C
101 Md. 476, 61 A. 330

Court of Appeals of Maryland.
STORCK
v.
MAYOR, ETC., OF **CITY** OF **BALTIMORE** et al.
June 22, 1905.

Appeal from Circuit Court of Baltimore City; Henry D. Harlan, Judge.

Suit by Edward J. Storck against the mayor and city council of Baltimore City and others for an injunction to restrain defendants from interfering with the construction of certain steps of a building. From a decree in favor of defendants, plaintiff appeals. Reversed.

West Headnotes

Municipal Corporations 268 667
268k667 Most Cited Cases
Acts 1904, p. 1077, c. 616, § 1, prohibiting the obstruction of the sidewalks of Baltimore City, gives the board of estimates authority to regulate the limits within which it shall be lawful to erect any steps for houses, but that no such regulation shall permit any erection at any point between the grade of the side walk and a point 10 feet above the grade, provided "that outside which" such erections shall lawfully exist between the grade of the sidewalk, etc., at the time of the passage of the statute, other such erections may be permitted; and the section then defines the "burned district," within the meaning of the section. Held, that the proviso was void, as meaningless, the courts having no right to construe it by inserting the phrase "Burned District" after the word "outside," and to eliminate "which," and substitute therefor the word "where."

Municipal Corporations 268 667
268k667 Most Cited Cases
Acts 1904, p. 1077, c. 616, § 1, providing for the prevention of the obstruction of sidewalks in Baltimore City, forbids affirmatively the erection of steps beyond the building line, but provides that, outside of a certain district, steps beyond the building line may be permitted where there are other such steps in existence within 200 feet. Held that, the proviso being void as an arbitrary classification, a property owner was entitled to erect steps such as are embraced within the proviso, notwithstanding the affirmative inhibition.

Municipal Corporations 268 667
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Acts 1904, p. 1077, c. 616, § 1, providing for the prevention of the obstruction of the sidewalks of Baltimore City, provides that certain erections between the grade of the sidewalk and a point 10 feet thereof shall not in any case be permitted unless there shall have lawfully existed at the time of the passage of the statute, on the same side of the street, such an erection at a point within 200 feet of that where it is proposed to make such other erection. Held, that the provision is invalid, because of an arbitrary and unreasonable classification.

Argued before McSHERRY, C.J., and FOWLER, BOYD, PAGE, SCHMUCKER, PEARCE, and JONES, JJ.

Edgar H. Gans, for appellant.
Edgar Allan Poe, for appellees.

FOWLER, J.
This is an appeal from a decree of the circuit court of Baltimore City. ***331** Edward J. Storck, the owner of a lot of ground on Patuxent street, in that city, desiring to improve it by building thereon a number of dwelling houses, made application in due form of law for a building permit, which was granted. Subsequently he applied to the board of estimates for a permit to put front steps to these houses, extending out on the sidewalk beyond the

building line. It appears from the minutes of the proceedings of the board that it was willing to grant this permit for the erection of steps, but it declined to do so solely on the ground that it was prohibited by the act of 1904, p. 1077, c. 616. Whereupon Mr. Storck filed the bill in this case, asking for an injunction to restrain the city from obstructing or in any way interfering with the construction and erection by him or his employés of the steps in question. It was alleged in the bill, among other things, that the board of estimates have the right to grant him the privilege of building the said steps in accordance with his application therefor, notwithstanding the act of 1904, p. 1077, c. 616; that said act does not repeal the act of 1900, c. 109, under which said board has such authority; that said act of 1904, p. 1077, c. 616, is invalid, because its meaning cannot be ascertained under any of the rules of construction known to the law, and that it is therefore too uncertain to be enforced; that said act of 1904, p. 1077, c. 616, if it can be construed in the way claimed by the city authorities, is unconstitutional and void, as it deprives the plaintiff of his property without due process of law, and denies to him the equal protection of the laws. The defendants demurred to the whole bill. The court passed a decree sustaining this demurrer and dismissing the bill. From this decree the plaintiff has appealed, and the only question involved is whether the act of 1904, p. 1077, c. 616, is a valid exercise of legislative power. On the part of the plaintiff it is contended this act is invalid for two reasons: First, its meaning is too uncertain to be enforced; and, second, if sufficiently certain, it deprives the plaintiff and all others in like situation of the equal protection of the laws. The contention of the defendants is just the reverse, namely, that the act in question is free from any fatal uncertainty, and that it in no way deprives the appellant of his constitutional rights. In addition to this contention, however, the defendant urges that, even if it should be held that a portion of the act is void, the remainder thereof is valid, and the plaintiff, by its terms, is not entitled to the privilege asked for.

