C
94 Md. 743, 51 A. 953

Court of Appeals of Maryland.
UPSHUR et al., Board of Police Com'rs,
v.
MAYOR, ETC., OF **CITY** OF **BALTIMORE**.
April 1, 1902.

Appeal from Baltimore city court; Henry Stockbridge, Judge.

Mandamus proceedings, on the relation of the mayor and city council of Baltimore, on behalf of the board of park commissioners, against George M. Upshur and others, the board of police commissioners of Baltimore, to compel the police commissioners to detail and place under the control of the park commissioners a certain number of regular patrolmen for the parks of the city. From a judgment awarding the writ, defendants appeal. Reversed.

West Headnotes

Mandamus 250 ⚿174
250k174 Most Cited Cases
The petition for a writ of mandamus to compel the police commissioners to detail a designated number of patrolmen for park duty alleged that the number asked was necessary to preserve order in the parks. The answer of the defendants denied such allegation. The docket entry showed that issue was joined on the petition and answer, but there was no agreement in the record authorizing the court to determine the issue of facts, as provided by Code Pub.Gen.Laws, art. 60, § 7, and on a trial by the court no evidence was heard. *Held*, that the trial court could not award the writ of mandamus, for the necessity of detailing the designated number of patrolmen for park services was not shown.

Municipal Corporations 268 ⚿180(1)
268k180(1) Most Cited Cases
Acts 1898, c. 123, § 95, which directs the police commissioners of Baltimore, at the request of the park commissioners, "to detail, from time to time," members of the regular police force, as the park commissioners may deem necessary, for the preservation of order in the parks, does not authorize the park commissioners to compel, by mandamus proceedings, the police commissioners to detail for park service a designated number of patrolmen all the year round and an additional number during the summer months; the act merely requiring that the police commissioners shall set apart at intervals a number of patrolmen for park service, and not that a designated number shall be detailed permanently for such service.

Municipal Corporations 268 ⚿181
268k181 Most Cited Cases
Acts 1898, c. 123, § 95, directing the police commissioners of Baltimore, at the request of the park commissioners, to detail members of the police force for park duty, subject to the order of the park board, is a substantial copy of Acts 1862, c. 29, which provided for police service for a park outside of the limits of Baltimore. Local Law, § 744, requires the police commissioners to preserve the peace, etc., within the city limits. Section 745, as amended by Acts 1900, c. 425, authorizes the police commissioners to employ a permanent police force for the city, under regulations prescribed by them from time to time. Section 755 requires policemen to report to the police board. Section 759 declares that the mayor and council shall have no control over the police commissioners or any officer. City Charter, § 6, provides that no officer of the city shall interfere with the police commissioners or any police officer. Held, that Acts 1898, c. 123, § 95, did not authorize the park commissioners, appointees of the mayor and city officers to compel, by mandamus, the police commissioners to detail for park service for parks within the city limits a designated number of patrolmen, the act not creating an exception to the general powers

exclusively conferred upon the police commissioners to police the whole city.

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

Alonzo L. Miles, for appellants.
Hon. Wm. Pinkney Whyte and Olin Bryan, for appellee.

McSHERRY, C.J.
This is an application for a writ of mandamus. The petition was filed in behalf of the board of park commissioners, by and in the name of the mayor and city council of Baltimore, against the board of police commissioners. The relief asked is that the police commissioners shall be required to detail and place under the direction of the board of park commissioners 83 men from the regular force of patrolmen for the preservation of order within the parks and squares of the city of Baltimore. This demand that the police commissioners shall separate and detach from the regular force under their command about 12 per cent. of the total number of policemen, and place them under the control of the park board, to render service in the parks and squares, is supposed to be sanctioned by section 95, c. 123, Acts 1898. That section, which is a part of the city charter, is in the following words: "The board of police commissioners of Baltimore city is directed at the request of the board of park commissioners to detail from time to time such of the regular police force of said city as the said board of park commissioners may deem necessary for the preservation of order within said parks and squares, according to the regulations aforesaid, which policemen shall be under the direction of said board of park commissioners, and shall have the same power in said parks and squares that the police of the city of Baltimore have as conservators of the peace in Baltimore city or elsewhere." ***954** If this section stood alone,-if there were no other provisions of the local law bearing on the same subject,-it might possibly furnish a ground to support to some extent, but not in its entirety, the park commissioners' contention. But there are other enactments forming part of the local law, and equally as important and obligatory as the one just read, and equally as applicable as it is to the subject-matter of this controversy. These will be alluded to in a moment, and then section 95 will be interpreted, first, as it now stands, and, secondly, in the light of other pertinent sections, and in view of the circumstances that suggested and accompanied its adoption when originally enacted.

