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92 Md. 535, 48 A. 165

Court of Appeals of Maryland.
MAYOR, ETC., OF **CITY** OF **BALTIMORE**
v.
STEWART et al.
Jan. 23, 1901.

Cross appeals from Baltimore city court.

Action by Alice Gerry Stewart and her husband against the mayor and city council of the city of Baltimore. From a judgment quashing certain proceedings relating to a street improvement, and refusing to declare invalid an ordinance authorizing the improvement, both parties appeal. Reversed in part.

West Headnotes

Municipal Corporations 268 ⚿112(3)
268k112(3) Most Cited Cases
The title of Baltimore City Ordinance No. 50 of 1900, authorizing the repaving of a street, declares that the paving shall be done with asphalt, while the body of the ordinance contains a proviso permitting the use of vitrified brick in lieu of asphalt in the gutters and on such other portions of the street as, in the judgment of the city engineer, shall be necessary or desirable. Held, that the title does not violate City Charter, Acts 1898, c. 123, § 221, declaring that the subject of every ordinance shall be described in its title, since matters of detail need not be specified.

Municipal Corporations 268 ⚿284(3)
268k284(3) Most Cited Cases
Baltimore City Ordinance No. 50 of 1900, authorizing the repaving of a street, and declaring that the paving shall be done with asphalt, but permitting the use of vitrified brick in lieu of asphalt in the gutters and on such other portions of the street as, in the judgment of the city engineer, shall be necessary, is not invalid as delegating to him the power belonging to the city council, to determine what material shall be used.

Municipal Corporations 268 ⚿306
268k306 Most Cited Cases
It is no objection to the validity of an ordinance authorizing the repaving of a street that the cost is apportioned by the front-foot rule, when all parties interested have had ample opportunity to contest the adoption of the rule before the passage of the ordinance.

Municipal Corporations 268 ⚿321(2)
268k321(2) Most Cited Cases
The exercise of the discretion vested in the city council in determining the necessity of repaving a street at the expense of abutting lot owners cannot be reviewed by the courts in the absence of proof of fraud or manifest invasion of private rights.

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

Wm. Pinkney Whyte and Charles W. Field, for appellant.
Stewart & Farber, for appellees.

McSHERRY, C.J.
There are two appeals in this record. One was taken by the mayor and city council of Baltimore from a judgment of the Baltimore city court quashing certain proceedings of the city engineer in relation to the proposed paving of St. Paul street. The other was entered by Alice Gerry Stewart and David Stewart from a judgment of the same court refusing to declare invalid an ordinance directing St. Paul street to be paved. Practically the same controlling question lies at the foundation of each case, though there are, in addition, minor inquiries suggested as applicable to the second which do not seem to have been specifically ruled on below. One opinion, however, will be sufficient to dispose of both appeals. The proceedings of the city engineer

were quashed upon one of the grounds which Mr. and Mrs. Stewart rely on to invalidate the ordinance. If there was error in quashing these proceedings on that ground, then there was no error in refusing on the same ground to strike down the ordinance. So we will proceed at once to inquire whether the judgment from which the city appealed should be affirmed.

By Ordinance No. 50 of 1900, passed pursuant to the general paving ordinance contained in article 48 of the Baltimore City Code of 1893, provision was made for the paving of St. Paul street between Twenty-Fifth and Thirtieth streets. After the decision by this court of the case of ***167**Ulman v. Mayor, etc., 72 Md. 587, 20 Atl. 141, 11 L.R.A. 224, wherein it was held the assessments levied upon the owners of abutting property to pay for the paving of streets were invalid if levied without notice to the persons affected, or without an opportunity afforded to them to be heard, the mayor and city council provided by a general ordinance an elaborate plan of procedure to be followed thereafter whenever street paving was to be done. Adequate provision was made for giving ample notice to every individual interested in the subject, or who might become chargeable with any part of the cost of the improvement; and the notices required to be given were: First, as to the pendency of an ordinance providing for the paving of a particular street; secondly, as to the apportionment of the cost of the paving; and, thirdly, as to the right of each interested party to appeal from the findings of the city engineer to the Baltimore city court. The first of these notices is required to be given through the press after an ordinance has been introduced, and before it has been acted on by the city council; and the object of it is to warn all persons who may be affected by the measure, should it be adopted, to appear before the joint standing committee on highways, and there contest the passage of the ordinance, if they desire to do so. The second notice, also given through the press, is issued by the city engineer, and warns all persons that they may appear before him on a designated day and then and there controvert the apportionments made by him; while the third public notice is given by the city register, and informs all persons interested in the paving of the particular street that they may appeal within 30 days from the apportionment made by the city engineer to the Baltimore city court, where the questions presented by the appeal can be tried by a jury, if a trial by jury be claimed. These provisions of the general ordinance contained in article 48 of the city Code gratify all the requirements as to notice and hearing which in Ulman's Case were said to be necessary to give validity to the assessment against an individual for the cost of paving a public thoroughfare. Each proprietor fronting on any street to be paved is thus afforded an opportunity to litigate the passage of an ordinance providing for the paving of that street. He is also given a hearing before the city engineer upon the question as to whether the amount assessed against him for the improvement is excessive or erroneous, and he is finally given an appeal to a court of law, where the same question may be determined by a jury. “If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed on his land, there is no taking of his property without due process of law.” Ulman v. Mayor, etc., 72 Md. 593, 20 Atl. 142, 11 L.R.A. 224; Spencer v. Merchant, 125 U.S. 345, 8 Sup.Ct. 921, 31 L.Ed. 763; Paulsen v. City of Portland, 149 U.S. 41, 13 Sup.Ct. 754, 37 L.Ed. 41.