It may be said at the outset that it is conceded that the plaintiff, but for the act of 1904, p. 1077, c. 616, had done everything required to entitle him to the permit to erect steps as set forth in his application, and hence we may at once proceed to the consideration of the act which has given rise to this controversy. It is entitled "An act to prevent the obstruction of the sidewalks of the streets *** of Baltimore City," and for that purpose it repeals and re-enacts sections 6 and 8 of the city charter. As section 1 alone relates to steps, we will direct our attention to that section, without referring to the other parts of the act. Upon an examination of section 1 of the act, we find that it re-enacts section 6 of the city charter in totidem verbis, down to the sentence beginning, "To regulate the limits," as found in the fourth line from the end of the old section. The amended section then reads: "To regulate (subject to the restrictions hereinafter set forth) the limits within which it shall be lawful to erect any steps, porticos, bay windows, show windows, signs, columns, piers or other projections or structural ornaments of any character for the houses fronting on any of the streets, lanes," etc., "of said city, but no such regulation shall permit any such erection at any point between the grade of the sidewalk of any such street," etc., "and a point ten feet above such grade: provided, that outside which such erections or any of them shall lawfully exist between the grade of the sidewalk and a point ten feet above such grade at the time of the passage of this act, other such erections of the same kind as those hereinbefore specified, may be permitted, under such regulations as the said mayor and city council," etc., "may from time to time prescribe. The Burned District within the meaning of this section shall be the territory comprised within the following metes and bounds." Then follows the description of the Burned District. "Block" is then defined to mean, as used in this section, "the

portion of one side of any street," etc., "included between the nearest two cross streets." And finally the section ends with this proviso, "Provided that no such erections between the grade of the sidewalk and a point ten feet above thereof shall in any case be permitted, unless there shall lawfully exist at the time of the passage of this act, on the same side of such street," etc., "such an erection upon or on the said block, at a point within two hundred feet of that at which it is proposed to make another such erection."

It will thus be seen that the part of section 1 of the act under consideration, namely, that portion of the section which relates to steps and certain other erections particularly referred to, confers upon the city the power to regulate the limits within which it shall be lawful to erect steps for houses fronting on any of its streets. Immediately following this general and sweeping power, the city is absolutely prohibited from granting permits for any such erections, including steps, at any point between the grade of the sidewalk and a point 10 feet above such grade. Of course, this prohibition necessarily includes steps; and, if there were nothing else, it would be clear that the act prohibits the erection in the city of Baltimore of any more steps outside ***332** the building line, for they must of necessity rest on the sidewalk, and therefore be below the 10-foot point. But following the language just referred to we are confronted with the first proviso-"that outside which" steps, bay windows, etc., may lawfully exist between the grade of the sidewalk and the 10-foot point, at the time the act was passed, other such erections, including steps, may be permitted, under regulations prescribed by the city.

In the first place, it may be conceded that, if this proviso had been enacted as suggested by the learned counsel for the city, no difficulty, so far as this proviso is concerned, could have existed, for his contention is that the object of the Legislature was to prohibit absolutely the erection of steps, etc., beyond the building line anywhere within the Burned District, which is particularly described in the act, by metes and bounds, and to allow such erections outside of that district under such regulations as the city should prescribe. If we could adopt this view, the proviso would then read, "Provided, that outside of the Burned District where any such erections shall lawfully exist at the time of the passage of this act, other such erections may be permitted under regulations," etc. There could be, we think, no valid objection to this proviso if it had been enacted in this revised form. And while we have no doubt this was the form, substantially, in which the act was drawn by its learned author and submitted to the Legislature, yet we must be guided solely by the language found in the act, and from it, if possible, discover the intention of the lawmaking power. Before proceeding further, perhaps we should say we cannot agree with the contention of the plaintiff that under this act the city has power to regulate only the limits of the sidewalks within which steps may be erected. In our opinion, when this language is used in section 1 of Act 1904, viz., "to regulate (subject to the restrictions hereinafter set forth) the limits within which it shall be lawful to erect any steps," etc., the Legislature referred to the limits of the city, and not to the limits of the sidewalk. But that question is not material now, in the view we have been forced to adopt.

What, then, is the meaning of the words "outside which," as used in the section under consideration? No attempt was made by counsel to define these words themselves, but it is contended, as we have seen, that they should be understood to mean "outside the Burned District." But there is no justification for this interpolation. The Burned District had not been mentioned in the previous part of the act. So far as the act itself is concerned, it might with equal propriety be suggested that the words "South Baltimore" or "Old Town" ought to be inserted after the words

