Record. No.

The Bear Creek Fertilizer Company of Baltimore City

vs.

The Mayor and City Council of Baltimore et al.

IN THE

COURT OF APPEALS

OF MARYLAND.

Appeal from the Circuit Court of Baltimore City.

ROBERT H. SMITH,
RICH & BRYAN,
for Appellant.

THO. IRELAND ELLIOTT,
for Appellees.

FILED OCTOBER 7th, 1897.

Appeal from the Circuit Court of Baltimore City:

Bill of Complaint and for Injunction.

(Filed 4th October, 1897).

THE BEAR CREEK FERTILIZING CO. OF BALTIMORE CITY, a Corporation, *Plaintiff*, *vs.* THE MAYOR AND CITY COUNCIL OF BALTIMORE, ALCAEUS HOOPER, Mayor of Baltimore; CHARLES D. FENHAGEN, Comptroller, and JAMES F. MCSHANE, Commissioner of Health.	In the Circuit Court of Baltimore City.

To the Honorable Judge of said Court:

The bill of complaint of the Bear Creek Fertilizing Company respectfully shows to your Honor:

I. That your orator is a body politic and corporate, duly incorporated.

II. That as the Journal of the First Branch of the City Council of Baltimore of March 9th, 1880, shows "that Mr. Atkinson, from the Joint Standing Committee on Health, submitted the following report and accompanying resolution, which was read:

"The Joint Standing Committee on Health, to whom was referred a communication from the Commissioner of Health in regard to the removal of night-soil, together with a 'petition of persons engaged in its removal by odorless process, asking the passage of an ordinance providing a place of deposit, respectfully report that they have given the subject due attention. The committee are of the opinion that to obviate the difficulty the Health Commissioner should be authorized to advertise for proposals for the removal from the city of all the night-soil collected.

They therefore ask the adoption of the annexed resolution.

SAMUEL E. ATKINSON,
THOMAS H. HAMILTON,
JOSHUA HORNER, JR.,
First Branch.

J. PEMBROKE THOM,
Second Branch.

Resolved by the Mayor and City Council of Baltimore, That the Commissioner of Health be and he is hereby authorized and directed to advertise for proposals for the removal of all night-soil collected in the city, such proposals to be submitted for the action of the City Council, with a view to awarding the contract to the lowest responsible bidder."

On motion of Mr. Atkinson the resolution was read a second time, by special order, and adopted.

(See First Branch Journal of the City Council for 1880, p. 364).

This resolution was approved by Mayor Latrobe March 31, 1880, and became Resolution No. 87, to be found in the ordinances and resolutions of 1879–1880.

On May 11th of the same year Mr. Atkinson, from the Joint Standing Committee on Health, submitted the following report and accompanying ordinance, which were read:

"The Joint Standing Committee on Health, to whom was referred the matter of the removal of night-soil from the city, respectfully report that they have received and examined the bids authorized to be made by the Mayor and City Council, and after a careful review of the whole subject, recommend that the contract be awarded as provided in the annexed ordinance, the committee believing that such a contract will prove most advantageous to the city, and will be a great benefit in a sanitary point of view.

They therefore recommend the passage of the ordinance.

SAML. E. ATKINSON,
JOSHUA HORNER, JR.,
First Branch.

J. PEMBROKE THOM,
J. FRANK LEWIS,
JAMES H. IVES,
Second Branch.

(See Journal First Branch City Council, 1880, p. 844).

Then followed in the Journal the proposed ordinance. There were several immaterial verbal amendments made by the First Branch of the City Council in the ordinance proposed; and it then duly passed both branches of the City Council, and was approved by the Mayor on May 24th, 1880, and became Ordinance No. 121 of that date. That ordinance reads 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 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.

SEC. 2. *And be it further enacted and ordained*, That it shall be the duty of all persons engaged in the business of gathering night-soil in the city of Baltimore, to convey the same to one or the other of the dumping places provided by the contractors under the provisions of this ordinance, under a penalty of twenty dollars per load for every load of night-soil gathered and not so delivered; said penalty to be collected as other fines and penalties are collected.

SEC. 3. *And be it further enacted and ordained*, That the Mayor, Comptroller of the city and Commissioner of Health be, and they are hereby authorized and empowered to rent to the said R. R. Zell & Co. for the purpose of erecting works to receive and utilize the night-soil removed from the city, three acres of that portion of the city's property, in Anne Arundel County, known as the sea-wall property; said three acres to be about one-half mile below the Marine Hospital, and to have a frontage on the sea-wall of two hundred feet.

SEC. 4. *And be it further enacted and ordained*, That if the dumping and utilization of the night-soil at the sea-wall should be deemed a nuisance, and be so declared by the Commissioner of Health, then it shall be the duty of said contractors to remove their works, upon thirty days' notice from the Mayor, under a penalty of fifty dollars per day for every day the same shall remain after the expiration of such notice.

SEC. 5. *And be it further enacted and ordained*, That in case of the failure of said contractor to comply with the specifications of said contract, and to the satisfaction of the Health Department, then it shall be the duty of the Mayor to revoke the same.

SEC. 6. *And be it further enacted and ordained*, That all ordinances or parts of ordinances inconsistent with the provisions of this ordinance be, and the same are hereby repealed.

SEC. 7. *And be it further enacted and ordained*, That this ordinance shall take effect from the date of its passage.

III. And your orator further shows to your Honor that in accordance with said ordinance, said Mayor, Comptroller and Commissioner of Health, did contract with the said R. R. Zell & Co., in said ordinance mentioned, for the removal of all the night-soil gathered in the city of Baltimore, and said Zell & Co. started to perform said contract and remove said night-soil, but said Zell & Co. having failed in business, said contract was sold at public auction to S. A. Wetzler & Co., and was by said Wetzler & Co. sold and assigned to your orator.

IV. That from time to time the said contract has been renewed by the successive Mayors, Comptrollers and Commission-

ers of Health on the part of the city with your orator. That many of the earlier papers, including the original contract with Zell & Co. and the original assignment thereof to Wetzler & Co., have been mislaid and lost, and therefore cannot be filed herewith; but that the contracts for renewal executed respectively in 1883, 1885, 1887, 1889, 1891, 1893 and 1895 are in the possession of your orator and are herewith filed annexed to each other, marked "Plaintiff's Exhibit No. 1," and are prayed to be taken as a part hereof.

V. And your orator further shows unto your Honor that since first undertaking to remove said night-soil it has complied with its contract in every particular and respect, and has given satisfaction to the Health Department of the city of Baltimore, and that for the purpose of fitting itself to perform the duties required of it by said contract, it has, at an expenditure of over $80,000, procured one tug, 6 scows, 720 acres of land and the control of forty or more night-soil pits, situated in various portions of the Twelfth District of Baltimore County. That all of this expensive plant is almost, if not entirely, valueless for any other purpose than the handling and transportation of night-soil.

