

The Bear Creek Fertilizer  
Company of Baltimore City

vs.

The Mayor and City Council  
of Baltimore et al.

Court of Appeals

OF

Maryland.

October Term, 1897

The Appeal in this case standing ready for hearing, was argued by Counsel for the respective parties, and the proceedings have since been considered by the Court.

It is thereupon, this fifth day of January A.D. 1898, by the Court of Appeals of Maryland, and by the authority thereof, adjudged, ordered and decreed that the decree of the Circuit Court of Baltimore City made in this cause on the fifth day of October in the year 1897 be and the same is hereby reversed with costs above and below and the cause remanded to the end that further proceedings may be had in conformity with the opinion of this Court.

To Henry C. J.  
Bryan  
Fowler  
Briscoe  
Page  
Boyd

Wm. Shepard Bryan

D. And Fowler

John P. Briscoe

Henry Page

A. Kent Boyd

Court of Appeals  
of  
Maryland  
October Term 1898

The Board of Trustees  
of the City of Baltimore  
vs  
The Mayor and City Council  
of Baltimore et al

Filed January 5, 1898

No. 98.  
The Board of Trustees  
of the City of Baltimore  
City  
vs  
The Mayor and City  
Council of Baltimore

Decree

Wm. H. H. H. H.

John P. ...

Henry ...

A. H. ...



Bear Creek &c.,

vs.

Baltimore.

-:-

Opinion.

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The Appellant filed a Bill in Equity against the Appellee. The cause was heard on Bill and Answer, and the Bill was dismissed by the Court pro forma. An appeal has been taken to this Court.

The Bear Creek Fertilizer Company had made a contract with the Mayor and City Council of Baltimore for the removal of night soil from the City, which according to its contention, it had the right to renew. The object of the Bill was to procure its renewal. The facts which are material to the decision of the question are all admitted. They will be stated. The Joint Standing Committee of the City Council on Health in March 1890 having considered a communication from the Commissioner of Health, and also a petition asking that an ordinance should be passed providing a place of deposit for night soil, recommended the passage of a resolution which they attached to their report. This resolution authorized and directed the Commissioner of Health to advertise for proposals for the removal of all night soil collected in the City, with a view to awarding the contract to the lowest responsible bidder. Afterwards on May the eleventh the same Committee after a careful review of the whole subject reported an Ordinance embodying a contract, which they believed would prove most advantageous to the City, and would be a great benefit in a sanitary point of view. The ordinance with some unimportant verbal changes was passed

and on May 24th was approved by the Mayor. The first section of the ordinance is as follows: Section 1. Be it enacted and ordained by the Mayor and City Council of Baltimore, That the Mayor, Comptroller of the city and Commissioner of Health be, and they are hereby authorized and directed, in the name of the Mayor and City Council of Baltimore, to contract for a term of two years, with the privilege of renewal, with Messrs. R. R. Zell & Co., for the removal of all the night-soil gathered in the city of Baltimore; said night-soil to be transferred to air-tight barges, for removal from the city; the same to be done in an odorless and inoffensive manner, at two designated points within the city; compensation for said removal of night-soil to be collected from the persons dumping the same, at the rate of twenty-five cents per load of not less than one hundred and sixty and not more than two hundred gallons; and the said Messrs. R. R. Zell & Co. shall be compelled to keep at each of the above designated points, air-tight barges, under a penalty of fifty dollars per day for each day of fourteen hours the said R. R. Zell & Co. fail to comply, and shall execute a bond, with approved security, in the penalty of ten thousand dollars, to the Mayor and City Council of Baltimore, for the faithful performance of said contract. By the third section of the ordinance the Mayor, Comptroller and Commissioner of Health were authorized and empowered to rent to Zell & Company three acres of the City's property in Anne Arundel County for the purpose of erecting works to receive and utilize the night soil. The fourth section provided that if this use of the said three acres should be deemed a nuisance and should be so declared by the Commissioner of Health that Zell and Company should remove their works upon thirty days notice from the Mayor, under



a penalty of fifty dollars per day for every day the same should remain after the expiration of the notice. And finally by the fifth section, it was enacted that if the contractors should fail to comply with the specifications of the contract to the satisfaction of the Health Department it should be the duty of the Mayor to revoke the same. Every step in this proceeding shows that the City Council considered the subject with the deliberation and care which its gravity and importance required. It was a matter which vitally concerned the health of a large and populous City. Neglect in this respect might and properly would cause contagious disease of the most malignant character. To use the words of the Committee on Health they desired to make a contract which should be most advantageous to the City, and of great benefit in a sanitary point of view. The contract was made by the corporation itself, and not entrusted to the judgment and discretion of any public officer. Certain public officers were designated, whose duty it was to formulate the document containing the terms of the contract; but its terms and conditions and the individuals with whom the contract was made were all specified in the Ordinance. The ordinance having provided for a contract which was considered advantageous and beneficial, it was determined that it should remain under the control of the corporate body, and suitable means were adapted to protect its interest. The contractors were required to give bond with approved security; if the works which they should erect on the land rented from the City should become a nuisance they were required under a heavy penalty to remove them on short notice; and in case they should not perform their contract satisfactorily it was to be revoked. Super-added to all these precautions stipulated in the ordinance, there

