IN THE

United States Circuit Court of Appeals

FOR THE FOURTH CIRCUIT.

MARCH TERM, 1945.

No. 5273.

T. HENDERSON KERR AND LOUISE KERR,
Appellants,

vs.

THE ENOCH PRATT FREE LIBRARY OF BALTIMORE CITY, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
CIVIL ACTION.

BRIEF FOR THE MAYOR AND CITY COUNCIL OF BALTIMORE (hereinafter called "CITY").

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STATEMENT OF THE CASE.

Only one of the plaintiffs—T. Henderson Kerr—sues the City, and he sues as a taxpayer.

In the fourth count he complains that the City transfers annually nearly Four Hundred Thousand Dollars

public money to the Library Corporation and says that "if said Library Corporation is a private corporation beyond the control of constitutional restraints on public corporations, said appropriations in excess of One Hundred Thousand Dollars annually are *ultra vires* and void and constitute the taking of the plaintiff, T. Henderson Kerr's property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States." He prays the City be perpetually restrained from transferring to the Library Corporation, if it is a private corporation, "any public moneys derived in part out of taxes levied against him in excess of One Hundred Thousand Dollars annually."

In its answer the City relied upon Chapter 144, Laws of Maryland, 1908 (1938 Edition Baltimore City Charter) Article 1, Section 6, Subsection 14A, page 24. That statute is as follows:

> "LIBRARIES.
>
> The Mayor and City Council of Baltimore is authorized and empowered to appropriate and pay over such sum or sums, as it shall from time to time deem proper, for the equipment, maintenance or support of the Enoch Pratt Free Library of Baltimore City, or of any other free public library in Baltimore City, or of the branches of the Enoch Pratt Library of Baltimore City, or of any other free public library in Baltimore City, provided, that the title or ownership of the property of every such library or branch is vested in the said Mayor and City Council of Baltimore."

In disposing of the issue between plaintiff T. Henderson Kerr and the City, District Judge Chesnut said:

> "It is obvious that the action of the City is not *ultra vires*. No provision of the Maryland Constitu-

tion was referred to by counsel and none is known to the Court that would make the legislative authority invalid. Nor have counsel for the plaintiff cited any Federal authority for the proposition that the voluntary appropriations by the City take the plaintiff's property without due process. It results that the fourth count of the plaintiff must be dismissed generally."

ARGUMENT.

It is too plain for argument that Judge Chesnut's position is sound. In *Finan v. Mayor and City Council of Cumberland,* 154 Md. 563, it was decided (second syllabus)—

> "Provided there is express legislative authority for so doing, public funds may be used by a municipality in the erection or maintenance of a general hospital, although the hospital is controlled by a private corporation or agency."

The opinion of the Court in that case was delivered by Chief Judge Bond. After referring to a number of decisions, among them *St. Mary's Industrial School v. Brown,* 45 Md. 310, he said on page 567:

> "Long before, it had been decided that public funds might under proper legislative authority be appropriated to aid private agencies performing services to the community which were public in nature. *University of Maryland v. Williams,* supra; *St. John's College v. State,* 15 Md. 330. And from the beginning of the state government it had been the policy and practice to accomplish public purposes indirectly by such means; and all constitutions promulgated since the beginning had been framed unquestionably in full knowledge of this policy and practice * * *. We see no constitutional objection to it, once we accept the purpose to be furthered as a public one."

In *Johnson v. Baltimore*, 158 Md. 93, it is held that the acquisition of the land upon which to construct this library was for a public purpose.

T. Henderson Kerr does not allege that the City illegally assessed his property, nor does he attack the constitutionality of the statute authorizing the City to appropriate money for the maintenance and support of the Library. The complaint is based upon the alleged illegal action of the Library Corporation, over which the City has no control other than provided by Section 969 of its Charter, which is as follows:

> "It shall be the duty of the Mayor to appoint a visitor, who shall, as often as once a year, examine the books and accounts of the Trustees of the 'Enoch Pratt Free Library of Baltimore City,' and make a report thereof to the Mayor and City Council of Baltimore; and said Mayor and City Council shall, in case of any abuse of their powers by said Trustees or their successors, have the right to resort to the proper courts to enforce the performance of the trust imposed on them."

If the acts of the Library Corporation are legal, manifestly the plaintiffs have no case against the City, since the payment by the City is only alleged to be illegal because of alleged illegal acts of the Library Corporation. On the other hand, if the acts of the Library Corporation are adjudged to be illegal, redress should be against the corporation that commits the illegal acts and not against the City. A payment by the City of public funds to the Library Corporation, legal when made, is not rendered illegal because of alleged illegal subsequent acts of the Library.