VI. And your orator further shows unto your Honor, that an ordinance, entitled "An ordinance providing for the preparation, printing and publication of a supplement to the Baltimore City Code of 1879," was duly passed through the City Council and approved by the Mayor on March 24th, 1885, said ordinance reading as follows:

SECTION 1. *Be it enacted and ordained by the Mayor and City Council of Baltimore*, That the Mayor be and he is hereby authorized to employ a competent member of the Baltimore bar to prepare a supplement to the Baltimore City Code, embracing the codification of the Acts of Assembly of 1880, 1882 and 1884, relating to the city of Baltimore, and of the ordinances of the Mayor and City Council, approved since the adoption of the City Code of 1879, including the present session of the City Council.

SEC. 2. *And be it further enacted and ordained*, That five hundred copies of said supplement shall be printed and bound by the city printer, under the direction of the person so employed by the Mayor, as authorized in the preceding section, and that for the payment of the whole work the sum of thirty-six hundred and fifty dollars be and the same is hereby appropriated, to be provided for in the levy of 1885; said payment to be made by warrant drawn by the Mayor upon the Comptroller in favor of the city printer, so soon as the said supplement shall be delivered to and accepted and approved by the Mayor.

SEC. 3. *And be it enacted and ordained*, That said supplement shall be completed and submitted to the Mayor within thirty days after the final adjournment of the present City Council.

Approved March 24, 1885.

Under said ordinance, the then Mayor, the Hon. F. C. Latrobe, appointed John P. Poe, Esq., of the Baltimore bar, to prepare the said supplement, and on October 23rd, 1885, the said Mayor

Latrobe signed and published the following certificate at the foot of the said Ordinance No. 20, of 1885:

MAYOR'S OFFICE, CITY HALL.

Baltimore, October 23, 1885.

In pursuance of the authority conferred upon me by the terms of the foregoing ordinance, I appointed and commissioned John Prentiss Poe, Esq., of the Baltimore bar, to prepare the supplement to the Baltimore City Code, and hereby certify my approval of the work as prepared by him and submitted to me.

FERDINAND C. LATROBE,
Mayor.

In the supplement to said City Code, page 142, Art. 23, sections 88 A., 88 B., 88 C., 88 D. and 88 E., the above-mentioned Ordinance No. 121, of May 24th, 1880, is set forth as one of the subsisting ordinances of the city.

VII. Before the City Council of 1885 your orator presented a petition in the following words:

To the Honorable, the Mayor and City Council of Baltimore:

The petition of the Bear Creek Fertilizing Company of Baltimore City, a body corporate, duly incorporated, respectfully shows:

That on or about June 19th, 1880, the Mayor, Comptroller and Health Commissioner, in order to carry out the provisions of Ordinance No. 121, entered into a contract with certain persons doing business under the firm name of R. R. Zell & Co. for the removal of the night-soil of the city.

That by the terms of said contract it was provided, as in said ordinance directed, that the said R. R. Zell & Co. should receive the sum of 25¢ for each load of night-soil that they should remove, and that said sum should be paid by the night men delivering the same to be removed.

That the said R. R. Zell & Co. removed a large amount of said night-soil strictly in compliance with the provisions of said contract, and they were regularly paid 25¢ per load for so doing until about the first of August, 1880, when the said night men refused to pay therefor any longer, basing their refusal upon a decision of one of the Courts of this city.

That immediately upon such refusal to pay for removing the said night-soil, the said R. R. Zell & Co. went to see the Mayor, Comptroller and Health Commissioner in regard thereto and had a full consultation with those gentlemen, who, urging upon the said R. R. Zell & Co. the necessity of the prompt removal of said night-soil for the preservation of the health of the city, ordered them to continue to remove the said night-soil without any interruption and that they would see that the payment for so doing was made to the said R. R. Zell & Co.

That thereupon the said R. R. Zell & Co., acting upon the directions and express orders of the Mayor, Comptroller and Health Commissioner, and solely upon their credit, proceeded to remove said night-soil regularly in the manner required by the said con-

tract, and they did actually remove 13,248½ loads thereof without receiving any compensation therefor, all of which will appear by a reference to the certificate from the Health Commissioner's office hereto annexed.

That on or about November 30th, 1881, the said R. R. Zell & Co. assigned, for a valuable consideration, all their rights and claims under the aforesaid contract to your petitioner, and that by express reference the claim for the amount due for the removal of the 13,248½ loads of night soil above mentioned, was included in the said assignment.

That neither your petitioner nor the said R. R. Zell & Co. or any of them, have ever been paid anything whatever for the removal of the said 13,248½ loads of night-soil, although they have frequently demanded the same.

That as the city received the benefit of the expense and labor of the said R. R. Zell & Co. in removing said night-soil, and as the same was done by the direct order of the Health Commissioner of this city, your petitioners are advised that according to the right and equity of the matter, and the law of the land, they are justly entitled to be paid therefore.

They therefore beg that this Honorable Body will take such action in the premises as will secure the prompt payment of the amount to which they are entitled.

All of which is respectfully submitted.

The above copy of the petition is taken from the paper now to be found in Bundle 16 of the bundle of petitions Council papers 1885, in the custody of the City Librarian.

Having this petition before them, the Joint Standing Committee on Claims of the City Council reported to the Council as follows:

"The Joint Standing Committee on Claims, to whom was referred the petition of the Bear Creek Fertilizing Company of Baltimore City, asking to be paid the sum of three thousand three hundred and twelve dollars and thirteen cents ($3,312.13), amount due for the removal of the night-soil collected in the city of Baltimore during the year 1880, *have* given the matter their careful consideration, respectfully submit a favorable report thereon, and ask the adoption of the following resolution:

E. H. Fowler,
Thos. W. Terry,
Eldridge Peckham, Jr.,
First Branch.

McHenry Howard,
James McClellan,
Edwin Higgins,
Second Branch.

Resolved, by the Mayor and City Council of Baltimore, That the Comptroller of the city be and he is hereby authorized and directed to draw his warrant on the City Register in favor of the Bear Creek Fertilizing Company of Baltimore City for the sum of three thousand three hundred and twelve dollars and thirteen

cents ($3,312.13), being the amount due for the removal of 13,248½ loads of night-soil collected in the city of Baltimore during the year 1880, at 25 cents per load, as per agreement made by the Mayor, Comptroller and Health Commissioner, said sum to be provided for in the levy for 1885."

This resolution was duly passed and approved by the Mayor on March 13th, 1885, and became Resolution No. 60 of the Resolutions of 1885. The sum of $3,312.13 appropriated in said resolution was duly paid to your orator.

Your orator is advised and therefore charges that the effect of the passage of the resolution and the payment of the money thereunder was a clear legislative recognition by the entire government of the municipality of the validity of the transfer to the Bear Creek Fertilizing Co. of Zell's contract, and of the rights under that contract.

