WARD & TICHENOR, Law Case Printers, 832 and 834 Broad St., Newark, N. J.

N J. Court of Errors and Appeals.

THE STATE,
REUBEN F. HARRIOTT,
Plaintiff,
vs.
THE MAYOR & COMMON COUNCIL OF THE CITY OF NEWARK,
Respondents.
} *In Error.*

The question is whether Reuben F. Harriott is entitled to the damages awarded to him by commissioners appointed by the Essex Circuit Court, to assess damages from the change in the grade of Washington avenue, in the city of Newark.

This avenue is situate in the northerly part of the city, and was formerly located in the township of Woodside.

By the act of April 5th, 1871, P. L., 1264, this township was divided between Newark and Belleville; and that part of Washington auenue now in question became a part of the city of Newark.

For the purpose of our present inquiry it must be assumed that the grade of this avenue had then been established.

Subsequently, March 7, 1873, an ordinance was passed by the Common Council of Newark, to grade, curb, and flag this avenue.

Case, page 64.

The passage of this ordinance was the *first* and *only action* ever taken by the city of Newark, with reference to the establishment of the grade of this avenue.

The provision of the act under which this ordinance was passed is found in section 96 of the charter of Newark, approved March 11, 1857. P. L., 116.

This gives no express authority to *re-grade*. But it is settled that the power to *grade* carries with it the power to *re-grade*. The power is a continuing one.

Dillon on Municipal Corporations, sections 542 and 543.

The result of this action on the part of the city was regarded, by the property owners affected, as injurious to their interests, and the city having failed to take measures for awarding damages, an application was made to the Supreme Court for a mandamus for the appointment of commissioners for that purpose.

The Supreme Court determined that a mandamus should issue, and accordingly it was issued January 6, 1876.

Case, pages 61 and 62,

It will be observed that the writ commands the appointment of commissioners to assess damages for "widening" and grading of the avenue.

Lest any misapprehension should arise from the use of the word "widening," I call the attention of the Court to the fact that the term was improperly inserted in the writ, and that no "widening" of the avenue was ever undertaken by the city of Newark.

Adam's Testimony, page 27, line 24.

Besides, the report of the commissioners shows that no damages were awarded for "widening" this avenue. Their report is for damages from *change of grade*.

Sayre's Testimony, p. 8, l. 31; p. 31, l. 1.

In obedience to the order of the Supreme Court, the Common Council of Newark instructed their counsel to apply to the Circuit Court for the appointment of commissioners to assess these damages.

Printed book, p. 65, l. 39, and following.

This application was made under the ordinance to grade, &c., to which I have referred.

See petition, p. 63, l. 38.

This was the correct procedure, as this ordinance was the foundation of the claim for compensation.

Under our system commissioners to assess damages and benefits are appointed by the Judge of the Essex Circuit Court.

Laws of 1875, pp. 249 and 457.

The commissioners were duly appointed—p. 69, l. 12, —and they made their report, pp. 69 to 72.

This report was illegal in this respect, that the commissioners awarded damages to the *owners of lands on the line of the avenue, on which houses and buildings had not then been erected.*

This was in violation of the statute now in force in Newark. The statutes on this subject are found as follows: P. L. 1866, p. 571; P. L. 1868, p. 793; P. L. 1869, chapter 270.

The last statute referred to (act of 1869) provides that the damages to be awarded for changing the grade of any street, shall be measured according to the *general law* of the State, and "shall not be awarded *except in cases where a house or other building was erected upon the lands in question at the time of such alteration.*"

The general law of the State (Revision of 1877), provides (section 70) that an action upon the case shall lie in behalf of any person *owning any house or other building standing or erected upon any street or highway*, the grade of which shall be altered by the ordinance of the legislative authority of any city, to recover from such city all damages which *such* owner shall suffer by reason of the alteration of any such grade.

There can be no doubt that the damages thus authorized to be awarded are, in the city of Newark, determinable by commissioners appointed for that purpose.

See *Reock* vs. *City of Newark*, 4 Vr., 129, in connection with statutes regulating the assessment of damages in such cases in Newark, already quoted.

The existing statute thus gives damages only to owners of lands on which houses or buildings are erected.

Reuben F. Harriott owned land on the line of this avenue, *on which no building or house had then been erected.*

Testimony—Harriott, p. 48, l. 10; p. 11, l. 3; Adam, p. 36, l. 28; Sayre, p. 23, l. 9.

