LEGAL INTELLIGENCE.

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NUTRING COURT AT NISI PRIVS-Michael Bou-vier et al. vs. The City of Philadelphia et al. In

ERAD, J .- Broad street was laid out by William ERAD, J.-Brond street was faid out by William Penn, in his plan of the city of Philadelphin, and was one mile in length, from Vine to Ocdar street, and one hundred feet in width. This street now extends from the Delaware, at League Island, to the northern boundary of the present city, in ous straight line, of an uniform width of one hundred and thirteen feet, for aleven and a half miles. This street, from Willow to Prime street, a dis-tance of only one and a half miles, is obstructed and Engured by the tracks of the Philadelphin and Reading railroad, the City railroad, and the South work railroad, and by the various turnouts of private owners.

Bouthwark railroad, and by the various inrnouts of private owners. On the Skih of June, 1885, an ordinance was passed by the City Conncils to grade, curb and macadamize Broad street, from Columbia avenue to German-town avenue, the portion from Columbia avenue to Willow street having been paved with cobble stones several years previous. In the same year the Central Passenger Rail way Company of Phil-adelphia claimed the right to carry their railway down Broad street, from Columbia avenue to Green street, and to use steam as a propelling power. The citizens protested against II, and the Oity Solicitor was instructed by Councils to take such legal measures as may be necessary to re-strain the threatmed occupation of Broad street for a railway by any railway company, or by any perstrain the threatened occupation of Broad street for a railway by any railway company, or by any per-son or persons, company or companies, corpora-tion or corporations whitever, and on the 13th of October I granted an injunction, and the Supreme Court, in the year following, in The Common-wealth vs. The Central Passenger Railway (2 P. F. Smith, 506), gave judgment for the Common-wealth, and judgment of ouster accordingly. This terminated the alleged rights of this company, but the owners of property on this magnificent street, backed by the universal sentiment of their fellow-citizens, were determined that this principal avenue of the city should be kept free forever from all rail-

roads or other obstructions. To effect this object large meetings were held, the result of which was the laying before Coun-cils the drait of an act for the permanent im-provement of Broad street, which on the 25th of January, 1866, was referred to the Committee on Law. This was an act to incorporate Michael Bouvier, Henry Diston, Matthias W. Baidwin, T. B. Paterson and that associate the the street B. Peterson, and their ascociates, by the name of "The Citizens' Association for the Improvement of Broad street, in the city of Philadeiphia." On the 9th of March, Mr. Freeman presented a pet-tion from two hundred and twenty owners of property, owning thirty-two thousand feat from property, owning thirty-two thousand feet front on Broad street, in favor of the romoval of the rails from Broad street, and on the same day the Committee on Law made their report, accompanied by a draft of a law prepared by them. This draft, with a verbal amendment or so in the second section, made in Select Council, is in fact the act subse-quently passed by the Legislature, and the consti-tutionality of which is now contested. This was preceded by a resolution recenting the Legislature preceded by a resolution requesting the Legisla-tare to pass it. On the passage of the resolution of request the vote in Select Council was 18 to 4, and in the Common Council 33 to 5. The Committee on Law, in their report, say: "That after having afforded the citizens an opportunity to appear be-fore your committee, and to express their approba-tion or disapprobation of the proposed law, your committee proceeded to consider the same delibe-rately, and having amended the bill constants. rately, and having amended the bill so as to guard the rights and work the least inconvenience to all interested, they have come to the conclusion, and so report, that the proposed act of Assembly is emi-mently proper, and will, in the opinion of your com-mittee, if enacted into a law, redound to the benefit and future welfare of the city and the citizens generally. generally

"To the property owners, this measure, as in-"To the property owners, this measure, as in-tended to be carried out, will be vasily beneficial. Ground that has a fixed value, under the ban im-posed by the railroad and railroad turnouts, will andoubtedly rise up in value; the property holder will be benefited in the rise in value of his pro-perty; the city will be benefited in the revenue from taxation, and the citizens generally and public at large will be benefited in possessing, free and untrammelled, one of the grandest avenues in and untrammelled, one of the grandest avenues in the world.