VIII. And your orator further shows to your Honor that an ordinance entitled "An ordinance to adopt and legalize the new City Code, prepared by John Prentiss Poe," was duly passed through the City Council and approved by the Mayor on October 14th, 1893, said ordinance reading as follows:

SECTION 1. *Be it enacted and ordained by the Mayor and City Council of Baltimore*, That the new City Code, prepared by John Prentiss Poe, containing the Public Local Laws of the State of Maryland, relating to the city of Baltimore, and the General Ordinances of the Mayor and City Council of Baltimore in force on the first day of October, 1893, be and the same is hereby approved and adopted.

SEC. 2. *And be it further enacted and ordained*, That the adoption of the said Code shall not effect any act done or any right accruing or accrued, established or vested, or any suit or proceeding had or commenced in any case before such adoption, nor any offence committed, nor any penalty or forfeiture incurred, nor any suit or prosecution pending at the time of such adoption for any offence committed, or for the recovery of any penalty or forfeiture incurred prior thereto. In the City Code of 1893, referred to in said ordinance in Article 23, sections 116, 117, 118, 119, 120 the provisions of the Ordinance 121 of May 24th, 1880, are again set forth as existing ordinances and laws of the city of Baltimore.

IX. And your orator further shows unto your Honor that there has been no other or further ordinance enacted or ordained by the Mayor and City Council of Baltimore since the adoption of the Baltimore City Code of 1893, on the subject of the removal of night-soil.

X. And your orator being advised that it was entitled under the contract subsisting between it and the Municipal Corporation of Baltimore to have its said contract renewed at its election for the period of two years accounting from the second day of September, 1897, notified the Honorable Alcaeus Hooper, Mayor of Baltimore, that it desired to renew said contract for the said period of two years, accounting from the second day of September, 1897, and requested and demanded that he and the Comptroller and Commissioner of Health execute said renewal

contract. And the Hon. Alcaeus Hooper informed your orator's representative that he would not execute said contract and that he denied the right of your orator to have said contract renewed, he alleging that in his opinion, under the proper construction of the ordinances on the subject, it was not lawful and proper for him or for the Comptroller or the Commissioner of Health to enter into a new contract with your orator in the terms of the former contract.

XI. And your orator is informed that it has requested the Comptroller or the Commissioner of Health to execute said contract of renewal.

XII. And your orator has tendered itself to the Mayor, the Health Commissioner and the Comptroller, ready to execute the contract of renewal and the bond, in the penalty of ten thousand dollars, with security to be approved by the Mayor, and conditioned according to the terms of the ordinance, and to faithfully carry out the provisions of said ordinance and contract for the period of two years, accounting from the second day of September, 1897, and has been denied the right to do so.

To the end, therefore:

That an injunction may issue restraining and prohibiting the Mayor and City Council of Baltimore, the Honorable Alcaeus Hooper, Mayor of Baltimore; Charles D. Fenhagen, City Comptroller of Baltimore, and James F. McShane, Commissioner of Health of Baltimore, and each of them, and their agents, servants and employees, from interfering with the plaintiff in the removing of night-soil from the city in any manner, or for any cause other than those prescribed in the contract of September 2nd, 1895, heretofore filed as a part of Plaintiff's Exhibit No. 1, in the Ordinance 121 of May 24th, 1880 (now codified as Sections 116, 117, 118, 119, 120); and that a mandatory injunction may issue commanding and requiring Alcaeus Hooper, Mayor of Baltimore; Charles D. Fenhagen, City Comptroller, and James F. McShane, Commissioner of Health, to execute and deliver a contract with the Bear Creek Fertilizing Company, in the form set forth in Plaintiff's Exhibit No. 1, for the term of two years, accounting from the second day of September, 1897, upon said contract being tendered to said Mayor, Comptroller and Commissioner of Health, by the Bear Creek Fertilizing Company; and that your orator may have such other and further relief as justice and its case may require.

May it please your Honor to grant unto your orator the writ of *of* subpœna against the Mayor and City Council of Baltimore, Alcaeus Hooper, Mayor of Baltimore; Charles D. Fenhagen, City Comptroller, and James F. McShane, Commissioner of Health, commanding them and each of them to be and appear in this Honorable Court on some day to be named therein, and to abide by and perform such decree as may be passed in the premises.

And as in duty, &c.

ROBT. H. SMITH,
RICH & BRYAN,
Solrs. for Pltff.

Plaintiff's Exhibit No. 1.

(Filed with the Bill 4th October, 1897).

This contract and agreement, made this second day of September, A. D. 1895, by and between the Bear Creek Fertilizing Co. of Baltimore City, in the State of Maryland, a body corporate, duly incorporated, of the first part, and Ferdinand C. Latrobe, Mayor; James R. Horner, Comptroller, and James F. McShane, Commissioner, in the name and representing the Mayor and City Council of Baltimore City, of the second part:

Witnesseth, whereas by an ordinance approved May 24th, 1880, the said Mayor, Comptroller and Commissioner were 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 night-soil gathered in the city of Baltimore.

And whereas, in accordance with said ordinance, said Mayor, Comptroller and Commissioner did contract with said R. R. Zell & Co. for the removal of all the night-soil gathered in the city of Baltimore, but said R. R. Zell & Co. having soon thereafter failed in business, said contract was sold at public auction to S. A. Wetzler & Co., and by said S. A. Wetzler & Co. sold, assigned and transferred to the Bear Creek Fertilizing Co.

And whereas, the said parties of the second part assented to said sale and transfer, and the said party of the first part has in every respect carried out and fulfilled the terms of said contract.

And whereas, said party of the first part has requested the execution of these presents as evidence of said contract for a term of two years, accounting from September first, A. D. 1895, with privilege of renewal, and the said parties of the second part, in the name of the Mayor and City Council of Baltimore, have assented to said renewal by executing these presents.

Now, therefore, in consideration of the premises and of the acceptance of the bid of said The Bear Creek Fertilizing Co. by said Mayor, Comptroller and Health Commissioner, the said party of the first part does hereby contract and agree with the Mayor and City Council of Baltimore to remove in an odorless manner from two points hereinafter designated, all the night-soil delivered to it by the privy excavators of the city of Baltimore, and it does bind itself under a bond in the penalty of ten thousand dollars to comply with the following conditions, to-wit:

It, The Bear Creek Fertilizing Co., shall keep two enclosed buildings, one to be situated at Winan's Cove and the other at Foley's Wharf, adjoining the Lazaretto; it shall at all times, between the hours of six o'clock, A. M., and eight o'clock, P. M., Sundays and holidays excepted, keep at the said dumping stations a barge to receive the night-soil; as compensation for the services to be rendered by said The Bear Creek Fertilizing Co., it shall be entitled to charge for each and every load of night-soil of not less than one hundred sixty gallons, and not more than two hundred gallons, the sum of twenty-five cents, and no more, for each and every load; said twenty-five cents per load to be paid by the person or persons or corporation dumping at said stations into said barges; the said barges, when

loaded, are to be towed away at least once in every twenty-four hours after being loaded and their places supplied by empty barges ready to receive the night-soil as it is delivered.

