

in his favor by a competent tribunal, the case presents a question, not of title to office, but whether the plaintiff shall be permitted to perform its duties without interference. In such a case, *mandamus* and not *quo warranto* is the proper remedy. *Eaton v. Burke*, 66 N. H. 306.

*Exceptions sustained.*

BLODGETT, C. J., did not sit: the others concurred.

Merrimack, }  
June, 1899. }

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HINCKLEY v. FRANKLIN.

Under P. S., c. 73, s. 24, an abutting landowner is entitled to compensation for damages caused by a change of the grade of any part of the highway; and the fact that the change was only of parts theretofore unwrought is no defence.

Upon an appeal in such proceeding, the owner will not be heard as to claims not presented below; and what was so presented may be shown by evidence outside the record, if the petition is general.

PETITION, for assessment of damages arising from a change in the grade of a highway. Facts found by the court. In constructing a sidewalk in the highway opposite the plaintiff's land, in the year 1895, the surface of the ground between her line and the traveled part of the highway (a space about six feet wide) was lowered from one to six feet to a grade about ten or twelve inches above that of the traveled part of the highway.

The plaintiff made an application in writing to the city council of Franklin, August 30, 1895, setting forth that in repairing the highway in question the grade was lowered, whereby she was damaged, and requesting them to view the premises and assess "the damages occasioned to her by the altering of said grade." The application did not state the time when the change was made, nor specify the particulars thereof. The plaintiff now alleges that changes in the grade were made to her injury in the years 1891 to 1895, and seeks to recover in this action the damages resulting from all these changes. The defendants say that a claim extending over such a period cannot be considered, because the plaintiff, in her application to the city council, claimed damages only for the changes that were made in the year 1895, and they offer to prove this allegation by oral testimony.

69	614
71	492
69	614
72	480

*Sargent & Niles*, for the plaintiff.

*Edward G. Leach*, for the defendants.

PEASLEE, J. Does the statute providing for compensation to abutters, for damages caused by a change in the grade of a highway, apply to changes in that portion which was theretofore unwrought and unused for travel?

Much stress is laid upon the technical meaning of the word "grade"; and it is argued that there can be no change of grade until the way has been reduced from its naturally uneven condition to one of fairly uniform rise and fall; that an unwrought way is ungraded, and that the grade cannot be changed until it exists. Cases are to be found wherein this construction has been applied to statutes as to changes of grade; but it is not necessary to consider them here, for the precise and technical meaning of this word is not an essential part of our statute. The original act applied to "any alteration in any street or highway" . . . caused "by raising or lowering the same." Laws 1848, c. 725, s. 1. In the revision of 1867, the language now in use was first adopted, but the change was understood to be one of form and not of substance. Com'rs' Rep., G. S., c. 67, s. 18; G. S., c. 66, s. 20; P. S., c. 73, s. 24.

The question is, whether such a change as was here made was an alteration, within the meaning of the statute. The object of the act appears to be to compensate the landowner for changes made in the surface of the land after the highway has been built. The compensation originally paid him for the taking of land for the road was computed upon the basis that the road would be built in a manner suited to the then existing circumstances. *Rowe v. Addison*, 34 N. H. 306, 312, 313. It was the duty of the town to so build the road, and it must be presumed, certainly as against the town itself, that it did so. The road as built being what the circumstances called for, was what was considered in the original award of damages. Before 1848, if the circumstances changed so that more grading must be done, or further alterations in the surface must be made, the landowner was without remedy. *Benden v. Nashua*, 17 N. H. 477, and cases cited. It was presumably because of this rule that the act of 1848 was passed. *Waldron v. Berry*, 51 N. H. 136, 143, 144. When the town built the road and left the portion now used for a sidewalk in its natural condition, it established, as against itself, what was the proper construction there. This the landowner could rely upon, and, if changes were subsequently made, she was entitled to compensation. *Cambridge v. Commissioners*, 125 Mass. 529. It is no answer to say that, when the road was built, the town might have done what it has now done,

without further compensating the landowner. This argument would defeat every claim under the act. Nor does the right to recover depend upon improvements made by the landowner. If the change injures his natural field, he is entitled to compensation. *Bartlett v. Bristol*, 66 N. H. 420.