Yet the commissioners awarded him $7,700 damages.

Now the Court will observe that the common law gives no relief to owners injuriously affected by a change of grade. Damages can be obtained only by aid of a statute.

Dillon on Municipal Corporations, sections 782 and 783.

Blum vs. *Morris Canal*, 2 Stock., 256.

And legislative enactments like that relied on in this case are constitutional. Consequential injury to property from a lawful public improvement, is not a "taking" within the constitutional prohibition.

Dillon on Municipal Corporations, 784 and notes.
Cooley on Constitutional Limitations, 541.
Sedgwick Stat. & Com. Law, 533 and 534.
Dillon on Municipal Corporations, 455.

Even if the act of 1869, now in force, be unconstitutional, the plaintiff in error would not be benefited; for the earlier act of 1868 gives damages only *where the city* had previously established a grade which it afterwards altered; and the *city* never established a grade prior to the ordinance of 1873, under which the present grade was established.

The report of commissioners in this case, thus illegal in part, was presented for confirmation to the Judge of the Essex Circuit Court.

See act of 1875, already referred to.

It was confirmed, as of course. No objection was made to it on the ground that it was illegal, for the reasons already stated—nor was the fact then known to the counsel of the city. Page 31, l. 6.

The report having been thus confirmed, the legal position was that owners of land on the line of the avenue, on whose property no house or building had been erected, seemed to be entitled to damages.

Yet the statute, which alone was the guide, did not provide for *such* damages.

As soon as it was discovered that the commissioners had erred in the manner suggested, relief was at once sought, and Justice DEPUE, after discussion as to the proper method of reviewing these awards, ordered the writs of certiorari on which the decision of the Supreme Court was based.

And the Court further ordered that notice of such writs should be served on all persons interested, that they might appear and defend. This notice was given, as will appear from proof on file in the Supreme Court. At all events, the plaintiff in error cannot complain, for he appeared at the taking of testimony, presented proofs, and was heard by counsel before the Supreme Court. Under such circumstances it is idle for him to contend that persons interested were not notified.

It should be remarked that the Essex Circuit Court could not legally set aside its order of confirmation when once made. Its powers were then exhausted. It could not "open" this order.

In the matter of *Beekman Street*, 20 Johns., 270; *State, Van Winkle* vs. *R. R. Co.*, 2 Gr., 164. These causes are important as bearing upon the status of the Court in executing this statute.

But objections are made to this proceeding by *certiorari*. One is that the suit as originally brought was improperly in the name of The Mayor and Common Council of the City of Newark: for the reason that there is no proof that "the city was interested in said awards, because the damages thus awarded were necessarily assessed upon lands benefited."

The argument proceeds upon a basis essentially false:

First, because it does not appear, nor is it true, as a fact, that any assessment of benefits from this change of grade, equal to damages awarded, or any other such assessment, has actually been made. (p. 48, l. 1 and following.)

Besides, it is probable that an assessment of benefits for such illegal awards, would not stand the test of judicial

investigation. Only money lawfully expended in a public work can be assessed.

Besides, if the whole of this change of grade is assessable, as contended by counsel for plaintiff in error, no tax-payer could bring suit because he could not be injured. ~~found~~

State, Keene, pros. vs. *Brownson*, 6 Vr. 468.

And. *Second*, because these illegal awards as they stood on the face of the report, were indebtednesses of the city of Newark. It might have been sued upon them. As a legal corrollary it is no doubt true, that if it could be sued upon such awards, it might itself sue upon them, and seek relief therefrom.

If sued for such an award, it is questionable whether the city could in that suit interpose the defence of its invalidity.

It would seem that such illegal awards should be attacked in a separate and direct proceeding.

Camden vs. *Mulford*, 2 Dutch., 49.

State, Wilson, Pros., vs. *Longstreet*, 9 Vr., 313.

But, even if their illegality might be interposed in a suit on these awards, still certiorari will lie.

Carson vs. *Martin*, 2 Dutch., 600.

State vs. *Jersey City*, 6 Vr., 381.

The corporation, the Mayor and Common Council of the city of Newark, is the guardian and trustee of the public interests. It owes this duty to the public to prevent the collection of illegal claims against it, and to remove all appearance of unjust demands. Under its charter it has the power to sue, but only as the guardian of the public.

The act of these commissioners created an apparent debt *against the city;* and therefore as the representative of the public interests, it was its duty to take steps to obliterate this unlawful claim.