It, the said The Bear Creek Fertilizing Co., does hereby further agree to transfer in the above mentioned manner all the night-soil that may delivered at the above designated stations.

In witness whereof, M. W. Adams, secretary and treasurer of the Bear Creek Fertilizing Co., has hereto subscribed his name and affixed the seal of said body corporate, and the said Mayor, Comptroller and Health Commissioner have hereto subscribed their names.

Test:

HARRY L. WALKER.

M. W. ADAMS,
Secretary and Treasurer of the Bear Creek Fertilizing Company.

Seal of the Bear Creek Fertilizing Company.

Seal of the Mayor and City Council of Baltimore.

FERDINAND C. LATROBE,
Mayor.
JAMES R. HORNER,
Comptroller.
JAMES F. McSHANE,
Com. of Health.

Answer of Defendants.

(Filed 4th October, 1897).

THE BEAR CREEK FERTILIZING COMPANY OF BALTIMORE CITY, a Corporation, *Plaintiff*,

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, ALCAEUS HOOPER, Mayor of Baltimore; CHARLES D. FENHAGEN, Comptroller, and JAMES F. McSHANE, Commissioner of Health.

In the Circuit Court of Baltimore City.

To the Honorable, the Judge of said Court:

The answer of the Mayor and City Council of Baltimore, Alcaeus Hooper, Mayor of Baltimore, Charles D. Fenhagen, Comptroller; James F. McShane, Commissioner of Health, to the bill of complaint filed against them in this Court in the above entitled cause respectfully shows:

I. That these respondents admit the matters and facts recited in the first, second, third and fourth paragraphs of said bill; and also that the Plaintiff's Exhibit No. 1 filed with said bill is a correct copy of the various contracts recited in the fourth paragraph.

II. That these respondents believe that the various contracts entered into by and between the Mayor and City Council of Baltimore and said Bear Creek Fertilizing Company have been faithfully performed by said company, but they know nothing of the facilities of the plant owned or operated by said Bear Creek Fertilizing Company, and they respectfully represent to this Court that such matters and facts have nothing whatever to do with the question herein involved, because said question relates altogether to the validity of such contract and not to either the manner or the means of their performance.

III. That these respondents admit that the ordinance referred to in the sixth paragraph of said bill is therein correctly recited, and they also admit as correctly stated the certificate dated October twenty-third, eighteen hundred and eighty-five, and executed by Ferdinand C. Latrobe, Mayor.

IV. That these respondents admit the presentation of the petition set out in the seventh paragraph of said bill, and the report of the committee thereon made, as well as the passage of the resolution recited in said paragraph; but they do not admit the truth of the statement therein contained, and they particularly deny that the action of the Mayor and City Council of Baltimore alleged to have been taken upon said petition was any recognition of the transfer of any contract to the said Bear Creek Fertilizing Company, and they respectfully suggest to this Court that even though there had been such recognition the fact thereof has nothing to do with a determination of the question involved in the present case, because the question here involved is as to whether or not the said complainant by reason of anything that has heretofore been done is entitled to have enforced a perpetual contract with the Mayor and City Council of Baltimore for the removal of night-soil.

V. That these respondents admit the passage and approval on October fourteenth, eighteen hundred and ninety-three, of Ordinance No. 216; and they admit that in the published volume entitled "Baltimore City Code, 1893," there are recited as sections 116, 117, 118, 119 and 120, of Article 23, the provisions of Ordinance No. 121, approved May 24th, 1880; but they respectfully suggest that they are improperly so published because the authority contained in section one, of Ordinance No. 216, was to publish the general ordinances of the Mayor and City Council of Baltimore, whereas in point of fact said Ordinance No. 121, approved May 24th, 1880, cannot be considered in any sense a general ordinance, it simply authorizes a contract for a limited time and with a particularly named firm of individuals.

VI. That these respondents admit the matters and facts set out in the ninth, tenth, eleventh and twelfth paragraphs of said bill.

VII. That these respondents respectfully represent to this Honorable Court that there is no existing warrant either by virtue of any law of the State of Maryland, or any ordinance of the Mayor and City Council of Baltimore, which would compel, permit or authorize these respondents to execute or recognize any contract with the Bear Creek Fertilizing Company of Baltimore City for the removal of night-soil gathered in Baltimore

City, and the compulsory payment for such removal in accordance with the terms of said Ordinance No. 121, approved May 24th, 1880; and they further suggest that there -- any authority to provide for the removal of such night-soil is dependent entirely upon the power and discretion vested in them as the Board of Health of Baltimore City, the exercise of which authority and discretion they respectfully suggest is beyond the *power of this Court to direct or control.*

VIII. They further respectfully suggest to this Court that the Ordinance No. 121, approved May 24th, 1880, is not now in force and cannot therefore be recognized by this Court as the basis upon which it can rest any injunction or decree against these respondents, and they further pray the Court to dismiss the bill with costs to these respondents.

And as in duty, &c.

THOS. IRELAND ELLIOTT,
Solicitor for Respdts.

Agreement as to Hearing.

(Filed 4th October, 1897).

THE BEAR CREEK FERTILIZER COMPANY OF BALTIMORE CITY
vs.
MAYOR and CITY COUNCIL of BALTIMORE *et al.*
} In the Circuit Court of Baltimore City.

It is agreed in this case that the case be submitted to the Court on bill and answer.

ROBT. H. SMITH,
RICH & BRYAN,
Solicitors for Plaintiff.

THOS. IRELAND ELLIOTT,
Solicitor for Defendants.

Decree Dismissing Bill Pro Forma.

(Filed 4th October, 1897).

THE BEAR CREEK FERTILIZER COMPANY OF BALTIMORE CITY
vs.
MAYOR and CITY COUNCIL of BALTIMORE *et al.*
} In the Circuit Court of Baltimore City.

This case being submitted on bill and answer, it is, the proceedings being read and considered, ordered, adjudged and decreed *pro forma*, this 5th day of October, 1897, that the bill of complaint be and the same is hereby dismissed with costs.

J. UPSHUR DENNIS.

Plaintiff's Order for Appeal.

(Filed 4th October, 1897).

THE BEAR CREEK FERTILIZER COMPANY, &c.,

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*

} In the Circuit Court of Baltimore City.

MR. CLERK:—Enter an appeal from the decree of the Court here dismissing the bill of complaint *pro forma*, to the Court of Appeals of Maryland.

ROBT. H. SMITH,
RICH & BRYAN,
Sols. for Plaintiff.

Agreement as to Record.

(Filed 4th October, 1897).

THE BEAR CREEK FERTILIZER CO.

vs.

MAYOR AND CITY COUNCIL *et al.*

} In the Circuit Court of Baltimore City.