was the inalienable power of the Corporation to abrogate the whole system of night-soil removal, when in its judgment the public health would be protected in a better manner in some other way. In the Lake Roland case, 77 Maryland 381 the police power which embraces the protection of the public health was said to be a high conservative power of the utmost importance to the existence of good government. And it was declared that its exercise could not be limited by contract or any other way; and reference was made to well-known and very remarkable cases in the Supreme Court of the United States. It is unnecessary for us at this time to mention the circumstances stated in the Lake Roland case which would make a ~~Mun~~ Municipal Corporation liable in damages. The Corporation having thus guarded the public interests, and its own rights under the contract, had no reason to desire a change of contractors, so long as the work should be done in a satisfactory manner. Those with whom they were dealing were required to provide an outfit which would involve large expense; and they were authorized to rent from the City real estate for the erection of valuable works. The preparations and expenditures were such as would not have been made for a contract of transient duration. There was certainly on both sides an expectation of a continuance of the relations between the contracting parties, unless future events should make a change desirable.

The contract for the removal of night soil was duly made with Zell & Co.; and they commenced the performance of it. But they failed in business, and the contract was sold by public auction to Wetzler & Co. and by them sold and assigned to the Appellant. From time to time the said contract has been renewed with the Appellant



by successive Mayors, Comptrollers and Commissioners of Health who in every instance described themselves as representing the Corporation and sealed with the corporate seal of the City of Baltimore the written instrument by which the contract was made. The contracts from 1883 to 1895, both years inclusive, are in the same form as the one which appears in the record, and these contracts have been faithfully performed by the Appellant. The ordinance under which these contracts were made is still in force. It has been embodied in the codifications of the ordinances made under the authority and with the approval of the Mayor and City Council of Baltimore. In the year 1885 the Appellant presented a petition to the Mayor and City Council of Baltimore in which it set forth that Zell & Co had removed a quantity of night soil amounting to more than thirteen thousand loads for which they were entitled to receive from the nightmen twenty five cents a load according to the terms of the ordinance; that the night men before this work was done informed Zell & Co that they would not pay for it and thereupon Zell & Co had a consultation with the Mayor, Comptroller and Health Commissioner, and they urged upon Zell & Co the necessity of the prompt removal of the night soil for the preservation of the health of the City, and ordered them to continue the removal without interruption and said that they would see that payment should be made to Zell & Co for doing so. The petition further stated that the rights and claims of Zell & Co under the contract and their claim for the amount due for the removal of these thirteen thousand loads of night soil had for valuable consideration been assigned to the Appellant. The prayer of the petition was that the Appellant be paid twenty-five cents a load for the removal of the night soil, that

being the sum stipulated in the ordinance and amounting to more than three thousand dollars. A resolution was passed by the City Council, and approved by the Mayor directing <sup>the</sup> ~~in~~ payment, and it was duly paid to the Appellant. So we see that after the assignment to the Appellant of Zell & Co's rights, the contract of 1883 was made with the Appellant, and in 1885 this contract being brought before the City Council by the Appellants petition it was recognized and approved by the corporate body under all the forms of legislation; a resolution being passed by both branches of the City Council and approved by the Mayor which ordered that more than three thousand dollars should be paid to the Appellant under the contract. This <sup>+</sup> ~~contact~~ contained a statement of the assignment from Zell & Co to the Appellant, and an assent to the assignment by the Mayor, the Comptroller and the Commissioner of Health representing the corporation, and the further statement that the Appellant had in every respect carried out and fulfilled the contract, And it also stated that the Appellant had requested the execution of the contract, with privilege of renewal, and that the Mayor, Comptroller and Commissioner of Health in the name of the Mayor and City Council of Baltimore had assented to said renewal. It was under the corporate seal of the City of Baltimore. The contracts from 1883 to 1885 with the Appellant contained the same statement, and are all under the corporate seal. It appears then that the corporation made a contract with the Appellant which was regarded as most advantageous to it, and a great sanitary benefit; that it was made with great care and circumspection, and after much deliberation; that the Appellant has in every respect fulfilled its part of the contract; that the corporation has regularly and uniformly renewed



it from time to time; that in its last renewal in 1895 (as in all the previous renewals) it was agreed that the Appellant should have the privilege of renewal. From all these circumstances we must see that the Corporation has manifested its assent to a continuance of it from time to time, until it should see fit to change its purpose by some corporate act. This corporate act must be done in its legislative capacity, In our opinion the Appellant is entitled to a renewal of the contract in the accustomed form; and it must be executed by the Mayor, the Comptroller and the Commissioner of Health in the name of the Mayor and City Council of Baltimore.

The pro forma decree must be reversed, and the cause remanded, in order that a decree may be passed in accordance with this opinion.

Decree reversed and cause remanded, with costs above and below.

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Remanded

No. 98

Dear Creek &c

<sup>vs</sup>  
Baltinase

M. Ryan & Co  
P & Co

Opinion by  
Ryan J

To be reported

Filed January 5<sup>th</sup> 1898