

mer, but a violent one in the winter and during rains; that in his opinion it was better to bring the waters east than west, for the good of all, because it was taken in the shortest course to the basin; any course, however, would have been very inconvenient; but the least expensive and inconvenient direction, in the opinion of the city council, was the eastern; the commissioners were very anxious to preserve the basin; Jones's falls deposited a good deal, and also Harford run.

The defendant further offered in evidence by John Hillen, that the stream from H to E on the plat was a natural one, but was ordinarily quite a trifling little stream, from streams flowing from Hampstead and Chinquepin hills; that naturally it would go through a bore of the size of a thimble at this time, but it became a torrent in time of rains, which torrent pursued the same course, viz. from H to E; that Harford run is also small, but is considerable in time of rain; the walls of Harford run canal are about 15 feet apart, this canal has a very slight fall down to the western cove; the fall of Harford run is about one inch in ten feet, but sufficient to carry off the water very well; the city block was made to fill up the cove by making fast land of that which was neither water nor dry land ever since his boyish days; that it was always flat and shallow at that place within his memory; that from Wilk's street to the deep or navigable water was about four or five hundred yards, which must have been first filled up before the navigation could have been much injured; that whether it was for the good of the whole that these waters should have been turned east instead of flowing west, was a matter of opinion; that the best, in his opinion, for the general interest, was done; had all the waters gone west it would have been irresistible, but perhaps they might have been divided.

And the defendants further offered in evidence to the jury, by Frederick Schaeffer, that he resided in Baltimore since 1784; that the stream from Hampstead hill to the western cove was something of a stream, and became very large when it rained; the city wished to turn it down Ann street, and therefore raised the mounds: he thinks the city did the best that could be done for the good of the town; that even forty years ago the water in Harford run at one time got so high by a three hours' rain as to drown a man: witness's property is situated near to Harford run, it is between Eden and Caroline streets, and nearer to said run than to Ann street; that he has known it to overflow twice since the great bridges were carried away, which was in 1817, but he has never known it to overflow since the extension below Pratt street, which was begun in 1823.

The defendant further offered in evidence by the said William McDonald, that there is a great tendency in every part of the harbor of Baltimore to become shallower from the washings from the surrounding hills, and that the mud machine is necessarily occasionally used in every part of it in order to keep the water at its accustomed depth, and that it is applied by the city in the channel and at ends of streets and public wharves, but is never applied at the expense of the city within fifty feet of a private wharf in any part of the city of Baltimore; the individual owners have them dug out at their own expense.

Whereupon the said defendants prayed the opinion and direction of the court to the jury, that in passing the several ordinances and resolutions offered in evidence by the plaintiff, the mayor and city council of Baltimore acted within the scope of the authority conferred on the said corporation by the laws of this State, and that the plaintiff therefore is not entitled to re-

cover damages against the said corporation in this action for the loss he may have sustained by the filling up of the water at his wharf, as stated in the testimony. First, because the corporation, and its agents and servants, in making the said alteration, acted as public agents in discharge of a public duty imposed on them by law. Second, because the corporation consists of the inhabitants of Baltimore city, and they are not liable to any injury done to by the acts of their servants and agents, which were not commanded by the said corporation. Third, because the river and the soil of the river being the property of the State, and the defendants being the agents of the State, clothed with discretionary powers with regard to the preservation of the navigation of the harbor, the defendants are not liable in this action for the consequences resulting from their acts as complained of in the declaration, and stated in the evidence. Fourth, because if any wrong has been done in filling up the cove, it is a public nuisance, and the plaintiff upon the evidence above stated has not sustained such an injury as will so entitle him to maintain an action.

2d. Prayer. The defendants also prayed the opinion and direction of the court to the jury, that, in grading and paving the several streets, and damming and turning the water at the several places marked on the plat, and stated in the evidence, the officers, servants, and agents, of the mayor and city council of Baltimore acted within the scope of their lawful authority; and if the jury find from the evidence that they acted bona fide, and to the best of their judgment, then the present action cannot be maintained against the said corporation for any thing done by their said officers, servants, or agents, in manner aforesaid; which opinion and direction the court refused to give to the jury, but were of opinion, and so directed the jury, "that the plaintiff will be entitled to a verdict, if the jury believe from the testimony that the plaintiff's property was injured by the washings occasioned by the diversion of the waters from flowing into the western cove and turning them into the eastern cove, and only to damages proceeding from such a source, as the counsel for the plaintiff have admitted that they are not entitled and do not claim damages on account of that portion of the injury which may have been sustained by the washings from such of the waters into the eastern cove as would naturally have flowed there, notwithstanding, by the grading and cutting down of Washington and other streets, the waters which naturally flowed into the eastern cove carried down more earth and sediment than before said gradings and cuttings they had been accustomed to do; that when the jury ascertain the lessened value of the plaintiff's property by the injury done to the property as a wharf, or, in other words, the amount of its depreciation in value, proceeding from that cause, and when they also ascertain the losses sustained by the plaintiff by the diminished income or profits of his property, proceeding from such cause, these amounts, when ascertained, together with any damages the jury may reasonably think the plaintiff may be entitled to, from any inconvenience he may have sustained by being compelled to change the employment of his property, will constitute the true measure of damages; that in ascertaining these amounts they must confine themselves to a consideration of the injury sustained prior to the 21st of March, 1822, the day of issuing the writ; that in the estimation of the damages it is fair and proper that the jury should take into consideration the uses to which the property has been devoted since the infliction of the injury; and in estimating its permanent injury it is right and proper that the jury should look at its capacity, and of course