It is agreed that the Clerk in making up the Record shall, in copy--- the Plaintiff's Exhibit No. 1, only copy the contract of the year 1883; the contracts of the years 1885, 1887, 1889, 1891, 1893 and 1895 being in the same words as the contract for the year 1883 except as to dates and signatures.

ROBT. H. SMITH,
RICH & BRYAN,
for Pltff.

THOS. IRELAND ELLIOTT,
for Deft.

Which said appeal being by the Court here read and considered, it is thereupon ordered by our said Court that a transcript of the record and proceedings in the cause aforesaid be transmitted to the Court of Appeals of Maryland as agreed upon, and the same is transmitted accordingly.

Test: ALVIN ROBERTSON,
Clerk.

In testimony that the aforegoing is truly taken from the records and proceedings of the Circuit Court of Baltimore City, in the cause therein entitled,

(Seal's Place). I hereunto subscribe my name and affix the seal of the Circuit Court of Baltimore City aforesaid, this 6th day of October, A. D. 1897.

ALVIN ROBERTSON,
Clerk of the Circuit Court of Baltimore City.

Filed November 30, 1897.

BEAR CREEK FERTILIZING COMPANY OF BALTIMORE

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

IN THE

Court of Appeals

OF MARYLAND.

OCTOBER TERM, 1897.

GENERAL DOCKET No. 98.

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Appeal from the Circuit Court of Baltimore City.

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BRIEF FOR THE APPELLANT.

This suit is brought to determine the appellant's right to have the Mayor, the Comptroller, and the Commissioner of Health of Baltimore, execute a renewal for two years from September 2d, 1897, of the contract under which, and its various renewals, the appellant, the Bear Creek Fertilizing Company, has been for many years past removing the night soil from the city of Baltimore. The appellant made a formal demand upon the city officers for a renewal of the contract, and it was refused. (Record, pages 7, 8, 11.) The contention of the appellant is, that by the proper construction of the contract between it and the city of Baltimore, such

contract was renewable at the option of the appellant. The Mayor denied this. The suit is tried on bill, answer and exhibits.

STATEMENT.

The original contract and the various renewals are identical in form, except as to dates and signatures of the officers. (Record, page 13.) The last renewal is between the Bear Creek Fertilizing Company of Baltimore City, of the first part, "and Ferdinand C. Latrobe, Mayor, James R. Horner, Comptroller, and James F. McShane, Commissioner, in the name and representing the Mayor and City Council of Baltimore City, of the second part," and is dated September 2d, 1895. It recites, that by ordinance approved May 24th, 1880, the said Mayor, Comptroller and Commissioner were 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 night soil in the city of Baltimore; and that a contract in accordance with the ordinance was duly made, but that Zell & Co. having soon thereafter failed in business, said contract was sold *at public auction* to S. A. Wetzler & Co., and by that firm sold, assigned and transferred to the Bear Creek Fertilizing Company; and that the parties of the second part assented to said sale and transfer; and that the party of the first part has "in every respect" carried out and fulfilled the terms of said contract; "and whereas, said party of the first part has requested the execution of these presents as evidence of said contract for a term of two years, accounting from September first, A. D., 1895, *with privilege of renewal*, and the said parties of the second part, in the name of the Mayor and City Council of Baltimore, have assented to said renewal by executing these presents." Then the contract for the removal of the night soil in air-tight barges

from Winan's wharf and Foley's wharf, in the manner and under the conditions prescribed in the Ordinance 121 of 1880, is set out. The contract is executed by the Bear Creek Co., by the signature of its secretary and treasurer, and by affixing the corporate seal, and on behalf of the city, by the signatures of the Mayor, the Comptroller and Commissioner of Health, and by affixing the seal of the Mayor and City Council of Baltimore. (Record, pages 9, 10.)

The sources of the power of the Mayor, the Comptroller and the Commissioner of Health to make this contract are all set forth in the bill of complaint.

Prior to 1880, there seems to have been no regular method prescribed by law for the removal of night soil from Baltimore. The different persons engaged in this necessary and important, but offensive business, seem to have acted without municipal supervision, regulation or control.

In March, 1880, acting on a communication from the Commissioner of Health, and a petition from the persons engaged in the business, the Joint Standing Committee on Health of the City Council favorably reported the passage of a resolution, authorizing and directing the Commissioner of Health to advertise for proposals for the removal of all night soil collected in the city, "such proposals to be submitted for the action of the City Council, with a view to awarding the contract to the lowest responsible bidder." This resolution was duly passed by the Council and approved by the Mayor. (Resolution 87 of 1879–80, Record, pages 1 and 2.)

On May 11th, 1880, after receiving and examining the bids thus authorized to be made, and "after a careful review of the whole subject," the same Joint Standing Committee recommend that the contract be awarded as provided in the ordinance annexed to the report, "believing that such a contract will prove most advantage-

ous to the city, and will be a great benefit in a sanitary point of view."

The "annexed ordinance," after having several immaterial verbal amendments made in it by the First Branch of the City Council, was passed as Ordinance 121, of May 24th, 1880. (Record, pages 2, 3.)

This ordinance, we maintain, is still in force, and is the source of the power of the city officers to make the contract in issue at bar. It authorized and directed the Mayor, the Comptroller and the Commissioner of Health "to contract for a term of two years, *with the privilege of renewal*, with Messrs. R. R. Zell & Co., for the removal of all night soil gathered in the city of Baltimore."

As already stated, in accordance with this ordinance, a contract was made by the three city officers with Zell & Co., and that firm started to perform said contract and remove the night soil, but having failed in business, the contract was sold at public auction to Wetzler & Co., and by Wetzler & Co., in turn, was sold and assigned to the appellant.

Since that time the appellant has claimed the right to perform this contract, and has faithfully done everything which the contract or ordinance required the contractor to do. The appellant has from the beginning claimed that by a proper construction of the contract the privilege or option of renewal belonged to it, and not to the city officers, and every two years the request has been made for the renewal of the contract, and each time, until the request was made of Mayor Hooper, the public officers, (including Mayors Whyte, Latrobe, Hodges and Davidson,) have, by acceding to the request, recognized the lawfulness and propriety of the appellant's claim to have the contract renewed at its option.

The rights of the appellant have not only been recognized by the successive executives of the city for fifteen

years, but by the legislative branch of the City Government as well.

Before Zell & Co. failed, they entered upon their contract and had removed a large amount of night soil, when, in August, 1880, the night soil men temporarily refused to pay the price per load required by the ordinance. At the request of the then Mayor, Comptroller and Commissioner of Health, Zell & Co. continued to remove the night soil, and removed 13,248½ loads of it, without receiving compensation therefor.

Long after Zell's failure in November 1881, the appellant presented its memorial to the City Council of 1885, setting forth the above facts, and also that it was the assignee of Zell & Co., and praying to be paid for the 13,248½ loads of night soil removed by Zell. (Record, pages 5, 6.)

