained an express authority to sign a petition for *grading* as well as paving. (Compt's Exhibit X, No. 4.) There was also a confirmatory power from Mears filed with Complt's Exhibit X, No. 6. The power of attorney first given to Lavender limited him to no particular time, but was intended to authorize him to give Mear's assent to the paving and grading; and by virtue of it, he might have signed a dozen papers to manifest this assent, if necessary.

(*g.*) Any dealings between Lavender and Hilberg, to induce the latter to assent to the paving, are manifestly of no importance in this inquiry.

Third. The bill charges that the grade was established on the application aforesaid, (of 25th July 1853,) by the city commissioner, and that it was not established in accordance with the laws of the State, and the Ordinance of the city, (no specific objections are stated;) and that the grade was afterwards unlawfully changed.

(*a.*) In pursuance of the application of July 25th, the commissioner established the grade of a portion of the street; that is to say, he fixed the angle of elevation at which the road should ascend; this was clearly within his powers after he had determined to pave, even if the application had said nothing about grading. The Ordinances evidently consider an application to pave as including one to grade. Rev. Ordinances 1850, No. 15, secs. 2, 5, 11.

He was authorized to change the grade of another portion by Ordinance No. 4, approved December 16th, 1853; and a majority of the owners assented to the change of grade. (Complainants' Exhibit X, No. 6.) An appeal was taken under section 12, Ordinance No. 14, Revised Ordinance 1850, (Defendants' Exhibit M, No. 1,) and his decision was sustained. But as no grading had actually been

done, he might have changed the angle according to which the work was to be done, without any Ordinance or any assent of a majority. The Act of Assembly 1829, ch. 114, evidently refers to a case in which the work had actually been done. But if this be otherwise, the grade which was changed ought to have been established originally in conformity with Act of 1835, ch. 390, which requires the assent of a majority of owners; this street not having been opened (to the full width) when this grade was fixed originally by the commissioner. There is no evidence that an application to grade was made by any owners previously to the one under which the grade was changed. The first grade must then be considered as illegally established; and what is called the change of grade, is in fact, the original grade, which it was clearly within the competency of the commissioner to establish.

Fourth. Other errors are charged in the proceedings of the city commissioner.

(*a.*) That there was no contract in writing for grading and paving. Complt's Exhibits X, No. 14, and X, No. 15, shew a proposal for paving and grading in writing by the pavers, and an acceptance in writing by the commissioner's clerk, and an approval in writing by the Mayor: and respondent's Exhibit No. 2, is the paving bond executed by them, and approved by the Mayor.

(*b.*) That there was not a proper plat. Vide Bryson's testimony, (Interrogatory 2d.)

(*c.*) That the proceedings were irregular in regard to the tax. Vide Respondents' Exhibit No. 3, and Rev. Ord. 1850, No. 15, section 6.

It will be seen that many of the alleged errors and omissions related to provisions of the ordinances merely directory and by no means essential to the validity of the acts of the officers concerned.

As to the rule of law in cases where the power of a public officer has once legally attached and the matter is confided to his judgment.

United States vs. Arredondo, 6 Peters, 729, 730.

Fifth. The respondents shew in their answer the proceedings of the collector and auditor, and the construction of Ordinance No. 10, of 1855, on which they now rely. Vide Mr. Gill's testimony; Complt's Exhibit A. B., No. 1, and Defendants' Exhibit No. 4.

Sixth. The charge about the withdrawal of the paving bills is not sustained, has been abandoned by the complainants' counsel.

Seventh. It is clear that where a tribunal of limited jurisdiction acts within the scope of its powers and its jurisdiction attaches, then its proceedings cannot be reviewed and no mistake or error on its part can be availed of to set aside or annul its proceedings.

1 Gill & Johnson, 212, Williamson vs. Carman.

23 Wendell, 277.

It is not sufficient to show error in the proceedings of tribunals of limited jurisdiction, the party complaining must show that he has been injured.

10 & 4 Shepley, (Maine,) 9; 2 Hill 9.