Must the change be of the whole width of the highway, or the whole of the part theretofore wrought, or is a substantial change of any part sufficient? Sidewalks are parts of highways concerning which grades may be established which differ from that of the portion used for teams. P. S., c. 50, s. 10, *par.* XIV. The same section of a highway may have different grades, one for the street proper and another for the sidewalk. That a change in either would be within the provisions of the act of 1848 cannot be doubted. It is therefore immaterial, except as to the extent of the injury, that the grade of the street outside the sidewalk has not been altered.

The cases which hold that work done upon manifestly unfinished streets cannot be considered as changes, have no application here, as we understand the facts in this case. The work of constructing a sidewalk along an ancient highway cannot be considered a part of the original building of the road.

The petition to the city council was sufficient. Under it the plaintiff might have proved all damages caused by alterations made before it was filed. *Sawyer v. Keene*, 47 N. H. 173. Acting under this petition, the plaintiff presented only a part of her claim to the city council, and now seeks to be heard as to the whole, upon appeal. The petition being only a general statement, the city council could not know what was intended to be included, except by the statements of the plaintiff. The case is not unlike that of a writ containing the common counts,—the claim being made definite by a specification.

The provision of the statute, that the city council shall give notice to and hear the petitioner, requires him to make his claim there. There is no authority given to assess damages except upon a hearing. The claim must be presented to the lower tribunal before an appeal can be taken. Until that tribunal has acted, or has failed to act when properly applied to, there is nothing to appeal from, and the appellate court has no jurisdiction. The plaintiff cannot be aggrieved by the failure to allow a claim which she did not present for allowance. If this rule applies to the claim as a whole, it must apply to separate and distinct items which are litigated in one proceeding. *Rich v. Eldredge*, 42 N. H. 246. The damages claimed for the changes made in the years before 1895 were distinct items which should have been presented to the city council. As this was not done, there has been no action upon them by the inferior tribunal. As to them, there was nothing to appeal from; and this court,

having no original jurisdiction of the matter, cannot entertain the appeal.

The petition being general, it may be shown by evidence outside the record what issues were presented for determination thereunder. *Hearn v. Railroad*, 67 N. H. 320, 322, and cases cited; *Burns v. Burns*, 68 N. H. 33.

*Case discharged.*

CHASE and PARSONS, JJ., did not sit: the others concurred.

Hillsborough, }  
June, 1899. }

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FELCH v. WEARE.

A town is not liable for the neglect and failure of selectmen to perform the official duties imposed upon them by statute.

CASE, to recover the value of the plaintiff's sheep killed by dogs. The declaration alleges that the plaintiff, at Weare in this county, on the first day of May, 1897, "was the owner of a large flock of sheep, and that the same were confined in the plaintiff's close at said Weare; that during said summer of 1897, while lawfully within said close, on divers days, to wit, on the fifth day of May, 1897, and on sundry days thereafter, a large number, to wit, fifty-two, of said sheep were killed by dogs; that the said plaintiff informed one of the selectmen of said town that he had sustained such damage, and requested him to proceed to the premises where the damage was done and determine whether the same was inflicted by dogs, and, if so, to appraise the amount thereof, if not exceeding twenty dollars; and if, in the opinion of said selectmen, the amount of the damage exceeded twenty dollars, to appoint two disinterested persons, who, with himself, should appraise the amount thereof, according to law. Yet the defendants' selectmen, wholly regardless of their duty in the premises, have refused and do still refuse to determine the plaintiff's damages, contrary to the form of the statute in such case made and provided, whereby the plaintiff has lost the value of his said sheep, and to the damage of the plaintiff, as he says, in the sum of two hundred and fifty dollars."

The defendants moved to dismiss, and the motion was granted, subject to the plaintiff's exception.

*Drury & Hurd* and *Sargent & Niles*, for the plaintiff.