Having this petition before them, the Joint Standing Committee on Claims of the City Council recommended the passage of Resolution No. 60, of 1885, providing for the payment to the Bear Creek Fertilizing Co., of the sum of $3,312.13, "being the amount due for the removal of 13,248½ loads of night soil in the year 1880, at twenty-five cents per load, as per agreement made by the Mayor, Comptroller and Health Commissioner." (Record, page 7.)

This resolution was duly passed and approved by the Mayor, on March 13th, 1885, and the sum appropriated duly paid to the appellant. (Record, page 7.)

As the facts and circumstances of the assignment were here brought pointedly to the attention of the City Council, this action of the City Government was a clear recognition of, and assent to, the assignment to the appellant of Zell's rights under the contract. Upon no other theory could this money have been awarded to the appellant. Whether an assignment of this contract could lawfully be made by the original contractor to the

appellant without the assent of the corporation of the Mayor and City Council of Baltimore is a question which does not arise in this case. If the question did arise, it would seem that the rights of the assignee would be complete without notice to or assent by the City Government or any of its officers.

Horner vs. Wood, 23 New York, 350, 355.
Devlin vs. Mayor, 63 New York, 8.
Taylor vs. Palmer, 31 California, 241.
Ernst vs. Kunkle, 5 Ohio St., 520.
Smith vs. Hubbard, 85 Tennessee, 306.
City of St. Louis vs. Clemens, 42 Missouri, 69.
Arkansas Smelting Co. vs. Belden Co., 127 U. S. 390.

There is no *personal confidence* in a contract to remove night soil; it makes no difference to the public who removes it, so long as the contract is faithfully performed. If the person removing it should fail to do so properly, the city has ample protection in the bond filed, and in the summary power of the Mayor to revoke and annul the contract secured by the fifth section of the ordinance. (Record, page 3.)

Mayors Whyte and Latrobe in making the contracts for renewal with the Bear Creek Co., as assignee of Zell before, 1885, evidently acted upon this view of the law.

But, as we have just seen, the passage of the above Resolution No. 60 of 1885, takes this question out of the case, and makes manifest the assent of the entire municipality, (both the Mayor and the City Council,) to the assignment to the Bear Creek Co., and also its recognition of the validity of such assignment.

A legislative recognition of any right or franchise, when advisedly and clearly made, is equivalent to an original grant of such right or franchise.

Koch vs. North Ave. Ry. Co., 75 Md. 222, 226.
Basshor vs. Dressell, 34 Md. 503, 510, 511.

Morawitz on Private Corporations, sec. 20.
Kanawha Coal Co's. Case, 7 Blatch. 391.
Bow vs. Allentown, 34 New Hampshire, 351.

And in addition to the passage of this resolution in 1885, the entire corporation of the Mayor and City Council of Baltimore has on two other occasions, recognized the existence of this Ordinance 121 of May 24th, 1880, as a subsisting ordinance, still in force and proper to be incorporated among the permanent ordinances of the city.

1. When the supplement to the City Code of 1885 was prepared and promulgated, this Ordinance 121 of May, 1880, was incorporated in it as sections 88 A., 88 B., 88 C., 88 D. and 88 E. of article 23. (See supplement of City Code of 1885, page 142. Record, pages 4, 5.)

2. When the Baltimore City Code of 1893 was adopted, this same Ordinance 121, of May, 1880, was again included as sections 116, 117, 118, 119 and 120 of article 23. (Record, page 7.)

This action of the learned codifier in inserting these ordinances in the new Codes, and of the Mayor and City Council in adopting his work, could only have been upon the ground that the assignment to the Bear Creek Company was valid and effectual, for the firm of Zell & Co. had been defunct since 1881, and the Bear Creek Co. alone had since that time been enjoying the fruits and performing the duties of the contract.

The Meaning of the Contract.

The learned City Solicitor misconceives our position when he states in paragraph IV of his answer, (Record, page 11,) that the claim of the appellant is "to have enforced *a perpetual contract* with the Mayor and City Council of Baltimore for the removal of night soil."

It is perfecly clear, we admit, that such a contract would not be maintainable. The care for the removal of night soil from a great city is clearly one of those duties which, relating to the public health, convenience and comfort, fall within the police power. It is very manifest, therefore, that one City Council neither by ordinance nor in any other way, could barter away the power of a succeeding City Council to deal with the problem in their legislative discretion, as the exigency of the public interests might in their judgment demand. No action which the City Council of 1880 might have taken could prevent the City Council of 1897 from dealing with the matter as in their legislative discretion they fairly thought necessary for the conservation of the public interests.

Lake Roland Elevated Railway vs. Baltimore, 77 Md. 376.

North Balto. Pass. Railway vs. Baltimore, 75 Md. 250.

Rittenhouse vs. Baltimore, 25 Md. 336.

Fertilizing Co. vs. Hyde Park, 97 U. S. 659.

1 Dillon on Municipal Corp., section 97.

And we of course make no such extreme or untenable contention. There is, however, a vast difference between stating that the Bear Creek Co. has a contract to remove all the night soil from the city of Baltimore *forever*, and stating that it has a right at its option to remove such night soil *until the municipality by ordinance sees fit to change the method* of disposing of this matter. It is one thing to deny that the local government, (the Mayor *and* City Council,) in its governmental capacity, can terminate our rights and privileges, and another to deny the power of the Mayor alone, the mere executive, to do so.

Our claim is not to a perpetual right, but to a right to remove the night soil until, in its governmental discretion,

the city government sees fit to change the ordinances dealing with this subject. There is, we submit, nothing unlawful, unreasonable or beyond the power of the City Council of 1880 in such a contract as we assert. Whether we have such a contract of course depends upon the proper construction of the Ordinance 121 of 1880, and the contract made under it.

In construing any paper it is always proper to consider the situation of parties to it at the time of its execution. (Brantly on Contracts, page 182.) Here was a great city trying to devise some proper and healthful scheme for treating offensive matter, which, if not handled properly, would not only create an intolerable nuisance, but might, and probably would, breed pestilence. The Legislative Branch of the City Government itself took charge of the matter, and after advertising for bids, (and considering the bids received under the advertisement,) determined *by ordinance* to make the contract direct with the contractor whose bid apparently commended itself most to the judgment of the City Government.

Can it be supposed that all this elaborate investigation would have been gone through with if it had been the intention of the City Government to make a mere *temporary* disposition of the matter?

It is to be noted that the ordinance itself provided all the requirements of the contract, and that the Mayor, Comptroller and Health Commissioner were given no powers to negotiate the terms of the contract, but were merely authorized to formally execute the instrument setting forth the terms previously decided on by the City Council. This making the contract by the entire City Government, rather than by the Executive Department, was remarkable. Is it not probable that it was because the contract was important, and was to be of *indefinite duration*, that the whole City Government

thought proper to take part in making it, and to vest no power, discretion or responsibility in regard to it in the Executive alone?