This will dispose of all the questions in this case, except the question whether Bel Air Avenue was a legally condemned street, and whether the proprietors of a majority of feet applied for the pavement. The city commissioner had nothing to prevent his jurisdiction from attaching if the street was condemned, and the majority of proprietors applied to grade and pave. Any mistake made by the commissioner, if he did make any, can be remedied, not collaterally, but by a direct suit at law.

Eighth. The Bel Air Avenue as shown by the testimony of O. Bouldin, had been paved as a public street, from Bridge street to Point Lane, many years before the proceeding in this case. The part from Point Lane had been opened and used as a public highway in connexion with the part to Bridge street for a half century. Bel Air Avenue was located as a street fifty feet wide on Poppleton's plat in 1817 or 1818. Hence, the only thing necessary to be done was to widen it by ten feet. Hence, the application to the city council. Hence, the Ordinance and the condemnation under it. No damages could be claimed or allowed for the bed of Bel Air Road. The condemnation of the street inflicted no injury, and whatever rights proprietors had to this bed when it was a road, they now have since it became a street. The Ordinance in relation to paving draws a distinction when streets are opened and condemned, and those opened and not *condemned by law* or *Ordinance*, the

signature of a majority being sufficient for the former, but it being necessary that all should unite in the latter, a street must be condemned by law or Ordinance. If condemned, then the majority can cause it to be paved. What is meant by condemnation? Dedication with long continued use must be considered a condemnation. Because in this case there can be nothing to *condemn*. It would be an absurdity to require a mere formal condemnation. In this case, however, if a formal condemnation was necessary, there was a formal condemnation by the Ordinance. If, therefore, the Act of 1838 was not complied with, there was no necessity in this case so to comply, since a simple Ordinance to condemn so far as respects the 40 feet, would have sufficed.

In regard to the original propriety of the injunction, as argued in the appellees' fourth point, in addition to what is stated in the brief used in the Superior court, we add, that we rely upon the exceptions taken to the bill, page 94, record; and on the first exception refer to Union Bank vs. Poulteney, 8 Gill & Johns., 332. Nusbaum vs. Stein & als., 12 Maryland 318; on the second exception, to McElwain vs. Willis, 9 Wend., 561; Champlin vs. New York, 3 Paige, 573.

GEO. M. GILL,
W. S. BRYAN,
For Appellants.

In the Superior Court.

MAYOR AND CITY COUNCIL OF BALTIMORE AND ALS.

ads.

BOULDIN AND ALS.

STATEMENT OF DEFENDANTS.

First. The first charge in the bill is, that Bel-Air Avenue has never been regularly or formally condemned as a public street. This charge, like all others in the bill, is explicitly denied in the answer, which is put in under oath, to meet the requirements of the decision of the Court of Appeals in 16 Md.

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(*b.*) The Act of 1838, ch. 226, (expounded in Moale vs. Mayor, in 5th Maryland,) gives to the City Council full discretion in opening streets, restricting them to no particular lines; consequently they have a right to open a street over what had once been a road.

(*c.*) If, therefore, Bel-Air Avenue was not already a street to the extent of its original width, it became so by the proceedings under the ordinance, if they were valid in other respects.

(*d.*) The Commissioners made a return which was quashed on appeal to the Criminal Court; they then made a second return from which no appeal was taken. The effect of this second return, thus standing unimpeached, is to condemn all the ground requiring condemnation in Bel-Air Avenue from Point Lane to North Avenue, to the width laid down on Poppleton's Plat.

(*e.*) It is said that the Commissioners assessed damages for only ten feet of ground on the avenue, assuming that the residue had already been condemned, and was already a street; whereas they ought to have assessed damages also, for the benefit of the owners of the bed of the avenue, as it was previous to the widening; that they still held the fee in that ground, and that it could not become a street until that fee was divested out of them, and vested in the City, and that this could be done only by assessing them damages for said fee, which, it is said, ought to have been nominal.