And such has been the practice in this State.

See, as illustrations, *State, West Hoboken, Pros.*, vs. *Andrews*, 9 Vr., 174.

State, City of Newark vs. *Essex County Freeholders.*

The decision of the Supreme Court, then, in this branch of the case, was undoubtedly right. See page 2, lines 30 to 37.

Another objection to this proceeding, is that the statute of 1875, p. 249, already referred to, supplement to Newark charter, says, section 2, that "report of commissioners when comfirmed by the Court, shall be final and conclusive." If it be contended that this provision of the statute controls the right to review in *ordinary cases* the contention, (though probably untenable,) need not be controverted. But the allowance of the writs in this case is founded upon the fact that the *commissioners exceeded their jurisdiction.*

Upon this point I refer to

Vance vs. *Whorl*, Penn., 335.
State vs. *Conover*, 2 Hal., 203.
Ackerman vs. *Taylor*, 3 Hal., 365.
Krumerich vs. *Krumerich*, 2 Gr., 41.
Traphagen vs. *Township of West Hoboken*, 10 Vr., 232.

We ground our application for relief on the fact that the commissioners, in making their awards, *exceeded their jurisdiction;* that the Circuit judge had no power, under the circumstances, to confirm it; and that this report, even though so confirmed, is still subject to review in the manner now before the Court.

But the counsel for the plaintiff in error further insists that a writ of error, and not certiorari, is the proper remedy in this case. I answer this view is not sustained by judicial authority in this State.

The Judge of the Circuit Court, *in this matter*, has only statutory powers. Apart from the statute he has no power in such matters. He proceeds *under the statute*, and not according to the course of the common law.

And the rule is that the Supreme Court, exercising general common law jurisdiction, may review by *certiorari* the proceedings of an inferior tribunal or Court executing *statutory powers.*

I refer to the following cases;

Curtis vs. *Stevens*, 7 Vr., 304. On *certiorari* to review a refusal to quash a part of a return to a writ of attachment. The Court say, referring to proceedings under attachment act, "There is no doubt that it is within the power of this Court to control the abuse of the writ of attachment in a Court of inferior jurisdiction. *Nor can there be a question that the plaintiff has adopted the proper form of remedy.*

"The proceedings under an attachment act are *special* and *statutory*, not according to the course of the common law, and *therefore* the proper method of review is by the writ of *certiorari*. Such has been the practice of this Court in cases cited."

So in 2 *Dillon on Municipal Corporations*, sect. 739, the author says (citing many authorities), "In this country the rule has been very generally adopted by the Courts that when a new jurisdiction is created by statute" (as here), "and the inferior Court, board, tribunal or *officer* exercising it, proceed in a summary manner" (as here), "or in a course different from the common law" (as here), "the circuit or district court, or other tribunal exercising original common law jurisdiction," (as our Supreme Court does) "has, in *the absence of a specific remedy being given*, an *inherent* authority to revise the proceedings of such inferior jurisdiction by certiorari. And *in such cases* a *writ of error is not*, without the aid of a statute, the proper remedy to effect the removal of the proceedings to the revising tribunal."

Further, all matters relating to *assessments* in connection with local improvements are, by statute, relievable by certiorari.

The statute of the State, title, "certiorari," sec. 9, says, "In all cases of writs of certiorari brought to remove any tax or assessment, or other *order* or proceeding touching any local or public improvement, it shall be the duty of the Court to determine disputed questions of fact as well as of law, and to inquire into facts, &c., and thereupon to *reverse* or affirm in whole or part such tax,

assessme .t or other *order* or proceeding according to the justice of the case."

By this statute the Court, on certiorari, may reverse *any order* touching assessments.

And the act of 1875, under which this proceeding was had, provides that the confirmation of the report shall be by rule or "order" of the Judge. See it.

With this statute before us, it is idle to consider the decisions of other States with reference to such matters, under their peculiar organization.

The act of the Judge in appointing commissioners and confirming their reports under our special act, is not a judgment of the Court proceeding under the common law, but a rule or order under a statute—nothing more.

Hence certiorari will lie.

In *Dend. Rutherford* vs. *Fen*, 1 Zab., 702, Court of Errors, the Court say: "A writ of error *properly lies only in case of common law* proceedings, in *actions* commenced by writ to review some supposed error in the final judgment of a court of record," criticising and overruling to some extent, *Evans* vs. *Adams*, in 3 Green, 373.