That when the ordinance provided for a contract for two years, "with the privilege of renewal," it must have meant a renewal from time to time at the option of the contractor, is shown by the following considerations:

First. To perform this work, (which, at the time, was a new venture, in the nature of an experiment, and therefore of uncertain profit,) it was necessary for the contractor to provide himself with an expensive plant, much of which would necessarily be unfit for other uses; the bill states that the appellant, at an expenditure of over $80,000, has procured one tug, six scows, 720 acres of land, and the control of forty or more night soil pits situated in various portions of the twelfth district of Baltimore county. (Record, page 4.) No contractor in his sane senses would risk this outlay, if he only had the contract secured to him for the short space of two years, and if, after that short period, the contingencies that surround public contracts might take the contract away from him and render his entire plant valueless. This contract is one which no one would undertake as a business proposition unless some fair assurance of permanence were guaranteed him, and of course the ordinance and contract are to receive a reasonable common-sense construction.

Second. If the privilege of renewal did not belong to the contractor, it must have belonged to the Mayor, the Comptroller and the Commissioner of Health, for otherwise the provision would be meaningless. There would be no sense in stating in a contract that it should be renewed, if *both* parties agreed to it. That would follow without any stipulation.

But it is not reasonable to suppose that the City Council intended this opinion was to be entrusted to

the discretion of these three officials when they were allowed absolutely no discretion in making the original contract.

Third. The ordinance and contract has, as already stated, received the construction we contend for from every Mayor and Comptroller and Health Commissioner, from the date of its inception down to the application to Mayor Hooper. If there was any original difficulty about the proper interpretation of the ordinance and contract, this long, uniform and consistent contemporaneous construction put upon the ordinance by all the public officers called on to construe it, would be entitled to, and would receive, very great weight, and would solve the difficulty in favor of the contention of the appellant.

Doll vs. Ins. Co., 35 Md. 107.
District of Columbia vs. Gallagher, 124 U. S. 505, 510.
Insurance Co. vs. Dutcher, 95 U. S. 273.
Nicherson vs. R. R., 17 Fed. Rep. 408, 410.
Willerts vs. Ins. Co., 81 Indiana, 300.

In the case of Nicherson vs. R. R., *ubi supra*, Judge McCrary, speaking for himself and the district judge, said: "If we were in doubt as to either of the questions raised by the demurrer, the fact that the parties themselves who made the contract at once adopted the construction above suggested, and have for many years acquiesced in and acted upon it, would lead us, without hesitation, to resolve our doubts against the claims of the complainants. * * * It is not necessary to determine whether such action, continued for so long a period, is an absolute estoppel, which deprives them of the privilege of now being heard to assert that this construction is erroneous. It is enough to say that the construction which the parties themselves placed upon their own contract, and upon which they have so long acted, is the one which the Court ought to adopt."

And in *Ins. Co. vs. Dutcher*, 95 U. S. 273, Mr. *Justice Swayne*, speaking for the Court, said: "The practical interpretation of an agreement by a party to it, is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. * * * In considering the question before us it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case."

And apart from all authority, it is difficult to believe that Mayors Whyte, Latrobe, Hodges and Davidson, none of them knew what their duties were, especially when we remember that they had as their legal advisers, among others, Messrs. Bernard Carter, Albert Ritchie, John P. Poe, Thomas W. Hall, Robert Gilmor and William A. Hammond. It is scarcely credible that, if the Bear Creek Company was not entitled to enjoy this contract until the City Council saw fit to legislate further on the subject, some one of these able lawyers would not have discovered it. *"There were other brave men before Agamemnon."*

Fourth. If Ordinance 121 of 1880 is not a subsisting ordinance, and the rights of the contractor under it are not subsisting rights, it is impossible to understand why it was re-enacted in the Code of 1893; and it will not do to say, as is suggested in the answer, that this was done inadvertently. Even if this were so, the ordinance having been re-enacted in the Code, would still be law.

U. S. vs. Hammond, 2 Woods, (U. S.) 203.
Trustees vs. McKinstry, 75 Md. 188.

But that the ordinance was re-enacted, not by an inadvertance, but advisedly, is manifest, when we remember that in 1885, it was also codified in the Supplement of 1885 to the City Code of 1879.

There has been no other ordinance on the subject of night soil enacted or ordained by the Mayor and City Council of Baltimore since the adoption of the City Code of 1893, and it is difficult to believe that unless this Ordinance 121 of 1880, codified as sections 116, 117, 118 and 120 of article 23 of the City Code of 1893, was intended by the City Council to regulate this subject, there should not have been some further legislation. This is an additional reason for believing that the City Government (as distinguished from the Executive) believed and intended this ordinance to be still in force.

Fifth. So far as the city is concerned, the construction of the ordinance and contract contended for is most reasonable and fair.

This offensive matter is being removed from the city without one cent of cost to the taxpayers, and at the reasonable and easily borne charge of twenty-five cents per load, of from 160 to 200 gallons, to the night soil men. It can well be understood how the City Government would have thought it was a proper thing to make so advantageous a contract to the public, one of indefinite duration, and thus eliminate from political manipulation a delicate matter, which, if it should fall into the control of incompetent parties, *might* seriously affect the public health, as it *would certainly* seriously affect the public comfort.

And when it is remembered that the whole matter in any event remains in the governmental control, not of the Mayor alone, but of the Mayor and City Council together; that under the police power, the city, whenever it desires to change the method of removing night soil, can repeal this ordinance and terminate our contract, it becomes apparent that there is no supposed ground of public policy to justify any artificial construction of the ordinance to defeat our rights.

The City Government cannot be supposed to have desired to hold any contractor indefinitely to what might be a disadvantageous or losing contract. All that it could with propriety have asked was that it should not be itself indefinitely held to a contract which might be disadvantageous to the taxpayers or the citizens at large. This is secured it by its governmental control of the whole subject. There is no reason for supposing that "the privilege of renewal" was ever intended to secure the option of renewing the contract to the city, and there is every reason for supposing that it was intended to secure that option to the contractor.

It is respectfully submitted that the *pro forma* decree should be reversed, and relief granted as prayed.

ROBERT H. SMITH,
EDWARD N. RICH,
WILLIAM S. BRYAN, JR.,
For Appellant.

Filed December 4, 1897.

BEAR CREEK FERTILIZING COMPANY OF BALTIMORE

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

IN THE

Court of Appeals

OF MARYLAND.

OCTOBER TERM, 1897.

GENERAL DOCKET No. 98.

Appeal from the Circuit Court of Baltimore City.

BRIEF FOR THE APPELLEE.

STATEMENT.

The appeal in this case is from a *pro forma* decree of the Circuit Court of Baltimore City, dismissing appellant's bill of complaint. This bill had been filed for the purpose of accomplishing two objects: (1.) To enjoin any interference by the Mayor, Comptroller and Commissioner of Health of the city of Baltimore, constituting its Board of Health, "with the plaintiff, in the removing of night soil from the city." (2.) To secure a mandatory injunction requiring said Mayor, Comptroller

and Commissioner of Health "to execute and deliver a contract with the plaintiff for the term of two years from September 2, 1897."