It may not be amiss to briefly restate a few fundamental and familiar principles which ought not to be lost sight of in dealing with the question which this record presents. It must be remembered that the writ of mandamus is not a writ of right granted as of course, but it is one which is allowed "only at the discretion of the court to whom the application is made. This discretion will not be exercised in favor of applicants unless some just or useful purpose may be answered by the writ." Booze v. Humbird, 27 Md. 4. It is also well settled that the relator's right which is sought to be enforced must be a clear, distinct legal right (State v. Register, 59 Md. 287), and that it must be certain and free from doubt. Mandamus is an extraordinary process, "and if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment, *** this writ will not be granted. *** And it will not be allowed unless the court is satisfied that it is necessary to secure the ends of justice." George's Creek Coal & Iron Co. v. Allegany Co. Com'rs, 59 Md. 259; State v. Latrobe, 81 Md. 222, 31 Atl. 788. The writ "is based upon reasons of justice and public policy to preserve peace, order, and good government" (Poe, Pl. & Prac. § 708), and obviously, therefore, will never be granted when those ends would be subverted or might be frustrated. Bearing in mind these recognized axioms, a farther examination of the provisions of

the charter and the local law will now be made.

That which is now section 95 of the charter has been transcribed, with some slight changes, from Acts 1862, c. 29; and that act related very largely to the acquisition of land now forming Druid Hill Park. That land was then wholly beyond the city limits, and entirely within the outlines of Baltimore county. Section 758 of the local law declares: "The said board of police commissioners are required, on the requisition of the board of park commissioners, to detail from time to time such number of the regular police force of said city as the said board may deem necessary for the preservation of order within any parks under their control, which detailed force shall have the same power in the premises that the police force of the city have, as conservators of the peace." This provision, when originally adopted, formed part of Acts 1867, c. 367, and was only applicable to Druid Hill Park, which was still beyond the city limits. Section 744 of the local law, taken almost literally from Acts 1860, c. 7, by which the board of police commissioners was first created, provides in part: "The duties of the board of police commissioners ***) shall be as follows: They shall at all times of the day and night, within the boundaries of the city of Baltimore, as well on the water as on the land, preserve the public peace, prevent crime and arrest offenders, protect the rights of persons and property, guard the public health, preserve order at primary meetings and elections, and at all public meetings and conventions and on all public occasions and places," etc. Section 745, as amended by Acts 1900, c. 425, declares: "The said board of police commissioners are authorized and required immediately on entering on the duties of their office to appoint, enroll and employ a permanent police force for the city of Baltimore, which they shall arm and equip as they may judge necessary under such rules and regulations as they may from time to time prescribe," etc. Section 755 is emphatic in providing that: "It shall be the duty of every officer of police and every policeman and detective, to report to the board and deliver to them all property seized or found by said officer," etc. In all of the aforegoing extracts, and in others to be read later on, the words upon which stress will be laid will be put in italics. Section 6 of the charter and section 759 of the local law will be quoted hereafter.