The act before us was passed on the 23d of March, 1866 (P. Laws, 299), and on the 30th of the same month another act was passed (P. Laws, 354), remonth another act was passed (P. Laws. 354), re-pealing the limitations on charges for paying, &cc., and giving the power to Councils to fix the same. On the 10th day of May, Mr. Gray presented in the Select Council a petition; very numerously signed from owners of property and residents on Broad street, requesting Councils to carry the act of Assembly into effect, which, on his motion, was referred to a special committee of five from each Council to report specially at the next measure of Freferred to a special committee of five from each Council to report specially at the next meeting of Councils, and on the 14th of June the committee reported an ordinance appropriating certain por-tions of Broad street for the purposes of a public data of Broad street for the purposes of a public drive, carrings-way, or avenue, as authorized by the act of Assembly, which being amended in the Common Council, became a law on the 5th July, 1866. This ordinance, amongst other things, pro-vided for a macadamized drive in the centre of the street, of twenty-aven fast which from Willow street, of twenty-saven feet wide, from Willow street to Fisher's lane.

This ordinance was not satisfactory to the owners of property on Broad street, between Columbia avenue and Willow street, who accordingly held meetings for the program ose of determining what kind

that at Chicago being soft and made ground, they say that owing to this fact the Nicolson pave-ment will last much longer here than in that dity "The Nicolson pavement," say the sub-commitsay that owing to this fact the Nicolson pave-ment will last much longer here than in that city "The Nicolson pavement," say the sub-commit-tee, thas several prominent advantages over stone pavements. For instance, its comparative noise-lessness and freedom from dust, and its great aving in the wear and tear of horses and vehicles. Horses do not require to be shod so often, and their Bocfs and legs are in better condition than those which travel over stone pavements. The saving for wegon or carriage bills for repair is very con-siderable. It can be more easily kept clean, and less dust arises from it. Then, too, the greater hold which horses take upon it earbles thereby facilitating travel and transportation. Mr Kneass' opinion is expressed in his affidavits in this case. "I am of opinion," says he, "that this pavement sliows travel to pass over it almost with-out noise; that the wear and teat of rolling stock is very much reduced, and that it is almost wholly free from dust; and that for these reasons it is a the points anthorized." "I desire to say that I found a highway in Chicage so paved had not heen remained for any for

"I desire to say that I found a highway in Chicago so paved had not been repaired for seven years, and the kind of repair which had been done was in equalizing the surface, which in some p was in equalizing the surface, which in some places had worn unequally. In no case did I learn that the pavement required renewal, although laid seven years, and it was because of this that I have stated that said pavement needed no repair, which of course is to be accepted with relation to the subject matter, and comparatively with other

"I say there is no difficulty in access to gas and white pipes, and I learned from the engineers of Ohioso that this pay ment was frequently re-moved for this purpose and easily restored; and although I made an examination with reference to this, I found no imperfection in the payement."

After a full, protracted, and careful of the whole subject on the 27th June last, the com-mittee reported wan ordinance anthorizing the paying of a portion of Broad street with the Nicol-son pavement," which, with an emendment in paying of a portion of Broad street with the Nicol-son pavement," which, with an amendment in Common Council, was passed unanimously by both Councils on the 3d July, and was approved by the Mayor on the 3th, and is the ordinance andar which the contract by the Department of High-ways was entered into with Charles E. Jenkiss and Jonathan Taylor, the terms of which are con-tained in the articles of agreement of loth July last between the city and these sentiments.

between the city and those gentlemen. Mr. Guillon, on behalf of his clients, protested against the laying of the pavement, and informed Councils his clients would contest the legality of the ordinance and the constitutionality of the act of Assembly of the 23a March, 1966.

These are substantially the questions before me. It is easy to say an act of Assembly is unconstitutional, but it requires a very clear violation of the fundamental law to be made out to induce a Court to take the responsibility of declaring it to be so, to take the responsibility of declaring it to be so, and, of course, nullifying all proceedings under it. The act itself was framed with the approbation of the property owners on Broad street, and of the cilizens at large. It was intended to secure the freedom of a great avenue, eleven and one-half miles in length, from all obstructions of every kind. It was intended also to protect Broad street from the Central Passenger Railway and all other railways forever. Councils, with only nine dis-sentients in both bodies, requested the Legislature to pass it, which they did. This act and its provi-sions were hailed by all as wise and beneficent, and as securing the greatest street of our city as a public drive, carringe-way or avenue for all time public drive, carriage-way or avenue for all time

If it be unconstitutional, then the railroads and other obstractions must remain, and any railway which can procure the Legislative sanction may iny its tracks over its whole length, and use steam in its most objectionable form. I have examined the act carefully, and I believe it to be clearly con-stitutional

It is the settled law of Pennsylvania that highways are universally the property of the State, and are subject to its absolute direction and con-trol. The State as the legitimate sovereign may dispose of them by their Representatives, and at their pleasure. Broad street is a highway, and there are upon a portion of it railroad tracks which can be taken by the exercise of the powers of emi-nent domain. Upon these acknowledged princi-ples this act was framed.