In the first place, it may be answered, that if the owners of the fee in the bed of the avenue, or any other persons, were aggrieved by the assessment of the damages, they ought to have appealed to the Criminal Court, (as permitted by section 9, of Ordinance No. 17, Revised Ordinances of 1850, authorized by Act of 1838, ch. 226.) And, not having appealed, the assessment cannot be attacked in this collateral way.

Methodist Church Case, 6 Gill, 400.

In the next place, the Commissioners were right in considering the avenue as already a street. It was condemned as a public highway in 1793; it was brought within the limits of the City by the Act of 1816, ch. 209; it was laid down on Poppleton's Plat, made in pursuance of Act 1817, ch. 168, section 12; and the testimony of witnesses shews that their personal recollection of its use as a highway, runs back to 1818. (Dawson's testimony, page 3 of the Commission.) If it were possible to impeach the assessment of the Commissioners at this time, (which is not the case,) the continuous use of this highway for public purposes for more than half a century, without objection

from any quarter, would at least shew a dedication to the public; and in case of a dedication, the original owners, by the express decision of the Court of Appeals, in Moale vs. Mayor, &c. 5 Maryland, 322, are *not entitled to even nominal damages.* There is no difference between the rights of the original owners in the case of a street within the City, and any other public highway. In many cases, the owners have conveyed the fee to the City by deed, and the same has been effected by special Acts of Assembly; and in the case of the North Avenue Boundary, they are authorized to do so, in consideration of the payment of the paving tax by the City, (2 Code, Art. 4, sec. 860;) but the City does not obtain the fee by the condemnation, which is regulated by the Act of 1838, ch. 226. There is a special statute relative to the streets in the City of New York, providing that the fee shall be vested in that City by the condemnation. The cases all shew that this is in derogation of the general rule of law.

10 Peters, 713, New Orleans v. The United States

10 Peters, 53, Harris, et al. v. Ellicott.

(*f.*) The return of the Commissioners shews that they strictly complied with the ordinance. This return was deposited in the Register's office in obedience to Sec. 8 of Ordinance No. 17, Rev. Ord., 1850, and is very different from the record which they were required to keep by sections 3 and 4 of the same ordinance.

(*g.*) It is said that a sum should have been invested for the benefit of Caroline Rogers, and that for default of this, the opening of the street was unlawful.

Thompson's testimony, page 7, (Commission, fourth remand,) leaves it unproved whether any money was invested for her or not. The Commissioners assess no damages to be paid to her and there is no competent evidence that she owned any land on the avenue. If she was aggrieved by the non-assessment of damages to her, she ought to have appealed, and the propriety of the decision of the Commissioners on that head cannot now be inquired into.

Non-payment or non-investment of damages cannot have the effect of annulling the condemnation.

(*h.*) The Commissioners having failed in their first attempt to assess the damages, were right in proceeding with the second.

Bruyn v. Graham, 1 Wendell, 370.

Second. The second charge in the bill is, that the application to pave was not signed by the majority of owners, required by Act of 1817, ch. 168, Sec. 18. The whole extent of ground paved was 9534 feet, 2 inches; one half of this is 4767 feet, 1 inch. The number of feet signed for in the second application is 5480, and B. R. Mears signed the first application for 615 feet, but did not sign the second. (Complainants' Exhibits X, No. 1, and X, No. 4.) As, however, the first application was before the Commissioner at the time the paving was determined on, and as B. R. Mears had never withdrawn his assent, these 615 feet should be counted. This makes the number of feet represented by owners assenting to the paving 6095.

(*a.*) The first ownership attacked is that of Joseph T. Mears. Complainants' Exhibit A B, No. 5, shews that Mears obtained his deed from Hinkley, June 22d, 1854. But the same deed shews that the property was sold in 1847 to one Van Camp, by Hinkley, as Trustee, appointed by a Court of Equity, and in the same year the sale was finally ratified; and on the 13th day of December, 1852, Mears acquired the title thus sold to Van Camp, and afterwards, when all the purchase money had been paid, obtains Hinkley's deed. This title represents 615 front feet. It related back to the sale when the purchase money was paid and deed executed.

Hunter v. Hatton, 4 Gill, 115.