Can these various sections be made to harmonize in such a way as to clothe the park board, appointed by the mayor, with authority to make, and then enforce by mandamus, the demand which is the basis of this proceeding, without disregarding the words of section 95, and without stripping the police board of some of its powers, and narrowing the limits of its prescribed duties? Before proceeding to answer this inquiry, it is essential that the precise demand made should be clearly understood and accurately kept in mind. The exact demand, in the language of the first paragraph of the petition, is that the police board shall furnish to the park board "from the regular force of patrolmen, eighty-three men to render service all the year round and six additional men to serve from May to October, for the preservation of order within the parks and squares of the city of Baltimore, in conformity with the regulations of the board of park commissioners, as authorized by section 95 of Acts Assem. 1898, c. 123, known as the 'City Charter.' " And the prayer of the petition is for a writ of mandamus commanding the police board "to comply with the request of the said board of park ***955** commissioners, as in this petition recited." There can be no mistake about the scope and significance of this demand. It distinctly asks that 83 men be detached from the regular force, and be placed under the direction of the park board, "to render service all the year round" in the parks and squares. Does section 95, standing alone, justify that demand? Does it, when construed with the other cited sections, confer such a clear, definite, and distinct legal right upon the park board to make that demand, and such a

correlative duty on the police board to comply therewith, as will be enforced by a writ of mandamus?

First. Section 95, standing alone, gives no power to the park board to demand permanent control or control for a year over any part of the regular force of policemen. At most that section directs the police board "to detail from time to time" such of the regular police force, etc. These words "to detail from time to time" are not technical words. They are the words of common speech, and as such their interpretation is within the judicial knowledge, "and therefore matter of law." Marvel v. Merritt, 116 U.S. 12, 6 Sup.Ct. 208, 29 L.Ed. 550. The Century Dictionary defines the verb "detail" to mean "to set apart for a particular service," and the phrase "from time to time" to mean "occasionally"; and the Universal Dictionary defines "from time to time" to mean "at intervals; now and then." Giving to the language employed its accepted meaning, the section merely provides that the park board may request the police board to "set apart" "occasionally" or "at intervals," or "now and then," a certain number of patrolmen "for a particular service," and therefore it does not mean that the police board shall detail the men permanently or for the definite period of a year. As the duty to be performed by the police board is only to detail men occasionally,-that is, at irregular intervals,-the imposition of that duty, thus limited, gives the park board no authority to demand that designated number of the police shall be detailed for a whole year to serve in the parks and squares. Service for a whole year means continuous service; the statute means occasional service. This construction not only ascribes to the language of the section its natural meaning, but, as will be seen in a moment, is imperatively demanded if the autonomy of the police department is to be maintained.

Secondly. Section 758, whilst requiring the police board to detail "from time to time," and therefore occasionally, some of the regular police force to preserve order in the parks, does not place the policemen, when so detailed, under the direction of the park board, as section 95 does. By which section are the policemen, when detailed for service in the parks, to be governed? As members of the force, they are undoubtedly bound to obey the police board. If, under section 95, they are subject to the direction of the park board, and are placed there, detailed, set apart, for a year, as the prayer for mandamus asks, they must obey the park board during that year, although section 755 makes it the imperative and unqualified duty of every policeman to report to the police board. If the men detailed-set apart-for the parks are under the direction of the park board, they cannot at the same time be also under the direction of the police board. That is obvious. Before the parks were brought into the city, the police assigned to the parks were placed under the direction of the park board, because the police board had no jurisdiction, as conservators of the peace, beyond the city limits. At that time it was impossible that a clash of authority between the two boards could occur. Now it is otherwise. But what is the utility of the detailed policeman reporting to the police board, if, after being assigned to service in the parks, he must take his orders from the park board? And how can he be under the direction of the park board unless he takes his orders from that board? Under section 744 and section 745 as amended by Acts 1900, c. 425, the police board has absolute control over the permanent police force enrolled for the city of Baltimore, and the municipal authorities have no right to interfere with that control. For, as was said by this court more than 40 years ago, in Mayor, etc., of Baltimore v. State, 15 Md. 455, 74 Am.Dec. 572, when construing Acts 1860, c. 7, which first created the board of police commissioners: "This law deprives the city authorities of all control over, or interference with, the police of the city, except as provided by the nineteenth section of