"outside which." It is true, the section contains a definition of "Burned District," following the proviso, and so, also, the same section embraces a definition of the word "Block." If the mere fact of being defined justifies the use of the words "Burned District," the word "block" is equally entitled to consideration. But it is apparent this addition to the text of the act would "make confusion worse confounded." If that portion of the section of the act immediately preceding this proviso had in terms applied to a defined and limited area of the city, then it would have to be conceded that the words "outside which" would necessarily have applied to such area, but, as we have seen, there is no such limitation; and it cannot be said, we think, that it is the duty of this court to supply in this case what the Legislature has omitted. There are, we have often said, cases in which the court will perhaps add to or take away certain words from a statute in order to effectuate the clear intention of the Legislature. Thus in the case of Waters v. Laurel, 93 Md. 221, 48 Atl. 499, cited by the defendant, the words "town of Luarel," omitted in the first section, were supplied by the court. But that was a very different case from this. The title of the act is: "An act to authorize and empower the mayor and city council of Laurel to borrow money," etc., and the first section provided that for the purpose of supplying water to the town the "mayor and city council" were authorized to borrow money. The question was, which mayor and city council? The plain answer was, the mayor and city council mentioned in the title and in every other section of the act, except in the first. Indeed, it is difficult to understand how any serious objection can be based upon such an omission as was relied on in the case just cited, for the section alleged to have been incomplete was quite as intelligible before as after the desired interpolation was made. But looking to the title of the act of 1904, p. 1077, c. 616, now before us, we fail to find in its title any reference whatever to the "Burned District." Nor, indeed, are those words used anywhere in the affirmative provisions of the act, but only where what is known as the "Burned District" is described or defined. In addition to this, however, we are asked not only to put into the body of the act these words after the expression "outside," but to eliminate the pronoun "which," and substitute therefor the adverb "where." We do not feel justified, under any recognized rule of construction, in taking such liberties with an act passed by the Legislature; and inasmuch as the words "outside which," standing by themselves, are concededly meaningless, our conclusion is that the proviso in which they occur is void. State v. Tag (Md., not yet officially reported) 60 Atl. 467; Campbell's Case, 2 Bland, 209, 20 Am.Dec. 360.

What we have said in regard to the first proviso might perhaps be sufficient to dispose of the case upon the theory that the second proviso, being an essential part of the ***333** first, must necessarily fall with it, under the rule announced in State v. Benzinger, 83 Md. 488, 35 Atl. 173.

2. But inasmuch as the validity vel non of the second proviso was fully discussed, we will consider the questions presented by this branch of the case. We have already transcribed it. Its place in the section is so far removed from the first proviso that it is somewhat difficult to see the connection between the two. However, assuming ex gratia that the law, as properly construed, prohibits steps from being erected in the Burned District-allows them to be erected outside that district in places where they have lawfully existed before the passage of the act, but not within 200 feet from such steps existing at that time-it is contended by the plaintiff that such construction would make the law unconstitutional, as involving an arbitrary discrimination between property holders, which would deprive the plaintiff and all others in a like situation of the equal protection of laws.

The case is before us on demurrer to the bill, and

therefore the facts properly pleaded therein are to be taken as true. In order to present the question now to be considered, it will not, however, be necessary to rehearse all of the allegations of the bill. It is sufficient to say that, among other things, it is alleged in the ninth paragraph that all through the residential portions of the city the dwellings almost invariably have steps projecting from the front of the buildings upon the sidewalk; that when a block is not built up entirely there are such steps in front of such dwellings as are built; that there are blocks where 200 feet counted in each direction from steps existing when the law of 1904 was passed would include the whole block, and there are blocks where such 200 feet would not include the whole block. So that, if the law of 1904 operates, some city blocks could be entirely improved with front steps projecting from the front of the buildings, some could be only partly improved, and some, namely, those on which there were no steps at the time of the passage of the act of 1904, could not be so improved at all. There was no attempt at bar to base the invalidity of the law upon the ground that, according to the construction contended for by the defendant, the erection of steps on the sidewalk was absolutely prohibited in the Burned District. On the contrary, it was conceded that it is entirely competent for the Legislature so to do, and that a discrimination between the crowded, central business part of the city, and the residential sections thereof, is "a rational discrimination, founded in the nature of things, and calculated to prevent the obstruction of the streets," which, according to the title, is the main object of the act. But it is the operation of the act, and especially the second proviso thereof, outside of the Burned District, which gives rise to the particular objection we are now considering, namely, what right has the Legislature to give to one class of property owners the privilege of erecting steps on the sidewalk, and to deny the same privilege to another class? It is settled beyond dispute this cannot be done arbitrarily. The classification must be natural, and not arbitrary. "Arbitrary selection can never be justified by calling it 'classification.' The equal protection demanded by the fourteenth amendment forbids this." Railroad v. Ellis, 165 U.S. 155, 17 Sup.Ct. 255, 41 L.Ed. 666. And in accordance with this settled rule, so long maintained by the United States Supreme Court, we have held, among other cases, in Luman v. Hitchens Bros., 90 Md. 25, 44 Atl. 1051, 46 L.R.A. 393, that "whilst the Legislature may, under conditions, create classes, and subject all persons coming within the classifications to burdens and duties not imposed upon individuals outside of the classes, these classifications must not be arbitrary or unreasonable, but must rest upon some difference which bears a reasonable and just relation to the act in respect to which classification is proposed." What is the act with respect to which this law makes the classification objected to by the plaintiff? The answer to this question is found in the title and the law itself, namely, the obstruction of the streets. The purpose of the act of 1904 was to prevent such obstruction, and hence the proposed classifications must be reasonable, natural, and not arbitrary, and must have a reasonable and just relation to that subject.