Facts.

By an Ordinance of the Mayor and City Council of Baltimore, being No. 121, approved May 24, 1880, the Mayor, Comptroller and Commissioner of Health, were 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 night soil gathered in the city of Baltimore.

On June 19, 1880, the Mayor, Comptroller and Health Commissioner, in order to carry out the provisions of Ordinance No. 121, entered into a contract with R. R. Zell & Co.

Subsequent to this, on or about November 30, 1881, R. R. Zell & Co. assigned their interest under said contract to the appellant, which has since that time, in pursuance of contracts issued successively every two years, continued to remove said night soil.

The last contract expired September 2, 1897, and the contention of the appellant is that the Mayor, Comptroller and Commissioner of Health were compelled, in accordance with said Ordinance, to execute and deliver a new contract for two years from the 2d day of September, 1897.

The contention of the appellee is, that there is no existing Ordinance controlling their action in this matter or giving to the appellant any right to have a contract, whether such contract be regraded a new contract, or as an extension of the old contract.

Argument.

It must be perfectly clear, that if the appellant is to succeed in its contention, it must be shown that when

the Ordinance No. 121, approved May 24, 1880, was passed, R. R. Zell & Co., and their assigns, became entitled to a contract renewable every two years in perpetuity conditioned only upon their desire or willingness to keep the contract, and to have it renewed at each successive period of time. There is no other conclusion, because the appellant bases its present suit upon the Ordinance of 1880, and apart from this Ordinance, the Board of Health would have had no right in 1880, nor would it have had any right at any time since, to make any contract with R. R. Zell & Co., or with their assigns, for the removal of night soil from Baltimore city.

It is to be specially noticed that that Ordinance not only provides for the removal of night soil, but also for the payment by all collectors of night soil in the city of Baltimore to R. R. Zell & Co. of the sum of twenty-five cents per load for each load so collected or removed. (See Record, pages 2, 3.)

The Ordinance was therefore not a general but a special Ordinance.

(1.) It granted to R. R. Zell & Co. without consideration, the license or privilege of removing night soil gathered in the city of Baltimore, and it excluded from said privilege every other individual, firm or corporation in the city of Baltimore.

(2.) It compels all the night soil collectors to convey the night soil when collected to the wharf or wharves of R. R. Zell & Co., and not to anywhere else; and—

(3.) It required the payment of a compensation of twenty-five cents per load to R. R. Zell & Co. and to no one else.

Surely nothing more can be needed to show that it was intended to be and was an Ordinance for the special benefit of a designated firm and had none of the assential features of a general Ordinance.

It has been stated in the bill (par. VII,) that R. R. Zell & Co, for valuable consideration assigned all their rights and claim to the Bear Creek Fertilizer Co., and it is further shown (Record, pages 6 and 7) that the Mayor and City Council of Baltimore compensated the Bear Creek Fertilizer Co. for the removal of certain night soil which R. R. Zell & Co. had removed previous to their assignment and for which they had failed to secure compensation in the manner provided for by said Ordinance. The appellant seeks to draw from these facts the conclusion of a recognition by the Mayor and City Council of Baltimore of the Bear Creek Fertilizer Co. as the assignee of all rights under the Ordinance.

We respectfully suggest to the Court, that instead of the action of the Mayor and City Council above referred to being capable of such instruction, it is actually an establishment of the fact that R. R. Zell & Co. had defaulted under their contract, and therefore had no contract rights to assign.

It is also to be noticed that subsequent to Resolution No. 60, approved March 13, 1885, making an appropriation out of the city treasury for a matter for which the municipality under the original ordinance and contract was not at all responsible, there has been nothing to authorize any contract with the Bear Creek Fertilizing Co., and the subsequent renewals seemed to have occured rather as a matter of default than as the result of any express or implied authority.

The Court, therefore, is called upon to decide whether the appellant has, or R. R. Zell & Co. would have had, the right to demand a renewal every two years, of a contract, the term of which, as provided for in the original Ordinance, was in in these words: "A term of two years, with the privilege of renewal."

Did R. R. Zell & Co. obtain such a contract as would enable them after the expiration of the first renewal to sue the Mayor and City Council of Baltimore for dama-

ges if the then Board of Health had refused to grant a second renewal?

Has the Bear Creek Fertilizer Co. the right now to sue the Mayor and City Council of Baltimore in damages for its refusal to renew the contract expiring September 2, 1897?

Unless both of these questions are answered in the affirmative, then the appellant has no standing in this Court. If they are answered in the affirmative then the Bear Creek Fertilizer Co. has such vested rights under a contract that even an Ordinance of the Mayor and City Council of Baltimore could not reach.

It is respectfully submitted that the original Ordinance did not contemplate a contract for longer than four years, two of which were provided for in the contract, and two of which were covered by the renewal. The privilege of renewal meant one renewal, and the privilege was exhausted when one renewal had been made. To reason otherwise is to say that the Mayor and City Council has permanently parted with all jurisdiction over the subject matter, and had authorized the Board of Health to make a contract, a continuation of which could not be interrupted even by the power and authority which had originally brought it into existence.

The authorities agree that "a covenant, to receive the construction of perpetual renewal, must be plain and distinct, and such as to bear no other construction without force and violence done to the words and the context," and this Court has recognized the doctrine.

Banks vs. Haskie, 45 Md. 219.

In the case of Cunningham vs. Patee et al., 99 Mass. 252, the Court says: "The renewal covenant is not to be inserted in the lease; that agreement is satisfied and exhausted by a single renewal. An agreement to renew *toties quoties* will not be inferred in the absence of words clearly pointing to that intention."

To the same effect are the cases of

Carr et al vs. Ellison, 20 Wend. 179.

Willis et al, admrs. vs. Astor, 4 Edw. Ch. 595.

Noonan vs. Orton, 27 Wis. 312.

This Court has itself refused to recognize the right of a lessee to have a renewal lease containing a covenant for a second renewal.

Worthington et al vs. Lee et al, 61 Md. 541.

When to these objections there is added the additional one of an entire want of mutuality in the contract, appearing from the fact that the Mayor and City Council of Baltimore, or the Board of Health, could never compel a renewal, it seems impossible to believe that the Mayor and City Council of Baltimore should be compelled to be continually renewing such a contract.

But this is not all. The Court is now dealing with the rights of the public, against which nothing is to be presumed.

Stein vs. Bienville Water Supply Co. 140 U. S. 80.

It is also suggested that if the ordinance is to be construed from its language as creating a perpetuity, it is void, as being beyond the power of the Mayor and City Council to pass.

The *pro forma* decree of the Circuit Court must therefore be affirmed.

Respectfully remitted,

THOS. IRELAND ELLIOTT,
City Solicitor,

THOS. G. HAYES,
City Counselor,
For Appellee.