

New Jersey Court of Errors and Appeals.

THE STATE, JAMES PARKER & HARVEY BALDWIN, PROSECUTORS, <i>vs.</i> THE CORPORATION OF NEW BRUNSWICK.	}	<i>Writ of Error to the Supreme Court.</i>
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This is a Certiorari issued out of the Supreme Court to the Corporation of New Brunswick to reverse a certain Ordinance of that City with the assessments under the same. The Supreme Court affirmed said Ordinance and proceedings as legal. 10

The following state of the case was agreed upon in the Court below :

NEW JERSEY SUPREME COURT.

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THE STATE, JAMES PARKER & HARVEY BALDWIN, PROSECUTORS, <i>vs.</i> THE MAYOR, &c., OF NEW BRUNSWICK.	}	On Certiorari to remove an Ordinance to "regulate and grade Easton Avenue from Prospect st., to Richardson st., and to curb and pave the sidewalks and gutters, thereof," and proceedings thereunder.
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The following is agreed upon as a statement of the case, between the parties: 30

James Parker, one of the said Prosecutors, is the owner in fee simple of certain lots of land fronting for the distance of *two hundred feet* on said Easton Avenue, and which are assessed for a proportion of the cost of executing said ordinance.

Harvey Baldwin, another of the said Prosecutors, is the owner in fee simple of certain other lots of land fronting on said Easton Avenue, and assessed for a proportion of the cost of executing said ordinance—the amount of which assessment has since the commencement of this suit, been paid by the said Baldwin to the defendants. 40

Easton Avenue, in front of said lots is one of the public recognized streets of the said City, and is also, the Turnpike Road of the New Jersey Turnpike Company, and the land over which said road runs, is the property of said Company, having been conveyed to them soon after their organization in A. D., 1806. Said Turnpike road has been regularly worked by said Company up to the passage of said ordinance, and that part of it upon which said lots front, constitutes a part of the road, for travelling on which said Company charges and collects toll—and is within the
10 corporate limits of said City of New Brunswick.

It is agreed that the foregoing be taken as a statement of the case in this cause, in addition to the charter of said Turnpike Company, with supplements thereto, the ordinance and proceedings returned with the certiorari and charter of the City of New Brunswick.

May 23, 1863.

ABM. V. SCHENCK,

Attorney for Def'ts in Certiorari.

PARKER & KEASBEY,

Attorneys for Plaintiffs.

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AN ORDINANCE

To regulate and Grade Easton Avenue from Prospect Street to Richardson Street, in the City of New Brunswick, and to curb and pave the side walks and gutters thereof.

SECTION [1.] Be it ordained by the Mayor, Recorder, Aldermen and Common Councilmen of the City of New Brunswick, in Common Council convened, That the owner or owners, occupant or occupants of the several lots fronting or lying on Easton Avenue, between Prospect st. and Richardson st., in the City of New Brunswick, shall cause that portion of the said avenue lying in front of his, her or their lot or lots, to the centre thereof, to be properly regulated and graded, and the gutters thereof to be properly graded, paved and curbed, and the sidewalks thereof to be properly graded and paved, the whole length thereof, with flag-stone or brick, and not less than four and a half feet in breadth, in a good and substantial manner under the superintendence of the City Paver, or other person appointed by the Common Council, within two months after the passage and publication of this
40 ordinance.

SECTION [2.] And be it further ordained, That in case the owner or owners, legal representatives or guardians of the owner or owners, of any lot or lots, situate as aforesaid, shall not reside in either the County of Middlesex, or of Somerset, in this State, then the Clerk of Common Council shall give such owner or owners, legal representative or guardian of such owner or owners, written notice of the passage of such ordinance, which notice shall be served personally or be sent by mail, directed to the said person or persons, at his or her usual place of abode, within thirty
50 days after the passage of this ordinance.

SECTION [3.] And be it further ordained, That in case the owner or owners, or the legal representatives or guardian of the owner or owners, of any lot or lots, situate as aforesaid, shall not within the space of two months after the passage and publication of this ordinance, cause that portion of the said Easton Avenue, lying in front of his, her or their lot or lots, to be properly regulated, and graded to the centre thereof, and the gutters thereof, to be properly regulated, curbed and paved, and the sidewalks thereof, to be properly graded and paved the whole length thereof, as aforesaid, then the City Paver or other person or persons appointed 10 by Common Council shall regulate, grade, curb and pave the same, agreeably to the requirements of this ordinance, and shall make a particular statement of the work so done, by him, or them, in each particular case, to the Common Council, to be recorded in their minutes and properly filed.

SECTION [4.] And be it further ordained, That the Clerk of Common Council shall within ten days after the passing of this ordinance, cause the same to be published in both of the daily newspapers printed in the city of New Brunswick.

Passed in Common Council this seventh day of May, A.D. 1860. 20
Attest, HENRY BLUMER, Clerk. P. C. ONDERDONK, Mayor.

NEW JERSEY SUPREME COURT.

Nov. 3, 1863.

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THE STATE,
JAMES PARKER, PROSECUTOR,
vs.
THE MAYOR, &c., OF THE CITY OF NEW
BRUNSWICK.

HAINES, J. The Mayor, Recorder, Aldermen and Common Council of the city of New Brunswick, by an ordinance passed May 7th, 1860, ordained: That the owners and occupants of the 40 several lots fronting or lying on Easton Avenue, between Prospect street and Richardson street, in the city of New Brunswick, should cause that portion of said Avenue lying in front of their respective lots to the centre thereof, to be properly regulated and graded, and the gutters thereof to be properly regulated and graded, paved and curbed, and the sidewalks to be properly graded and paved in the whole length thereof with flag-stone or brick, not less than four and a half feet in breadth, in a good and substantial manner, under the direction of the City Paver, or other person appointed by the Common Council. 50

The prosecutor, being the owner in fee of certain lots of land fronting on that avenue, was assessed for a portion of the cost of executing the ordinance; and complaining of the assessment, he seeks to have it set aside on two several grounds.