the fourth article of the constitution" of 1851,-an exception, it may be added, which does not concern the pending controversy, because it is no longer contained in the organic law. It was manifestly not the design of the legislature, when enacting the new city charter, to create a conflict between these various sections, and thereby to leave to the park board an opportunity, or the ability, if it should so elect, to diminish the force under the control of the police board, if the former selected section 95 to act under, when, by selecting section 758, the police would not be withdrawn from the supervision of the police department. Which section is to control? Are we to say that section 95 shall have priority over section 758? That would be in the teeth of the decision in Smith v. Commissioners, 81 Md. 513, 32 Atl. 193, where it was held that, when different sections of the same law conflict, the later one must prevail. Or are we to say that both sections, standing together, must limit the wide and comprehensive authority of the police board over the men enrolled by them for the preservation of order and the protection of persons and property throughout the entire city of Baltimore? Will any accurate answer to these questions ***956** reveal a clear, distinct, legal right in the park board sufficiently, free from doubt, and imperative to justify the issuing of a writ of mandamus; the ultimate effect of which writ will be to subordinate the judgment of the police board to the judgment of the park board on the subject as to what number of policemen shall be detailed for the parks, though the park board, as an agency of the city, is strictly forbidden to interfere in any way with the police board, as will be shown later on, when section 6 of the charter and section 759 of the local law are commented on. By treating section 95 as mandatory, a conflict of jurisdiction between the park board and the police board is made not only possible, but highly probable. This case presents a conflict in concrete form. The parks are now within the city limits. They now form part of the territory over which the jurisdiction of the police board extends. Independently of section 95, it is just as obligatory on the police board to maintain order, preserve the peace, and protect property within the parks and squares as it is to discharge the same duties in the heart of the inhabited portion of the city. "They shall at all times of the day and night, within the boundaries of the city of Baltimore, ***) preserve the public peace, prevent crime and arrest offenders, protect the rights of persons and property *** on all public occasions and places." Section 744. These are amongst the objects for which the police board was clothed with plenary power to enroll, to arm, and to maintain the force which the statutes subject to the board's authority. If the board is to do these things effectively, it must be in a position to enforce a rigid discipline over its subordinates; and there can be neither efficiency nor discipline, much less celerity of action, when the authority to command is divided between two boards. If section 95 is mandatory, then every part of it is mandatory, and the men who are furnished under it to the park board to serve for a year in the parks are for that period of time subject to the direction-that is, the control-of the park board; and if this be so, they are necessarily, for the same period, withdrawn from the control of the police board, for the obvious reason that they cannot obey both boards if the orders they receive from one are in conflict with the orders received from the other. If 12 per cent. of the enrolled force can be thus withdrawn from the control of the police department, why may not 20 or 30 per cent. be likewise dealt with? If that can be done, then the utter demoralization of the force will surely ensue. If section 95 be given a mandatory meaning, then the police board, so far as respects the preservation of order in the parks must be governed, not by its members' own sense of duty, not by the obligation of their oath of office, and not by their own judgment, but by the wisdom or the behests of the park board.