We gather from the argument and the record that the specific ground upon which the proceedings of the city engineer were quashed was that the title of Ordinance No. 50 of 1900 declared that the paving was to be done with sheet asphalt, while the body of the ordinance contains a proviso permitting the use of vitrified bricks in lieu of asphalt in the gutters and upon such other portions

of the street as, in the judgment of the city engineer, shall be necessary or desirable. The foundation of this objection is twofold: First, that the title of the ordinance is misleading, in this; that the ordinance embraced a subject not disclosed by the title; secondly, that the ordinance left to the discretion of the city engineer the selection of material with which the paving was to be done, whereas that was a matter to be determined solely by the city council. When it is proposed to pave a particular street, and an ordinance has been introduced to provide for doing the work, section 61a, art. 48, of the City Code, requires public notice to be given "of the introduction of said ordinance, and that any and all persons interested therein will be heard upon any matter relating thereto by the *** joint standing committee on highways, at the time and place to be designated in said notice." The City Code does not require the provisions of the particular paving ordinance to be published, but simply directs notice of the fact that an ordinance to pave a designated street has been introduced. Upon turning to the record, it will be seen that the notice which was in fact given reads in part as follows: "Pursuant to the provisions of section 61a, art. 48, of the Baltimore City Code of 1893, by order of the joint standing committee on highways, notice is hereby given to all person interested therein that an ordinance has been introduced into the city council and referred to the joint standing committee on highways, before which committee it is now pending, the title of which is as follows: 'An ordinance to provide for the grading and paring with sheet asphalt and curbing all that portion of Saint Paul street, from the north side of Twenty-Fifth street to the south side of Thirtieth street.' " Then comes a statement that by the provisions of the ordinance the cost of the work is to be paid for by assessing the whole expense on the abutting property in proportion to the frontage of said property, except the cost of paving the cross streets, which is to be paid by the city. The notice then proceeds: "All persons in any way interested in the subject-matter of said ordinance are hereby notified that the joint standing committee on highways will be in session at the city hall, First branch committee room, Baltimore, on Wednesday, March 21, 1900, at 3 o'clock p.m., for the purpose or considering said ordinance and giving a hearing to all those who may appear before them relative thereto." The first section of the ordinance, it will be observed, directs the city engineer to have the street graded and paved with Trinidad Lake, Alcatray, or Bermuday sheet asphalt, or other sheet asphalt which, in the opinion of the city engineer, is equally as good; it designates the kind of curbing; and then, in parentheses, occurs the proviso in relation to the use of vitrified brick for the gutters and in such other portion of the street as, in the judgment of the city engineer, may be necessary or desirable. Now, in what way is the title of the ordinance misleading, and in what manner does the title conflict with that provision of the city charter which declares that "every ordinance enacted by the city shall embrace but one subject which shall be described in its title"? Section 221, c. 123, Acts 1898. It is not pretended that the ordinance as passed is couched in precisely the language in which it was phrased when introduced. It is altogether possible that the proviso was inserted either by the joint standing committee, or after the ordinance had been reported back from the committee to the council. It is matter of common knowledge, which every person must be assumed to be acquainted with, that bills and ordinances are open to amendment on their passage through legislative bodies, and that they are consequently apt to differ materially when finally adopted from the form in which they were when introduced. This being so, the fact that only asphalt was mentioned in the title was no reason for any one supposing that the ordinance when passed would confine the paving material strictly and exclusively to asphalt. The notice having advised all parties interested that an ordinance had been introduced, it became their

duty to appear at the time and place designated, if they wished to contest the passage of the ordinance, or desired to have its provisions varied. The public notice was not intended to give information of the contents of the ordinance. It could not do so, for the reason already suggested,-that the ordinance was liable to be amended. But the object of the notice was merely to warn parties whose property abutted on the street proposed to be paved that an ordinance providing for that paving was pending. The fact that it was only a pending ordinance was notice in itself that its provisions were not necessarily or even probably final; and any one relying on its provisions as final, or depending on its title as indicating what its provisions would ultimately be, if misled at all, was misled by his own failure to heed the notice, and not by the terms of the notice as published.