(*b.*) Von Kapff's signature is next attacked. His testimony shews that he was authorized by Frederick Rodewald, Mrs. E. M. Rodewald and her husband Henry Rodewald. It was not necessary that he should have been authorized in writing. This signature represented 584 feet. But Mrs. Rodewald's separate property fronts only 30 feet. (Vide Martenet's testimony.)

(*c.*) Wm. Leach is next objected to because he signed for the beds of Ann and John streets. (Complainants' Exhibit A B, No. 4.) The Commissioners plat and the deed from Van Camp and wife to Leach, filed by Defendants, shews that Leach owned the land

on each side of these streets, and also the beds of the streets. He was, therefore, as much the owner of the beds of the streets, as of any other property which he possessed. And he would be entitled to full damages for it, if these streets should be opened.

No person was entitled even to an easement in this ground. Ann street fronts on the avenue 98 feet, and John street 93 feet. (Dawson's second deposition.)

(*d.*) Boggs' signature is objected to. The first application to pave (Complts. Exhibit X, No. 1,) shews that he was the Treasurer of the Second Presbyterian Church. It is proved by Crichton's testimony, that he was Treasurer, and it is admitted that the Church paid the tax charged against their lot on Bel-Air avenue. Its number of front feet is 336. The death of Boggs is admitted. It was the duty of the Commissioner to ascertain the authority of Boggs, and it is a fair presumption that he performed this duty. A jury would hold, under the circumstances, that he had authority to sign.

(*e.*) Leach, Hilberg, Henkleman and Hilberg signed conjointly for 1505 feet. Of these feet, 1237 feet 6 inches are comprehended in the deed marked "Latrobe," (Martenet's testimony.) It is said that Holmes had some interest in this property at the time; the contrary, however, is shown by Henkleman's testimony, and by Leach, who was twice examined. The deed from Leach and Holmes to Henkleman and the Hilbergs, (executed after the application to pave,) is not competent to shew title in Holmes. The agreement of Counsel with respect to Mr. Latrobe's statement shews that Holmes never paid any of the purchase money, and that the sale was made and ratified long before the application to pave. The principle of Hunter v. Hatton will apply to this signature.

(*f.*) The power of Attorney from Mears to Lavender was not executed until after the first application, and it contained an express authority to sign a petition for *grading* as well as paving. (Complts. Exhibit X, No. 4.) There was also a confirmatory power from Mears filed with Complts. Exhibit X, No. 6. The power of Attorney first given to Lavender limited him to no particular time, but was intended to authorize him to give

Mears's assent to the paving and grading; and by virtue of it, he might have signed a dozen papers to manifest this assent, if necessary.

(*g.*) Any dealings between Lavender and Hilberg, to induce the latter to assent to the paving, are manifestly of no importance in this inquiry.

Third. The bill charges that the grade was established on the application aforesaid (of 25th July, 1853,) by the City Commissioner, and that it was not established in accordance with the laws of the State, and the ordinances of the City, (no specific objections are stated;) and that the grade was afterwards unlawfully changed.

(*a.*) In pursuance of the application of July 25th, the Commissioner established the grade of a portion of the street; that is to say, he fixed the angle of elevation at which the road should ascend; this was clearly within his powers after he had determined to pave, even if the application had said nothing about grading. The ordinances evidently consider an application to pave as including one to grade. Rev. Ordinances, 1850, No. 15, Sects. 2, 5, 11.

He was authorized to change the grade of another portion by Ordinance No. 4, approved December 16th, 1853; and a majority of the owners assented to the change of grade. (Complainants' Exhibit X, No. 6.) An appeal was taken under Section 12, Ordinance No. 14, Revised Ordinance, 1850, (Defendants' Exhibit M, No. 1,) and his decision was sustained. But as no grading had actually been done, he might have changed the angle according to which the work was to be done, without any ordinance, or any assent of a majority. The Act of Assembly 1829, ch. 114, evidently refers to a case in which the work had actually been done. But if this be otherwise, the grade, which was changed ought to have been established originally in conformity with Act of 1835, ch. 390, which requires the assent of a majority of owners; this street not having been opened (to the full width,) when this grade was fixed originally by the Commissioner. There is no evidence that an application to grade was made by any owners, previously to the one under which the grade was changed. The first grade must then be considered as illegally established; and what is called the change of grade, is in fact, the original grade, which it was clearly within the competency of the Commissioner to establish.