Now as, under section 744, it is the imperative

duty of the police commissioners at all times of the day and night "within the boundaries of the city" and at "all public *** places" to "preserve the public peace, prevent crime and arrest offenders," and as the parks and squares are public places, and are now within the boundaries of the city, it necessarily follows that the jurisdiction of the police commissioners includes and extends over those squares and parks, and that the officers and men placed in the squares and parks are, whilst there, under the control and subject to the direction of the police commissioners. If this be so,-and it does not admit of a reasonable doubt,-then there is a palpable conflict between section 744 and the antecedent section 95 in so far forth as the latter section purports to subject the detailed policemen to the direction of the park commissioners; and, if both sections are mandatory, it is obvious that both cannot prevail. A construction which produces such a repugnancy, and which subordinates in any particular the police commissioners, who are state officers (Altvater v. Mayor, etc., 31 Md. 462), to the domination of a mere municipal board, cannot be said to establish a clear, distinct legal right, free from doubt; especially in the face of the provisions of section 759, which emphatically declares: "Nothing in this sub-division of this article shall be so construed as to *** give the said mayor and council of Baltimore any control over said board [of police commissioners], or any officer of police, policeman or detective appointed thereby." Nor can the theory that section 95 is mandatory be upheld against the explicit provisions of section 6, subtit. "Police Power," which provides: "Nor shall the said city, or any officer or agent of the city, or of the mayor thereof, in any manner impede, obstruct, hinder or interfere with the said board of police, or any officer, agent or servant thereof or thereunder." Both of these last-cited sections are prohibitory. No mandamus can be issued to enforce compliance with a demand which overrides or is at variance in any particular or to any extent with these clear and emphatic prohibitions. If section 95 is mandatory, then the police board is subject to the control of the park board to the extent that the former is imperatively bound to comply with the request of the latter. But the right to order such compliance is a right not only to control, but a right to interfere with, the police board; and quoad that right the police board becomes subordinate to the park board. But that is precisely what section 6 of the charter emphatically declares shall not be the case. If section 95 is followed, section 6 must be disregarded. Section 758 bears to section 759 exactly the same relation that section 95 bears to section 6. If sections 95 and 758 are mandatory, it cannot be denied ***957** that sections 6 and 759 are equally mandatory. The result of treating all these four sections as mandatory is that sections 6 and 95 of the charter must neutralize each other, and sections 758 and 759 of the local law must also do the same thing. There would then be no statutory provision at all to abridge the board powers conferred on the police board by section 744, and no law making the latter subservient to the park board in any particular.

Sections 95 and 758, when first adopted, had relation to a different situation from the one which now exists; and when they were put side by side with others which gave in mandatory terms such plenary power to the police commissioners throughout the whole city, including the parks, and which denied to the city in prohibitory words any control over the police, they must be treated as simply directory or explanatory, and not as creating exceptions to the broad and imperative powers of the police commissioners. A section of the Code-and all these sections of the charter are sections of the Local Code, art. 4-may be considered in the light of the original act from which it was codified, and with reference to the times and circumstances under which the law was passed. Maurice v. Worden, 52 Md. 294; Hooper v. Creager, 84 Md. 195, 35 Atl. 967, 1103, 36 Atl. 359, 35 L.R.A. 202. Both sections 95 and 758, as