But it is said the title violates the charter, in this: that the subject dealt with in the ordinance is not disclosed in the title. This provision***168** of the charter is similar to section 29, art. 3, of the state constitution, which has been frequently under discussion in cases decided by this court. What has been ruled in those cases in reference to the constitutional provision will apply to the like clause of the charter. It never has been understood that the title of a statute should disclose the details embodied in the act. It is intended simply to indicate the subject to which the statute relates. The subject of this ordinance was the paving of St. Paul street between certain termini. The material to be used in doing the work was an incident or detail, and not the subject. When the general subject is indicated, no matters of detail need be mentioned in the title. "The primary object of the provision, undoubtedly, is to exclude all foreign, irrelevant, or discordant matter from the statute, and to confine the statute to the single subject disclosed in the title." Phinney v. Trustees, 88 Md. 636, 42 Atl. 58. The use of vitrified bricks where sheet asphalt would not be serviceable does not detract from the scheme to pave with sheet asphalt, any more than the use of stone or iron lintels and sills would prevent a house built of brick from being properly described as a brick house. The pavement is still an asphalt pavement, though the gutters on either side of the street and the space between the car tracks be paved with some other material. The use of bricks in these places is not foreign to the purpose of the ordinance, and the proviso giving to the city engineer authority to substitute bricks for asphalt at the points indicated is neither irrelevant nor discordant matter at variance with the scheme and purpose of the ordinance as disclosed by its title. The position assumed in the court below, and sustained by the ruling appealed from, would, if finally sanctioned, absolutely preclude the use of any material except asphalt, no matter how urgent and apparent the necessity for employing in part some other paving material might be in the proper construction of the work. If, under the pretext of laying an asphalt pavement, a totally different and much more expensive one were put down, another question would be presented; but to say, when there is a title which indicates that an asphalt pavement is to be made, that a provision cannot be included by which, in the correct construction of such a pavement, bricks may be employed when necessary to give stability and permanency to the work, is to carry the doctrine far beyond any decided case; and, if accepted as the right doctrine, it would lead to the result that there could by no possibility be a valid ordinance unless every detail of its various provisions were scheduled in the title. This would convert the clause of the charter which was intended to prevent vicious legislation being cloaked under an innocent title into a snare that would practically defeat all legislation. As stated by this court in Mayor, etc., v. Reitz, 50 Md. 579, "Whilst the title must indicate the subject of the act, it need not give an abstract of its contents, nor need it mention the means and method by which the general purpose is to be accomplished." See, also,

Trustees v. Manning, 72 Md. 120, 133, 19 Atl. 599.

The remaining ground relied on for quashing the proceedings of the city engineer is that the ordinance delegated to him a discretion as to whether the street should be paved with sheet asphalt or with vitrified brick. While this objection does not appear to have been passed on by the city court, it is in the record, and has been argued, and must be disposed of; and it must be disposed of, because, if well taken, it would support the judgment appealed from. The objection, as made, assumes the existence of a provision in the ordinance which is not in fact contained there. There is no delegation to the city engineer of a power or discretion to decide "whether the street shall be paved with sheet asphalt or with vitrified brick." Undoubtedly the broad and unrestricted delegation of such a power would be unlawful. The power to determine what material shall be used in paving a street is a legislative power, and cannot be transferred by the city council to any one else; and, if the ordinance undertook to do this, it would be palpably invalid (Mayor, etc., v. Scharf, 54 Md. 521), unless the conditions exist which were present in Moale v. Mayor, etc., 61 Md. 239. What the ordinance in controversy does is quite different. The city council distinctly selected asphalt as the material with which the street was to be paved, and it merely permitted the city engineer to use vitrified bricks in lieu of asphalt in the gutters and upon such other portions of the street as, in his judgment, might be necessary or desirable. Both materials were designated by the ordinance, and the only discretion given the city engineer was with respect to the use of one in preference to the other of these two at particular places. This was a discretion not in regard to the adoption of the material with which the paving should be done, but with respect to the details of doing the work,-"a necessary discretion in a workman employed to do a work," as this court expressed it in Scharf's Case, 54 Md. 522. In the progress of the work, if it were found necessary or desirable to lay the gutters with brick, or to pave between the car tracks with them instead of with asphalt, the power to determine that it should be done had to be lodged somewhere; and placing the power in the hands of the city engineer, who is charged with the general supervision of the work, is not a delegation to him of a legislative authority to decide whether the street should be paved with sheet asphalt or with vitrified brick.

