

JJP 20227
 R 40000
 K 13200
 60000

435

133465

CITY OF CAMBRIDGE.

IN COMMON COUNCIL, Oct. 27, 1874.

The *Joint Special Committee* to which was referred petitions of FRANCIS W. BROWN, DANIEL KENNEDY, JOHN J. FATAL, and JOSEPH ROSENBERG, for compensation for damage to their several estates by laying out and widening Lincoln Street,

Reports, That it has given the several petitioners a hearing, and as their claims have already been thrice reported upon adversely, the Committee has tried to make the investigation full and thorough. The facts in the case are these: Lincoln Street was laid out forty feet wide from Elm Street to Webster Avenue by order of the City Council, approved September 16th, 1873. On the 21st of January, 1874, Daniel Kennedy petitioned for compensation for land taken from him by said laying out and widening, no award having been made to him in the order laying out the street; the Committee evidently considering it as merely an acceptance and laying out, and not a widening, as claimed by the petitioner. This petition was duly referred to the Committee on Roads and Bridges. Joseph Rosenberg, for same cause, petitioned February 4th, and his petition was referred to the same Committee. On March 18th, said Committee reported on both petitions, recommending "leave to withdraw." The other petitions now referred to us with above named petitions, were not presented till subsequently, as the various owners' rights were so nearly identical that these (as stated by the petitioners) were deemed sufficient as test cases, to call attention to the claims of all the owners to whom no awards had been made. Mr. Kennedy again pressed his claim,

and May 13th said Committee again reported, recommending "leave to withdraw, as no reason exists for granting the prayer of petitioner."

This Report was referred by the Common Council to the *City Solicitor*, for his *opinion* as to *Mr. Kennedy's claim*, "*irrespective of his loss of legal right to appeal*," which was the reason given by said Committee in defence of their report. The City Solicitor replied, June 15th, that "after an inquiry into the facts as well as the law, and after information from the petitioner, from the Committee, and from other sources, *he was satisfied* that the fence had been maintained on the line from whence it was set back for more than twenty years; and the *petitioner's claim against the City for compensation was a valid legal claim*." The report was recommitted to the Committee with this opinion, but June 30th the Committee reported "that it sees no reason for in any way changing the recommendation contained in its report of May 13th, viz.: "leave to withdraw." The parties again petitioned for a hearing before the Board of Aldermen, and their petitions were, after hearing, referred to the City Solicitor upon the question "whether the City can lawfully pay them damages," to which the Solicitor replies, that "*proceeding upon the assumption that the proceedings were regular*, and that they might have recovered upon an appeal seasonably made from the award of the City Council," "they have lost their right of appeal," and "they have no claim against the City." He further says, "the City Council decide as *judges between the rights of the public on the one hand, and the rights of the property owners on the other*; and their award allowing compensation to the owners of land taken, takes effect as the decision of a judge, and not as the offer of a party representing the City." He also says, "when the City Council *has laid out a street and made the awards*, they have, in my judgment, performed their whole duty in the premises, and any one dissatisfied therewith may, within six months, make complaint, &c., &c." The points raised are, —*Have the petitioners lost all right to claim compensation?* and, *Is the City Council debarred from granting such compensation?* The

City Solicitor declares emphatically that they were *clearly entitled to compensation up to the close of the legal six months*, which was March 16th. The petition of Mr. Kennedy was presented January 21st, nearly two months before, and it was reported upon March 18th, or two days after the close of the six months.

Sect. 7 of the Joint rules of the City Council provides that "Every Joint Committee to whom any subject may be referred, shall report thereon within four weeks, or ask for further time." This Committee is aware that this rule is not strictly adhered to, but where delay will work loss of legal rights, it would seem necessary that it should be. The Committee on Roads and Bridges did not ask for further time on these petitions, and it is not known that they claim any necessary delay; but, on the contrary, it is claimed by petitioners that at least one member of the Committee had, long before the report, stated the intention of the Committee; and yet Mr. Kennedy states, that in answer to repeated enquiries by him, the only information given him officially was that "it will be all right, we are not ready to report yet," and he therefore waited till it was too late. But petitioners' claim of unnecessary delay may not be a sufficient reason to warrant any revision.