First. That no jurisdiction exists in the City Council to order or execute the grading of this street.

Secondly. That the ordinance is void for uncertainty; or at least, is too vague in its terms to form a ground for penalty on non-compliance.

- 10 1st. On the ground of want of jurisdiction, it is insisted that the street is a part of the road of the New Jersey Turnpike Company: that the land itself belongs to them; that it constitutes a part of the road, for travelling on which the Company charges and receives toll; and that therefore the Company has the right and to them belongs the duty of regulating the road, and that the Common Council have no right to impose that duty on others, or to do it themselves.

- The act to incorporate the city of New Brunswick passed February 20, 1849, by its 10th section provides: That it shall be
 20 lawful for the Common Council of said City to make and establish ordinances and regulations for the levelling, grading, regulating, paving, curbing, flagging or gravelling of the streets and sidewalks of the said City; and to require the work to be done by the owners or occupants of lots fronting on or adjoining said streets; and to be superintended by the City Paver, who, under the Common Council, shall prescribe the manner in which such work shall be done. The act to incorporate the New Jersey Turnpike Company passed February 27, 1806, authorizes the construction of a
 30 turnpike road four rods wide, beginning in the city of New Brunswick in Albany or French street, between the bridge and the fork of said street. This seems to contemplate that the road so constructed is to be within the city and one of its streets. By this state of the case it appears "that the turnpike road so constructed is one of the public recognized streets of the City, and known as Easton Avenue." Hence it is obvious that the Common Council has jurisdiction over the streets of their City for regulating, grading and paving; and on the part of the road in question as one of those streets. They have no right to regulate or grade the
 40 street as to injure the Turnpike Company, or to interfere with its chartered rights. But they have for public purposes, the authority to make such municipal regulations as they deem expedient. They may have no power to require the Turnpike Company to grade their road or to pave it. But if in their judgment, the health, comfort, convenience or prosperity of the City require it, they may order the street to be regulated, graded and paved at the expense of the owners or occupants of the lots fronting on it. And it is no excuse for the owners to say that the rights of the Turnpike Company are infringed. When that Company complains their rights will be ascertained and protected. The im-
 50 provement is presumed to be for the benefit of the owners, and to

increase the intrinsic value of their lots ; and there is no injustice in requiring them to pay the expense of an improvement which is to contribute to their enjoyment and to promote their interest.

There is no vested right in the owners of the adjacent lots to require the Turnpike Company to bear that expense, nor to have the road continued at an original grade. They have the right in common with other citizens of requiring the Turnpike Company to keep their road in the condition required by their charter, under the penalties provided for neglect. If the Company may abandon their road, as is suggested by the counsel for the prosecutor, what on such abandonment would become of the supposed vested rights? It would surely vanish, and that without any just cause of complaint. The right to abandon the road is wholly repugnant to any right in the owners of the adjacent lands to require its continuance. 10

I can see no reason for objection to the ordinance in the fact that the fee of the soil of the road is in the Turnpike Company. Should they abandon the road, the public authorities can order it to be laid out and opened as a street or public highway, making due compensation, the same as might be done if the Company had only the right of way, and the fee was in the owners of the adjacent lots. 20

Nor can I see the force of the argument sought to be drawn from the act of March 19, 1857, which authorizes the Turnpike Companies of Springfield and Middlesex to cede and transfer to the city of Newark, any part of their respective Turnpike Companies, lying within that city. The object of that act was chiefly to enable these companies to cede parts of their respective roads, and to relinquish the repairing and control of such parts without affecting their right to the use and enjoyment of the other parts as before used and enjoyed. 30

2d. The other reason for setting aside the assessment is that the ordinance is uncertain and vague in its terms. The ground of the objection is that no fixed grade has been established ; but that the ordinance required the street to be properly regulated and graded, and the gutters to be properly graded, paved and curbed, and the sidewalks to be properly graded and paved with flagging or bricks, &c.

This objection would have been well taken had the ordinance made no other provision for the regulation of the work. But it does provide for it, and declares that it is to be done under the superintendence of the City paver or other person appointed by the Common Council. And this is in accordance with the terms of the Charter of the City, which authorizes the Common Council to require the work to be done by the owners or occupants of the lots and to be superintended by the City paver who, under the Common Council, shall prescribe the manner in which the work shall be done. There is no reason why the Common Council may not regulate the grade and prescribe the manner in which the work should be done, as well through a competent City paver, as 50

by a committee of their own body, or a Street Commissioner. Whether they could or could not, it is sufficient for the purpose that the Charter authorizes them so to act. It may be that the grade would not be uniform, or such as would be the best. But the abuse of a power is no argument against its proper exercise. The ordinance required the work to be properly done under the direction of the officer named in the Charter. It does not appear that any offer on the part of the prosecutor was made, or that he failed to do it for the want of information of what was the proper
 10 grade, or the proper mode of paving and grading.

There appears to be no reason for setting aside the assessment, and it must therefore be affirmed, with costs.

ELMER, J. concurs.

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NEW JERSEY COURT OF ERRORS & APPEALS.

THE STATE,

vs.

THE CORPORATION OF NEW BRUNSWICK.

} *In Error.*

The plaintiff assigns the following error in the judgment below, that the Supreme Court adjudged the said ordinance legal, when the same was illegal and void as against the prosecutors of said
 30 certiorari.

PARKER & KEASBEY, *Attorneys.*