The first section authorizes, empowers, and re-guines the city of Philadelphia "to occupy and ap-propriate Broad strict in said city for its entire length as the same is now opened, or may here-after be opened, and from curb to curb thereof, ex-cept as hereinafter provided, for the uses and pur-poses of a public drive, carriage-way, street, or avenue, and to improve the said street or portions thereof from time to time, and in whole or in part, with such mode of nexument paying. with such mode of payement, paving, macadam-izing, gravelling, or other roadway, as may, in the judgment of the Select and Common Councils of said city, be best adapted to and for the uses and purposes aforesaid; and for that purpose the said purposes aforesnid; and for that purpose the said Councils shall have, and are hereby authorized to enact such ordinances or resolutions, with such conditions or stipulations as may require the cost

of said improvements to be paid for by the owners of property abutting upon said street." After the decision in the Commonwealth vs. Woods, S Wright 113, how is it possible to argue that any part of this plain section is unconstitu-tional? Under the second section of the act of April, 1790, the Common Council, then the legisla-ture of the city, were suithorized to pass ordinances for levying of taxes for the purposes of dighting, watching, watering, pitching, paving and cleans-ing of the streets and alleys of the said city," and "regulating the time, order and manuer of estima-"regulating the time, order and manner of estimating, ascessing, levying and collecting of the said taxes, and of lighting, watching, watering, pitching, paying and cleansing the said streets, lanes and alleys." Under this general authority to the lo-cal legislature, taxes were levied and collected, and call egislicities, taxes were levied and collected, and the city was lighted, watched, pitched, paved and cleansed, and under the word "watering" water-works were erected to supply the city with water from the Schuylkill, the precursors of our present magnificent works at Fairmount. These grean and extensive powers were to be exercised by the Councils by means of "laws, ordinances, regula-tions and constitutions," enacted by them as a legislative body. legislative body.

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streams. I do not think the twentieth section of the act of April 21, 1855 (P. L., 260), nor the twenty-sixth section of the act of the 13th May, 1856 (P. L., 573), have any bearing on this case, and the fourth section of the act of 1866 gives ample power to Councils "to enact all ordinances or resolutions processory and proper for the section of the section. necessary and proper for the carrying into effect the requirements, provisions, and parposes of this act," covering everything that has been done by them in this matter.

"carriage way from ourb to curb shall be hid with the Nicolson payament, in accordance with specithe Nicolson payament, in accordance with speci-fications prepared by the Chief Engineer and Sur-veyor, and to his satisfaction and approval. The cost of said paying, exclusive of the street inter-sections, shall be paid by the owners of property abuting upon said street, as directed in section one of set of Assembly aforesaid," the contractors to take in pay for the paying of the intersections the cobble stones replaced by the Nicolson payement. This is in strict accordance with the act. The second section directs the Department of High-ways to enter into a contract with the only persons authorized to lay this payement. "provided the authorized to lay this pavement, "provided the cost of said work, including the grading, materials and workmanship, shall not exceed the sum of four dollars the square yard," the contractor to keep it in good order for three years. The contract was entered into by the Highway

Department under this ordinance, the newsment bills, at four dollars per square yard, to be received by the contractors in payment, and to be collect by them; thus following the old practices as near

their egents, exceeding the powers clearly vested in them, and I must therefore refuse the injunction Red for.

this conclusion on the merits, to consider the effect of the act of 5th of April, 1816, and the case in 12 Wright, 439, in prohibiting an injunction in this

I must, however, be permitted to say that the real objection sppcars to be not the unconstitutionally of the law, or the llegality of the ordinance or the contract, but the expense which the property

owners must necessarily incur. These owners, startled by the attempt to run a steam passenger railway down Broad to Green in front of their property, procured by the interven-tion of Councils the passage of this act. They did not wish the dust of a macdamized drive in the centre, and this resulted in the present order. centre, and this resulted in the present ordinance and contract, after a fair and satisfactory trial on one square of the street.

the passage of this act, securing in three years an uninterrupted street or avenue of eleven and a half miles in length, raised the value of all the ground

miles in length, raised the value of all the ground fronting on this portion of the street. Were the owners to pay nothing for this, and the ultimate removal of the railroad nuisance from Willow to Prime street ? The payment is the im-provement now complained of, and I think after the legislative favor, granted at their earnest re-quest, it is a small return for the present and fu-ture benefits which they undoubtedly have and will receive. will receive.