Sect. 43, General Statutes, provides that when petitions for laying out a highway shall have been presented to the County Commissioners, they shall view the premises, hear the parties, and, when they have adjudicated upon the common convenience and necessity of laying out, they shall as soon as may be proceed to lay out the same accordingly. It *afterwards provides*, that, if damage shall be sustained by any persons in their property by the laying out, the Commissioners shall estimate the amount, and in their return state the share of each separately; but they shall not order such damages to be paid, nor shall a person claiming damage have a right to demand the same until the land over which the highway is located has been entered upon and possession taken for the purpose of constructing it.

Sect. 62, of same Chapter, provides in the case of Town

Ways, that, if damage is sustained by any person in his property by the laying out of a town way, he shall receive such compensation as the Selectmen shall determine, to be awarded in the manner provided for award of damages by County Commissioners in laying out highways.

Sect. 73 provides that, a person aggrieved by the laying out *or* by the assessment of his damages or compensation by way of indemnity, may have the matter of his complaint determined by a jury, which may be applied for at any time within one year after such laying out *or* assessment of indemnity.

SECT. 81 provides that the provisions of the foregoing sections of this chapter, so far as applicable, shall apply to the several cities, except as may be otherwise provided by city charters.

The charter of the City of Cambridge provides that the City Council shall have exclusive authority and power to lay out new streets and ways within said city, *and* to estimate the damage which any person shall sustain thereby; and any person dissatisfied with the *decision of the City Council in the estimate of damages*, may within six months thereafter make complaint, &c., &c.

We rehearse these well known facts merely to show that *laying out streets* and *awarding damages* are two separate and distinct authorities and powers, and can unquestionably be used at different times. The street may be laid out by one order, and the damages awarded by another at any reasonable time thereafter within the time allowed by law to maintain valid an order of laying out. And we are led to ask, when was the "decision of the City Council in the matter of damages" to either of the petitioners? The order of Sept. 16th only awards damages to Mary Ann Sweet for land east of Winsor Street, which was a practical extension of Lincoln Street, and does not mention the owners of land bordering on Lincoln Street, as previously used. And yet the City Solicitor says they *owned* the land taken from them and *were entitled to compensation*.

Orders laying out streets and making no awards are almost

invariably worded (and this order may be the only variation from the rule) "Ordered, That no damages be awarded for the land so taken as aforesaid." The order laying out Lincoln St. does not say "Ordered, That damages be awarded to Mary Ann Sweet, and no damages to anybody else." If it implies that by omitting the names, it seems to be contrary to the law as laid down for a jury "acting as judges between the public and the owners," in relation to parties whose land has been taken, wherein it is stated that they shall make returns for compensating any individual who may suffer damage by the laying out of any highway, "and if they find any one or more of said parties not to have sustained damage they shall set forth in their return that they award no damages to such party;" but it still leaves the right of appeal after the "decision of the City Council" in regard to damages. When *was* that "decision?" Does it mean the *first* or the *final* "decision?" The last decision *as yet* was an award to M. A. Lewis of \$300, by order reported by said Committee May 20th, and approved June 11th, 1874.

We further deem it unquestionable that if the Committee and City Council *erroneously supposed* that petitioners did *not own* the land taken from them, then the implied decision of "no damages" is liable to be set aside as erroneous and contrary to fact. That an error cannot be corrected, would certainly be considered arbitrary and unjust.

The Committee felt that not only the law but the custom of the City Council in dealing with the citizens whom it represents, should be taken into account, and for that purpose the Clerk was instructed to examine the records to see if any precedents existed for such an award, even allowing the original order to be full and valid, and entailing the six months restriction. Out of those on record we have selected only some occurring in 1873 and 1874, and it is but fair to state that two of the Committee on Roads and Bridges for 1874 were upon that of 1873, and four-fifths of the Committee for 1874 were in the Common Council for 1873, and would be supposed to be

knowing to the precedents established by that Committee, if they were not, as we suppose they were, in turn based upon other precedents of previous years.

Portland St., from Main St. to Hampshire St., was laid out July 10, 1872.

July 1, 1873, nearly 12 months thereafter, awards were made of \$300 to Freeman C. Waitt, and \$600 to Pettingill & Pear.

And Dec. 5th, 1873, or nearly 17 months thereafter, an award of \$500 was made to Edward McHugh and T. J. McCarty, on said street. These were all additional to previous awards to same parties.