"Proceedings summary in their character are subject to review by writs of certiorari."

Kline vs. *Pemberton*, 2 Hals., 438. Error will not lie where the proceedings are not according to the course of the common law.

So in *Lawrence* vs. *Dickey*, 7 Hals., 368.

3 Mast. 305, *Mulvin* vs. *Bridge*. "A writ of error does not lie where the proceedings, *in any stage of them*, are not according to the course of the common law."

In *Eames* vs. *Stiles*, 2 Vr., 493, the ancient rule was somewhat relaxed; but this case does not decide that *certiorari* does not lie to revise and supervise the proceedings of inferior tribunals exercising statutory powers with reference te assessments.

But it is contended on the part of the plaintiff in error that the New York Courts have held that writ of error is the proper method of reviewing the order of a Judge

confirming a report of assessments. The questions have arisen under charter provisions similar to ours. But I do not understand that they sustain the position contended for.

It should be observed first, that the use of the writ of certiorari in New Jersey is more efficacious and common than in New York.

And second, the New York act of 1858, p. 57, supplement to the charter of New York city, provides a *statutory mode of review* "in cases of fraud and irregularity."

The earlier cases in New York certainly hold that the Court acting under a statute similar to ours, proceed not as a Court, but as commissioners.

I call the attention of the Court to—

Matter of Beekman Street, 20 Johns., 269.
Matter of Third Street, 6 Cow., 571.
Matter of Mt. Morris Square, 2 Hill, 14.
People vs. *President of Brooklyn*, 1 Wend., 318.
Stafford vs. *Mayor of Albany*, 7 Johns., 541.

This rule has been, to some extent, changed by later decisions. These cases hold that the Judge proceeds in such cases as a Court, and not as a commissioner. But they still hold that *certiorari* will lie.

Thus in *Striker* vs. *Kelley*, (the leading case,) 2 Denio, 20, the Court say, speaking of its action in confirming reports of assessments: "That these powers are judicial in their character is an obvious inference from those cases which hold that the proceedings may be reviewed by *certiorari*." * * * "For it is well settled that a *certiorari* will lie only in New York to bring up judicial proceedings. (*People* vs. *Mayor*, &c., of New York, 2 Hill, 9.)"

And that *certiorari* will lie to review such proceedings in New York,

See *Patchin* vs. *Brooklyn*, 2 Wend., 277; s. c. 8 Wend., 47.
Livingston vs. *Mayor*, &c., of N. Y., 8 Wend., 87.
Patchin vs. *Mayor*, &c., of Brooklyn, 13 ib., 666.
Bogert vs. *Mayor*, &c., of N. Y., 7 Cowen, 158.

It is true that in several cases in New York, the acts of the Court in appointing commssioners and confirming their reports, have been brought up on writ of error, just as in similar cases they might be reviewed in this State.

I cite as illustrations, the cases of *Doughty* vs. *Hope*, 3 Denio, 250; and *Emberry* vs. *Connor*, 3 Comstock, 512.

But these were cases of ejectment, and went up on bills of exceptions; and the whole question was thus before the Court.

But in this case, a writ of error would bring up simply the naked order of confirmation, and if the papers were regular the order would stand.

It is difficult to understand how under existing circumstances, any method but *certiorari* would accomplish adequate relief.

Perhaps the Court might grant a writ of certiorari as auxiliary to a writ of error to certify extraneous matter to the court; (3 Gr., 373; 2 South., 861;) but the method would be cumbrous and unnecessary.

I submit that *certiorari* is the proper remedy in this case.

But it is further said that the city is estopped from raising the question of the validity of this report, because it was confirmed on the application of its counsel.

Observe, the Common Council has never ordered these awards to be paid. If it had, its action could still have been reviewed. A municipality cannot bind itself *outside of its corporate powers.* Much less can its officer.

See, on this subject, *Dillon on Municipal Corporations*, sec. 749 and sec. 766; sec. 382 and note, and sec. 381.

The act complained of has none of the elements of an estoppel *in pais.*

Philipsburg Bank vs. *Fallner*, 2 Vr., 52.

Nor is the city estopped by the record, for no such record is returned with the writ.

In 2 *Stock.*, 353, "The principle of estoppel does not apply against public authorities of a city standing by and making no objection, while a railroad company expend their money in constructing a railroad upon the public highway."

See *Lehmer* vs. *Seymour*, 9 C. E. Gr., 144.