From what we have said, it will be seen that we do not concur in the conclusion reached by the learned and careful judge of the city court on the motion to quash the proceedings before the city engineer. The ***169** reasons assigned to support that motion are untenable. The proceedings should not have been quashed, and, unless there is something suggested on the other appeal to show that the ordinance itself is invalid, the judgment appealed from by the mayor and city council must be reversed. So much for the first appeal.

Now, as to the second appeal: What has been already stated is sufficient to answer the specific grounds relied on in the motion to set aside and declare Ordinance No. 50 null and void. But in addition to these specific grounds two others are asserted in the petition, which prayed an appeal from the city engineer to the Baltimore city court, and these will now be considered. They are: First, that St. Paul street is now paved with cobblestones, and needs no other pavement; and, secondly, that the apportionment of the cost by the front-foot rule is inequitable and unjust. The cases of Mayor, etc., v. Scharf, 54 Md. 513, Mayor, etc., v. Hospital, 56 Md. 27, and Alberger v. Mayor, etc., 64 Md. 6, 20 Atl. 988, fully dispose of these objections. In the case last named an ordinance directing a part of Baltimore street to be repaved with an improved pavement was involved. Among the objections to that ordinance, it was urged that there was no necessity for having the work done.

But this court thus dealt with the objection: "Under the power delegated by Acts 1874, c. 218, the discretion exercised by the city council in regard to the propriety or necessity of the improvements provided for by the ordinance cannot be controlled by the courts. It is only where the power is exceeded, or fraud is charged and shown to exist, or where there has been a manifest invasion of private rights, that the remedial and corrective power of the courts can be successfully invoked." An apposite quotation is then made from Judge Dillon's admirable work on Municipal Corporations, and the opinion proceeds: "And the application of this principle to this case effectually disposes of the contention on the part of the complainants, not only with respect to the manner of doing the work, but also with respect to the necessity or expediency of having it done. Whether there was a real necessity or a good reason for the removal of the old pavement and replacing it with Belgian blocks was a matter entirely within the discretion of the city council, and over the exercise of that discretion the courts have no power of review." 64 Md. 6, 7, 20 Atl. 990.

Now, as to the front-foot rule of apportionment of the cost of the improvement: Prior to Acts 1874, c. 218, the front-foot rule was prescribed by statute; and this had prevailed between 1782 and 1860 under various acts of assembly, and from 1860 until 1874 under sections 845 , 847 art. 4, Code Pub.Loc.Laws. The repeal of these last-named sections by the act of 1874 abrogated this rule of apportionment so far forth as it had been established by legislative enactment, but no further, while the act of 1874 gave to the city an unqualified discretion to adopt by ordinance the same or any other rule by which to ascertain the amount to be paid by each abutting proprietor. Under this power the general paving ordinance established, or, rather, re-established, the front-foot rule. The validity of that rule has been recognized by this court in a number of cases since the act of 1874 was adopted. Without referring to all of them, we name Alberger's Case, supra. What was said in Ulman's Case, 72 Md. 594, of the arbitrary character of that rule, had relation to the question then before us,-not the validity of the rule, but the hardship of its application to a case where the party charged with the payment of the assessment has had no opportunity to be heard. It may be well to note, in passing, that the Ulman Case overruled previous cases only in so far as those cases had held that notice and an opportunity to be heard were unnecessary to the validity of such an ordinance; and the effect of overruling those cases was to reassert the doctrine announced in Sharf's Case, 54 Md. 499. The case at bar is different from Ulman's Case, because here ample provision was made for giving all parties interested an opportunity to be heard before the ordinance was passed, and therefore to contest the application or adaptation of the front-foot rule to this particular paving if they saw fit to antagonize the rule. But there is another reason why the front-foot rule cannot be questioned in these proceedings. The ordinance fixing that rule was in force when the new city charter was adopted, and by section 3 of that charter (Acts 1898, c. 123) "all ordinances of the mayor and city council of Baltimore now in force and not inconsistent with this act shall be and they are hereby continued until changed or repealed"; that is, changed or repealed by the municipality. This enactment amounted to a legislative reaffirmance of the rule (Hooper v. New, 85 Md. 565, 37 Atl. 424), though the right to abrogate that rule and to substitute some other in place of it was reserved to the municipality. We cannot, therefore, say that the rule, in these circumstances, is inequitable, unlawful, or unjust.

This disposes of all the questions raised on the second appeal; and, as none of them are sufficient to invalidate the ordinance, the refusal of the court to declare it void was clearly right, and must be affirmed.

Upon the whole case, the judgment in No. 94 (the appeal of the mayor and city council) will be reversed, and that in No. 95 (the appeal of Alice Gerry Stewart and David Stewart) must be affirmed; and the record will be remanded to the court below so that a new trial may be had. And it is so ordered. Judgment in No. 94 reversed, with ***170** costs above and below, and new trial awarded. Judgment in No. 95 affirmed, with costs above and below.

Md. 1901.
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