Large owners of property on this portion of Broad street have driven away improvements by refusing to improve or seil. A strong instance is found in the beautiful rows of buildings on west Green street, which have not at Broad trees the Green street, a square west of it.

Individuals stopping public improvements have no right to complain when they are assessed for their share of the cost of rendering the streets in front of them of greater value to the community, and to the neighbors who have covered their lots with valuable and beautiful dwellings.

I therefore refuse the injunction and dismiss the bill of the plaintiffs.

CLOTHS, CASSIMERES, ETC. JAMES & LEE, NO. 11 NORTH SECOND STREET. ARE NOW RECEIVING A LARGE AND CHOICE ASSORTMENT OF COATING GOODS. BLACK AND COLORED CASTOR CLOTHS VELVET FINISH BLUE, BLACH, BROWN. AND DAHLIA PIQUE COATINGS. ALSO, A LARGE ASSORTMENT OF



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To the Finest College Rooms in the Citys Part of the Second, and the whole of the Third and The best organized and conducted Business College Education for the Counting-room in the shortest possible time consistent with the interests of the BOARDING AND DAY SCHOOL FOR FOR OHILDREN, S. E. COMPERCIANTER SPRING GANDEN STREETS, WILL RECORD NINTH and SPRING GANDEN STREETS, WILL RECORD NINTH Month (September) 16, 1887. A limited number of Boarders RUGBY ACADEMY, FOR YOUNG MEN CLARENCE SMITH, A. M., Principal.-Re-opens September 16. Pupils prepared for business of pro-feasional life, or for high standing in college. A Braichast Princip Department in separate rooms, Circulars, with full information, at No. 1220 CHESNUT Street. 8 12 2m A C A D E M Y OF THE PROTESTANT EPISCOPAL CHURCH, LOCUST and JUNI-FER Streets.-The Automani Session will open on MONDAY, September 2. Application for admission may be made at the Academy during the pre-ceding week, between 10 and 12 o'clock in the THE MISSES ROGERS HAVE REMOVED The mine and the street to No. 1914 PINE Street, where they will reopen their School for Young Ladies and Children, MONDAY, SEPTEMBER 9, 941m FRENCH, LATIN, AND GERMAN TAUGHT H in schools and families. Applications will be received at mrs. J. Hamilton's Ecokstore, No. 1244 CHESNUT Street. 8 21 im CARL DE BUBNA WILL RESUME HIS NOTICE .-- THE UNDERSIGNED

of improvemen' enound be adopted for that portion of the creat. On the 22d of November, the representatives of

the patentees of the Nicolson payement petitioned Councils for a trial of their payement in this city, and, on the 2sth of the same month, the chairman of the Committee on Highways reported that the committee "have examined the same, and are of opinion it is worthy of a trial. They have also had a conference with the owners of property on Broad street, between Jefferson and Oxford streets. Broad street, between Jefferson and Oxford streets, who are willing to put down a square of it in front of their properties, without expense to the city, except for intersections;" and reported a resolu-tion authorizing the same, which became a law on the 30th November, and the square was laid with the Nicolson pavement to the entire satisfaction of these sentiemen. of those gentlemen. On the 14th December Councils passed a supple-

ment to the ordinance of the 5th July, 1966, ordain-ing othat the privilege given to properly owners to change the character of paying, as specified in section 1 of the ordinance to which this is supple-mentary, shall, under the same restrictions, include the centre roadway therein designated as the "macadamized drive," provided that the macad-amizing shall not be replaced or superseded by

completed, and the contributed the there for now over ten years proves it in Schoceptable. It is also in the in Cinctinnati, Oleveland, Detroit, Toledo, San Francisco, Elmira, and has also been laid in the city of New York within the past month. It is composed of wood, with gravel screenings, but is entirely different in its construction from the wooden user and which proved so gravel as It is composed of wood, with gravel screenings, but is entirely different in its construction from the wooden pavements which proved so great a failure in our city some twelve years past. The blocks of wood ased are either whits pine or a more common timber burnetized; and in St. Louis they are using the cotton-wood of the west so prepared." After describing the pavement and the mode of laying it, he says: "As to the strength of this pavement, a trial was made in San Fran-cheo, and where a heavy locomotive was drawn over it, which by its weight fore the ordinary pavement into ruts, poor this there was no im-pression whatever. As to durability, they speak most favorably of it in Chicago, where they have bought the right to use from the patentee, and I have in my office a block which was lid in Chi-cago in November, 1856, after a severe use of mine years. From a height of aix inches, as origi-mally hild, it is reducid to four and a half inches, and when haid. The top, of course, is broomed up into it by the travel, and the brooming projects about enough over the thickness of the block to per year, while the stimber is as free from decay and filled with gravel and small stones pressed about enough over the thickness of the block to between them. "Among other advantages chimed and indorsed