See also, *Dudley* vs. *Mayhew*, 3 Comst., 9.

The remaining contention of counsel for plaintiff in error, that the Supreme Court "exceeds its authority in confirming some of the awards and rejecting others," is manifestly erroneous. The *certiorari* act, section 9, says: the Supreme Court may reverse in *whole or part* any assessment, &c.

HENRY YOUNG,

Attorney of Defendants in Error.

Starbuck & Dunham, Law and Commercial Printers, 165 Market Street, Newark.

In the Court of Errors and Appeals.

THE STATE,
REUBEN F. HARRIOTT,
Plaintiff,
vs.
THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK, *Respondents*.

On Certiorari
In Error.

In case of certiorari against Aram G. Sayre, David Collins and James F. Bond, Commissioners.

PLAINTIFF'S POINT.

The writ of certiorari directed to Aram G. Sayre, David Collins and James F. Bond, the Commissioners appointed to make the award for the damages sustained by the owners of land on Washington avenue by the regrading of the same, should have been dismissed by the said Supreme Court.

Because, before the issuing of said writ of certiorari the report of said Commissioners had been approved by the Circuit Court of the County of Essex and said Commissioners had been discharged, and being functus officio said writ of certiorari was erroneously issued and could have no force and effect.

Starbuck & Dunham, Law and Commercial Printers, 165 Market Street, Newark.

In the Court of Errors and Appeals.

THE STATE,
REUBEN F. HARRIOTT,
Plaintiff,
vs.
THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK, *Respondents*.

On Certiorari
In Error.

PLAINTIFFS' POINTS.

FIRST POINT.

The writ of certiorari, issued out of the Supreme Court, in the matter of the Mayor and Common Council of the City of Newark, prosecutors, versus the Essex Circuit Court, defendant, should have been dismissed for the following reasons:

I.

Because there was no error in the record or proceedings thus by said writ of certiorari removed into said Supreme Court.

II.

Because, if the Commissioners, who were appointed by the Circuit Court of the county of Essex, had made any erroneous or illegal award of damages to

the owners of land affected by the change of grade of Washington avenue then the said Circuit Court had full power, control and jurisdiction over such report, and would not have approved of the same; but having approved of said report it became a judgment of the Court, over which, nevertheless, the Court still has control, and an application of the respondents could, for good and sufficient reasons, have opened such judgment and corrected the same, and hence the only and proper remedy in this case was, after application to said Circuit Court to open such judgment and denial by that tribunal to comply with such request, to remove the inquiry into the validity of such judgment by writ of error, and not by certiorari.

III.

Because, the plaintiffs, in said writ of certiorari have failed to show that they were interested in said award made by said Commissioners for as much as the damages thus by said Commissioners awarded, were necessarily assessed upon the land which, by such change of grade, was benefitted, and hence, if the right to review a judgment rendered in a Court of competent jurisdiction by the writ of certiorari exists at all it can only be reviewed on the application of a party immediately interested in the effect of such judgment.

IV.

Because, the proceedings had before the said Supreme Court, upon said writ of certiorari, were had and taken without all the parties in interest in the

judgment rendered by the said Circuit Court, upon the report and awards of said Commissioners, were not brought before and into said Supreme Court by said proceedings upon said writ of certiorari.

SECOND POINT.

There was error in the judgment rendered by the Supreme Court upon said writ of certiorari in setting aside a portion of said Commissioners' report and affirming another part of said report and the awards thereby made to owners of land.

Because, the said Supreme Court, under the proceedings upon said writ of certiorari by which the entire award of said Commissioners and the judgment thereon rendered in said Circuit Court was removed, exceeded its authority in confirming some of the awards made by said Commissioners and rejecting other of such awards contained in said report, whereas the proceedings coming up in entirety could not be divided, and if the awards made by said Commissioners were illegal and erroneous at all the judgment of said Supreme Court upon said writ of certiorari should have been against the entire awards and report, and not against one part alone.

THIRD POINT.

The relators in said writ of certiorari by their own action in obtaining the approval of said Commissioners' report, by said Circuit Court, are estopped from relief under said writ of certiorari.

Because, the said Essex Circuit Court approved

the said Commissioners' report on the motion and at the request of said relators.

FOURTH POINT.

The judgment of said Supreme Court, upon said writ of certiorari, should have been a judgment of affirmance or of dismissal of said writ and not as entered in that behalf, in part affirming the said Commissioners' report and proceedings thereon and in part setting the same aside.