It will be observed that the act, as we are assuming it is to be construed, divides the property owners outside the Burned District into two classes-those who may be permitted by the city to build steps beyond the building line on the sidewalk, and those who are absolutely prohibited from so doing. The basis of this classification is found in the second proviso, to the effect that no steps shall be built beyond the building line unless there shall lawfully exist at the time of the passage of the act of 1904, on the same side of the street, such steps "upon or on the said block at a point within 200 feet of the point at which it is proposed to make another such erection." As we have said, it is not disputed that the Legislature may prohibit the erection of steps in certain localities, provided there is some reasonable ground for such

prohibition; but it is difficult to understand upon what theory it was determined to adopt the distance of 200 feet from existing steps as a limit within which other steps may be erected, and beyond which property owners are deprived of this valuable privilege. But this question is so well discussed in the brief of the learned counsel for the plaintiff that we will quote what he says upon this subject: "But in this case we have three classes, all of them in the outskirts of the city, where travel is light, and all practically in precisely the same ***334** position, so far as obstruction of the pavement is concerned, and yet differences are made by the law: (1) The class where steps exist somewhere near the center of the block. In this case the pavements on that side of the street are entirely unobstructed, except as to one or two houses on the block. If there is any reason for prohibiting steps in such a locality, it exists in such a block just as fully and completely as in a block which has one house built on the corner, or on a block where as yet there are no buildings at all. Yet in this first class the whole block may be improved by dwellings having steps projecting on the pavement. For what reason? Simply because, if you measure from the existing steps either way for two hundred feet, you will come to the end of the block. (2) The class where a dwelling is built on the corner. In this case the block may be improved with dwellings with steps to the extent of two hundred feet from the corner house. But all the rest of the block cannot have dwellings with steps. Why 200 feet? Why give the owner of a lot just 200 feet from the corner house a right to have steps, when his next-door neighbor in the same block shall not have the right? Will not one pair of steps obstruct the street as much as the other? What just and reasonable relation to obstruction of the streets is found in the length of 200 feet? Why not 100 feet or 300 feet? (3) The class where no dwellings are built on a block. In this class the owner is prohibited from building steps at all. His steps would be no more of an obstruction than those allowed in the first two classes. His neighborhood is about the same, the amount and kind of travel is the same, and yet he is deprived of a privilege very valuable to him, whilst his neighbor in the next block secures the privilege from the accident of being within 200 feet of existing steps."

Having already said that in our opinion the first proviso is void for uncertainty, and being of opinion that the second is also void because of the arbitrary and unreasonable classification attempted therein, the law must be declared inoperative and void so far as it applies to obstructions of the streets outside the Burned District. Within that district it is conceded by both sides that the law should be allowed to operate, because it was the intention of the Legislature to prohibit absolutely all obstructions within that congested portion of the city. But that question is not now before us.

3. It is contended, however, that the affirmative part of section 1, which contains a general prohibition against the erection of steps beyond the building line, should be allowed to stand, and that therefore the relief asked in this case cannot be granted. But we cannot agree to this view. It is impossible to say that the Legislature intended to forbid the erection of steps within the 200-feet limit of existing steps, for it is apparent the intention was to grant that privilege. Hence, if we adopt the view of the defendant, this purpose of the Legislature will be thwarted, and persons and classes of property owners who were clearly intended to be excepted from the provisions of the law will be subjected to its prohibitions. A construction leading to such a result cannot be approved. It was held by the Supreme Court of the United States in the case of Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 22 Sup.St. 431, 46 L.Ed. 679, that section 9 of the Illinois trust act was void because that section exempted agriculturists and live stock dealers from the penalties imposed for certain prohibited

combinations in restraint of trade, and that, if the law without the bad section were held good, the classes of persons therein mentioned would be subjected to a liability which it was not intended to impose on them. Hence the whole law was declared invalid. Judge Harlan said: "If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative." And to the same effect we have held in State v. Benzinger, 83 Md. 481, 35 Atl. 173; Stiefel's Case, 61 Md. 144.

It follows, therefore, from what we have said, that our conclusion is that the act of 1904, c. 616, amending the charter of Baltimore City, is void, in so far as it applies to the portion of the city outside the Burned District.

Decree reversed, with costs, and cause remanded.

Md. 1905.
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