Fourth. Other errors are charged in the proceedings of the City Commissioner.

(*a.*) That there was no contract in writing for grading and paving. Complts. Exhibits X, No. 14; and X, No. 15, shew a proposal for paving and grading in writing by the pavers, and an acceptance in writing by the Commissioners' Clerk, and an approval in writing by the Mayor; and Respondents' Exhibit No. 2 is the Paving Bond executed by them, and approved by the Mayor.

(*b.*) That there was not a proper plat. Vide Bryson's testimony, (Interrogatory 2d.)

(*c.*) That the proceedings were irregular in regard to the tax. Vide Respondents' Exhibit No. 3, and Rev. Ord. 1850, No. 15, Section 6.

It will be seen that many of the alleged errors and omissions related to provisions of the ordinances merely directory and by no means essential to the validity of the acts of the officers concerned.

As to the rule of law in cases where the power of a public officer has once legally attached and the matter is confided to his judgment.

United States v. Arredondo. 6 Peters, 729, 730.

Fifth. The Respondents shew in their answer the proceedings of the Collector and Auditor and the construction of Ordinance No. 10, of 1855, on which they now rely. Vide Mr. Gill's testimony; Complts. Exhibit A B, No. 1, and Defendants' Exhibit No. 4.

Sixth. The charge about the withdrawal of the paving bills is not sustained, has been abandoned by the Complainants' Counsel.

Seventh. It is clear that where a tribunal of limited jurisdiction acts within the scope of its powers and its jurisdiction attaches, then its proceedings cannot be reviewed and no mistake or error on its part can be availed of to set aside or annul its proceedings.

1 Gill & Johnson 212; Williamson v. Carman 23; Wendell 277.

It is not sufficient to show error in the proceedings of tribunals of limited jurisdiction, the party complaining must show that he has been injured.

10 & 4, Shepley (Maine) 9; 2, Hill 9.

This will dispose of all the questions in this case, except the question whether Bel-Air avenue was a legally condemned street, and whether the proprietors of a majority of feet applied for the pavement. The City Commissioner had nothing to prevent his jurisdiction from attaching if the street was condemned, and the majority of proprietors applied to grade and pave. Any mistake made by the Commissioner, if he did make any, can be remedied, not collaterally, but by a direct suit at law.

Eighth. The Bel-Air avenue, as shown by the testimony of O. Bouldin, had been paved as a public street, from Bridge street to Point lane, many years before the proceedings in this case. The part from Point lane had been opened and used as a public highway in connexion with the part to Bridge street for a half century. Bel-Air avenue was located as a street fifty feet wide on Poppleton's plat in 1817 or 1818. Hence the only thing necessary to be done was to widen it by ten feet. Hence the application to the City Council. Hence the ordinance and the condemnation under it. No damages could be claimed or allowed for the bed of Bel-Air road. The condemnation of the street inflicted no injury, and whatever rights proprietors had to this bed when it was a road, they now have since it became a street. The ordinance in relation to paving draws a distinction when streets are opened and condemned and those opened and not *condemned by law* or *ordinance*, the signature of a majority being sufficient for the former, but it being necessary that all should unite in the latter, a street must be condemned by law or ordinance. If condemned, then the majority can cause it to be paved. What is meant by condemnation? Dedication with long continued use must be considered a condemnation. Because in this case there can be nothing to *condemn*. It would be an absurdity to require a mere formal condemnation. In this case, however, if a formal condemnation was necessary, there was a formal condemnation by the ordinance. If, therefore, the Act of 1838 was not complied with, there was no necessity in this case so to comply, since a simple ordinance to condemn so far as respects the 40 feet, would have sufficed.

GEO. M. GILL,
W. S. BRYAN,
For Respondents.

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