DUE PROCESS OF LAW.

Voluntary appropriation by the City (in accord with express legislative authority) of funds lawfully collected cannot be said to deprive a taxpayer of his property "without due process of law." The draftsman of the fourth count of the Complaint must entertain "some strange misconception of the scope of this provision as found in the Fourteenth Amendment."

Davidson v. New Orleans, 96 U. S. 98, decided at the October Term, 1877, is one of the earlier "due process of law" cases after the adoption of the Fourteenth Amendment. The Court there, speaking through Judge Miller, traced the history of the "due process clause" to the Magna Charta but declined to undertake to define it. At page 103, he said:

> "It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal Government, for nearly a century * * * this special limitation upon its powers has rarely been invoked in the judicial forum * * *. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this Court is crowded with cases in which we are asked to hold that State Courts and State Legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment."

Davidson v. New Orleans is given as authority for the decision in *Corry v. Campbell,* 154 U. S. 629, where the Court said:

> "The only federal question presented by this record was decided at the present term in *Davidson v. New Orleans* and the judgment is affirmed upon that authority. We have no power to correct the errors of State Courts in respect to the details of assessments made by municipal corporations upon private property to defray the expenses of street improvements. Upon all such questions the action of the State Court is final. There can be no doubt but that our jurisdiction is at an end, if we find that sufficient provision has been made by law for contesting such a charge, when imposed, by an appropriate adversary proceeding in the ordinary courts of justice."

If the payment to the Library Corporation is illegal, sufficient provision is made by State law for contesting the City's action. It is not claimed by T. Henderson Kerr that the State law does not afford him ample opportunity for contesting the legality of the assessment of his property by the City and the State, and the payment by the City to the Library Corporation.

"Due process" is usually identified with procedure. Said Chief Justice Taft, speaking for the Supreme Court, in *Truax v. Corrigan,* 257 U. S. 312, 332, 66 L. Ed. 254, 263:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the general rules which govern society. * * * In *Hayes v. Missouri,* 120 U. S. 68, 30 L. Ed. 578, 7 Sup. Ct. Rep. 350, the court, speaking through the same justice (Mr. Justice Field) said the 14th Amendment

> 'does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. *It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions,* both in the privileges conferred and in the liabilities imposed.'" (Italics supplied.)

There is not a single circumstance in this record tending in the slightest degree to show that the City has denied T. Henderson Kerr his day in Court or that it has subjected his property to any liability different from that imposed upon every other taxpayer in the City of Baltimore. Decisions applying the "due process of law" clause of the Constitution have no direct bearing and are not helpful in this litigation. The historian, however, will find voluminous literature and cases on this subject in Selected Essays on Constitutional Law, Vol. I, pages 174, 203, 268 and 302 under the headings:

> Due Process of Law in Magna Charta—by C. H. McIlwain, page 174.
>
> The Doctrine of Due Process of Law Before the Civil War—by Edward S. Corwin, page 203.
>
> History of Due Process of Law After the Civil War—by Charles Grove Haines, page 268.
>
> Due Process of Law Today—by Charles M. Hough, page 302.

Judge Hough, in his readable article, characterizes the phrase as of "convenient vagueness" and says:

> "Forty years ago our highest court said that it could not be defined, or at all events definition was declined, because it was better to ascertain meaning in each case by a process of judicial inclusion and exclusion. This reservation of mental liberty for succeeding courts has often since been insisted on,

> and exercised. * * * Further, the 'due process' imposed is not primarily a requirement that right be done, but that appropriate machinery for doing right be provided." (page 303).

On page 307 he says:

> "The generation that fought the Civil War usually identified due process with common law procedure * * * it was that generation which, politically intent on the negro and with nothing else in mind, worked out the Fourteenth Amendment * * * which was over five years old before the Slaughter House cases opened before a very able court the still continuing conflict between private desire and public authority."

And again on page 315:

> "The highest court and most high courts * * * of late years have more and more made due process of law whatever process seems due to the demands of the times, as understood by the judges of the time being. The direct appeal of property to due process has, for the most part, failed * * *. The indirect appeal through liberty is still going on."

Judge Chesnut's decision that appropriations by the City for support of the Library do not take Plaintiff's property without due process of law, should be affirmed.

Respectfully submitted,

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