cover with the adjoining block the gravel space between them. "Among other advantages claimed and indorsed by some leading chemists in Boaton, is that of healthfulness, from the fact that the travel in its construction is a correction to mephilio gases. "Should this pavement prove acceptable, and I can now see no reason why it should not be, its general use will be a great saving to all who are at the expense of supporting horses and vehicles, whether for business or pleasure." During the first six months of the present year the Nicolson pavement on Broad street was be-fore the Committee on Highways, and in May hat a sub-committee of that body, accompanied by the Chief Engineer and Surveyor in his official char-acter, visited Chicago to inspect the Nicolson pave. acter, visited Chicago to inspect the Nicolson pays. ment as inid and used in that city. On the 25th of May inst this sub-committee re-

ported to the Committee on High ways that they had vieited Ohlcago, and inspected "streets which had been paved with it for greater or less periods of time, some of them for nine years." After stating the superiority of our soil as a foundation,

How much larger and more extensive were the powers vested in the city seventy-seven years ago than are to be found in this much abused first sec-

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than are to be found in this much abused first sec-tion? The section first appropriates, through the agency of the city, Broad street as a public drive, carriage-way, street or avenue, which being a proper use of a highway, is clearly constitutional. The next provision is the direction to improve the said street or portions thereof, with such mode of pavement, &c. as in the judgment of Couccils may be "best adapted to and for the uses and pur-poses atoresaid." To this I see no objection. Then the Councils are authorized to enact such ordithe Councils are authorized to enact such ordi-nances or resolutions (which is their usual ordi-nary and only mode of proceeding) "with such conditions or stipulations as may require the cost of said improvement to be paid for by the owners of property abauting upon said street," thus limiting the taxing power of the city in this case to those who are directly, immediately and largely bene-fited by the improvement. There can be no doubt that this provision is constitutional, and this dis-poses of all that part of the act which is material to the question before me or affects the present plaintiffs. the Councils are authorized to enact such ordi-

plaintiff. There is, however, a proviso "That so much of Broad street as lies between Willow and Prime streets shall not be subject to the operation of this act for the period of three years from the passage hereof," that is until the 33d May, 1869. This portion of the sheet of course must be freed from the railroads hald in it to make it a public drive through the whole length of the street. From Market street to Willow street, Broad street is practically not a bighway at all, as any one may had by taking a carriage and driving over it. For practically not a high way at all, as any one may find by taking a carriage and driving over it. For two squares at least the sireet is not only obstruc-ted by the railroad tracks and turnouts, but by loaded and empty ireight cars, and coal cars stand-ing or moving on all parts of them. It is a dis-grade to our city to have so noble a street rendered almost impresable by ordinary vehicles. The second and third sections of the act provide, in a constitutional manner, for the removal of all

in a constitutional manner, for the removal of all these obstructions. It is only necessary to observe that the words "or other obstructions" in the se-

cond section is mean to cover the turnouts. When all these of jects are accomplished, then this street will be preserved forever in its entire length as a public drive or carriage-way for all future generations. The city paves, and the expense is puid either by generation in any local invariant and a preserve heard that

The city paves, and the expense is paid either by general or local inxation, and I never heard that the taxpayers in the old city, or the property own-era in the districts, were the owners of the mate-rials with which the streats were paved. I hardly thick the cobids-stone objection can be seriously wread on constitutional grounds; nor is there any-thing in the further objection that cobile-stones are included in the words "or other obstruc-lons," which we have seen mean the "turnouts;" and it would be singular if the pavement expressly laid to drive over should be considered as an ob-struction.

As the law is constitutional, the only remaining questions are as to the legality of the ordinance and the contract. The usual method, where a street was to be paved, was for the High way De-partment to contract with a competent paver, for the paving of the street, or with a competent paver, se-lected by a majority of owners on the street. In either case the resolution of Councils authorizing the paving contained a provision, what the con-ditions of the contract shall be that the contractors abelie collect the court of paving from the owners of property on the street, and he shall also enter int_o As the law is constitutional, the only remaining