originally adopted,-the one in 1862, the other in 1867,-had reference to Druid Hill Park, which, as previously stated, was then part of the territory of Baltimore county, and which was not brought within the city limits until the annexation act of 1888 (chapter 98) went into effect. As the police of Baltimore city had no authority to make arrests in any part of the territory within the limits of Baltimore county, except in the instances named in Acts 1860, c. 7, and now reiterated in section 744, but which instances do not refer to the preservation of order in the parks, it was clearly necessary for the legislature to enact some provision for policing the parks owned by the city, but lying beyond the city limits. It was with that end in view, and with no other, that both sections 95 and 758 were at first adopted. The phraseology employed demonstrates this. Both sections declare that the policemen detailed for the parks should "have the same power in the premises that the police force of the city have as conservators of the peace." Had it not been for that or some similar legislation, the city police would have been without authority as conservators of the peace in the parks lying beyond the city limits. The original design and purpose of the legislation, then, was not to make the policemen assigned to the parks independent of the police commissioners, but the purpose and design was to give the men so assigned a power which, without that legislation, they would not have possessed. But when the parks were brought within the city limits by the annexation act the reason and necessity for those two sections obviously ceased, because, when the parks became part of the city, the police had, without regard to those sections, just as much power within the parks as they had on Baltimore or Charles streets. Neither of those sections, though the one was transcribed into the new charter and the other into the local law, confers any power on the police commissioners or on the policemen, not given by section 744; and neither of them can be treated, because so transcribed, as restricting the provisions of section 744, or as enlarging the authority of the park board in any way, unless sections 6 and 759, which deny to the city, and therefore to all its agents, including the park board, any control over the police, be entirely eliminated. If sections 95 and 758 are no longer necessary to give the police jurisdiction in the parks, because the parks are now within the city limits, and if those sections can confer on the park board no control over the police force without striking down sections 6 and 759, it is not perceived how the mere fact that they have been copied into the new charter and into the local law gives to them a mandatory effect, which will, if pushed to where it necessarily leads, seriously interfere with the management of the police force by the police commissioners. The history of the origin of sections 95 and 758, the purpose which induced their adoption many years ago, and their existing association with other provisions, with which they must clash if they are treated as mandatory, but with which they may stand in perfect accord if they are regarded as merely directory, would seem to require that they he held to be not mandatory, but directory. They cannot be read as exceptions to the police commissioners' general powers unless they are construed to be mandatory, because those general powers are, under section 744, themselves essentially mandatory, and mandatory powers like those cannot be controlled or limited by a mere directory provision. If sections 95 and 758 are treated as exceptions to section 744, they must, and can only, be so treated because they are mandatory. Now, section 95, if mandatory, is in conflict with section 6, which is no less mandatory. Both sections 6 and 95 are parts of the charter. Giving to each a mandatory effect will create a distinct conflict between two sections of the charter. Section 758, if mandatory, is in conflict with section 759. Neither of the latter is part of the charter, but both are included amongst the local laws. Giving to each a mandatory effect will create a distinct conflict between two sections of the local law. Can such

conflicts generate a clear, definite, legal right? Every principle of interpretation, in view of all the surroundings, points to a directory construction of sections 95 and 758. The unity of the charter and the consistency of the local law will be maintained by holding those sections to ***958** be directory. The stability police force will be thereby guarantied. The possibility of a clash of authority between two boards, with its serious consequences, will be thus averted, and sections 6 and 759 will be respected and obeyed.

Nor must the circumstances which preceded and the occasion which prompted the adoption of the act of assembly creating the board of police commissioners be overlooked when interpreting the city charter and the miscellaneous local laws to which reference has been made. For some years prior to the adoption of Acts 1860, c. 7, and therefore during a period when the police force was wholly under the control of the municipality, the city authorities failed to suppress the disorder and lawlessness which prevailed to an alarming extent, and the riots and bloodshed which invariably accompanied a general or local election. The law was defied; the public peace was disturbed; the constabulary were powerless, if not in sympathy with the mob; and reputable citizens were driven by violence from the polls. Relief from the intolerable conditions which existed was finally sought by an appeal to the general assembly, and Acts 1860, c. 7, completely separating the police department from the city government, was the result. The police board was created, and its members, and the force enrolled by them, were made state officers; and the city was denied, in the most positive manner, any right to interfere with or control the policemen. The underlying purpose was to deprive the city of all power over the police. The change made Baltimore one of the most law-abiding communities in the country. Can it be supposed that it was the design of the new charter to return, even partially, to the status which the act of 1860 abolished? The language of section 95 must yield, if need be, to the intent of the whole enactment (State v. Boyd, 2 Gill & J. 365); and that intent is perfectly obvious when the considerations already alluded to are given their just and appropriate weight. The words of section 95 are simply directory as respects the detailing of policemen for the parks. The police commissioners are "directed," and in section 758 they are "required," to make the detail; but neither of these words, in view of the whole context and the entire surroundings, creates an imperative, absolute duty, admitting of no discretion. The last sentence of section 29, art. 3, of the constitution, provides: "And whenever the general assembly shall enact any public general law, not amendatory of any section, or article of the said Code, it shall be the duty of the general assembly to enact the same, in articles and sections, in the same manner, as the Code is arranged." This provision, though containing the imperative word "shall," and though imposing an explicit duty, was held by this court to be directory, and a law passed without the observance of that requirement was upheld. Commissioners v. Meekins, 50 Md. 45. It is not disputed that cases may be found where, owing to peculiar conditions, the word "direct" has been held to impose a mandatory duty. Such, for instance, is the case of Mayor, etc., v. Reitz, 50 Md. 574. But mere words do not control. The whole surroundings, the purposes of the enactment, the ends to be accomplished, the consequences the may result from one meaning rather than from another, and the cardinal rule that seemingly incongruous provisions shall be made to harmonize, rather than conflict (New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. 656, 23 L.Ed. 336), must all be considered in determining whether particular words shall have a mandatory or a directory effect ascribed to them. It is peculiar, to say the least, that these two sections (95 and 758) should now be mandatory, and should, therefore, to some extent deprive the police commissioners of jurisdiction within the