Portland St., from Hampshire St. to Cambridge St., was laid out Dec. 7, 1872, and it was then ordered "that no damages be allowed for the land so taken as aforesaid."

Dec. 24, 1873, more than 12 months thereafter, an award of \$500 was made to Edward T. Sinnott on said street.

Lincoln St., from Elm St. to Webster Avenue, was laid out Sept. 16, 1873, and an award was made, as previously stated, to one party, Mrs. Mary Ann Sweet.

May 20, 1874, eight months thereafter, and two months after the Committee on Roads and Bridges had recommended that Daniel Kennedy "have leave to withdraw" because six months had expired and he had thus lost his right to claim compensation, on the recommendation of the same Committee an award of \$300 was made to Miss M. A. Lewis, on said street, without any explanation as to how it was she had not lost her's also.

This was a first award, but was in response to her petition presented January 14th, seven days before Mr. Kennedy presented his petition.

It was subsequent to this that the opinion of the City Solicitor was obtained in relation to the six months limitations; but that the Committee did not themselves fully appreciate the force of the point which they had repeatedly urged, may perhaps be inferred, from the fact that on Oct. 5th, 1874, they recommended a comprehensive order for additional awards on several streets in the locality known as the Cambridge St.

7

District, which streets had been laid out some eight months before, viz: Feb. 10, 1874. This order comprised four parties on Hunting St., two on Porter St., six on Warren St., two on Jefferson St., and seven on Harding St.; these awards ranging from \$6.00 to \$125.00, but making a total of only \$401.10; but if it is right and just (and we presume it was,) to make an award of \$6.00 eight months afterwards, it must be for \$600.00.

We admit that these precedents may rightly be considered action open to criticism, even though the Committee and Council acted justly; for, the City Solicitor says, "after the petitioners have lost their right to appeal, the rights of both parties are fixed, and if the tribunal laying out the street can, at the expiration of *one* year after the rights of the parties are thus fixed, change those rights by a new award, why may they not do the same thing at the expiration of *ten* years?" But we claim that *having* made new awards the City Council *itself* has "changed those rights."

This Committee is not knowing to the fact that any of above named parties preserved their rights by appealing. If any did, such action was made useless by the action of the City Council in making awards as quoted.

These precedents therefore apply to the present petitioners.

In conclusion, we submit the following legal opinions or decisions bearing upon the questions presented.

1st. After laying out of any street, "to estimate the damage which any person shall sustain thereby, constitutes another distinct clause and substantive and independent power, and is practically unlimited until the damage which any and all persons shall sustain is estimated and a *final decision* is reached; after which there may be an appeal for the individual or separate owner."

2nd. "It is competent for the City Council to defer the matter of awarding damages to such time as may be deemed proper."

3rd. "The City Council may pass upon the question of damages at any reasonable time after the order taking the land and laying out the street."

4th. "One award may be made for damages and the others deferred."

5th. "The 'decision of the City Council in matter of damages,' does not mean the 1st award, the 2nd award, or all of the several awards, but after a *final award* that shall be final."

6th. "If the record shows that the question of damages to the abutters has not been passed upon completely, the City Council may pass upon it."

7th. "The City Council may correct its own error, if one has been made affecting rights."

We incidentally suggest whether an economical change of policy may not be made in the matter of awards, if these opinions are tenable, as we presume they are.

The Committee has gone thus fully into this investigation of the claims presented, for the reason that a great difference of opinion evidently existed; and also because some of the points alluded to are either new or have been overlooked, and may form the basis for future decisions of the City Council.

It is said that kindred claims are in abeyance and the report of this Committee may open the gate to a large number of like claims. We know of none, and must submit that the gate has already been pretty well opened, but we presume they have all been treated as will all others to come, and as we know we have *tried*, and believe we *have treated these, upon their own merits*.

Believing then, that justice and equity demand it, and that the law as well as the custom of the City Council allows it, we respectfully recommend the adoption of the accompanying Order, making awards to the petitioners.

Respectfully submitted,

A. P. CLARKE.	}	<i>Committee.</i>
F. H. WHITMAN.		
JOHN J. HENDERSON.		
THOMAS GRAHAM.		
JOSEPH J. KELLEY.		