squares and parks, and should curtail their authority in any way over the police force; though the primary object of these same sections at the time of their enactment was, not to curtail or restrict, but, on the contrary, to enlarge, the jurisdiction of the police commissioners by permitting them to send conservators of the peace into the county, and to extend the authority of the city police so that they might preserve the peace and protect property beyond the limits of the city. From every point of view those two sections should be treated as only directory.

Finally. Laying aside all that has been said thus far, there is another view which is absolutely conclusive against the board of park commissioners, and it is this: No one, it is believed, will venture to contend that section 95, however interpreted, confers, or was designed to confer, upon the park board an arbitrary and capricious power to demand that the police board should furnish for service in the parks any number of policemen that the park board might, without adequate reason, ask for. Such a construction, if adopted, would put in the hands of a park board a dangerous power, which could be used to seriously cripple the efficiency of the whole police department. There must, therefore, in the very nature of the situation, be some relation between the number of policemen demanded, the total number available for service throughout the city, and the occasion or needs for which the demand is made. In other words, there must be back of the demand a necessity for the demand; and there can be, consequently, no valid demand without a real necessity to support it. For instance, the total police force is made up of 700 men outside of captains, lieutenants, and sergeants. Acts 1900, c. 425. They are charged with the duty of policing the whole city, covering about 31 square miles of territory, including the parks. If the park board should require the police ***959** board to furnish for a whole year, and not for some special occasion or emergency, one-fourth of the entire force to guard the parks, which contain only about 1.8 square miles, such a demand would be manifestly unreasonable and unlawful. It is clear, then, that there must be some just and appropriate relation between the number of men demanded and the occasion for the demand, to say nothing of the ability of the police board to furnish such a number, due regard being had to the duty to police the rest of the city. It is certain, upon the most obvious principles, that no court would by mandamus enforce obedience to a demand if in point of fact there existed no just ground for making the demand. This self-evident principle was recognized by the relators in this case, and accordingly, in the fifth paragraph of the petition, it is distinctly alleged that "the board of park commissioners *** are unable to properly preserve order and the property of the city within the public parks and squares of the city and protect the peace and safety of the citizens who have access to said parks and squares because of this failure and refusal upon the part of the board of police commissioners to comply with the request of said board of park commissioners in reference to the necessary members of the police force for the purposes herein before stated." This is clearly an allegation of fact, and, in substance, it avers that the number of men demanded by the park commissioners is necessary for the preservation of peace and order and the protection of property within the parks and squares. Indeed, under the terms of section 95 it is only when such a necessity does exist that a demand for policemen can be made at all. The relators were therefore required to make the averment contained in paragraph 5, or else, on the face of their petition, they would have had no standing whatever in court. The allegation is therefore a material one. Now, the answer of the respondents flatly denies that averment. The denial is brief, but it is explicit. It says the respondents "deny the matters and things alleged in the fifth paragraph of said petition." The next docket entry is, "Issues joined on petition and answer." Here, then, is a

distinct issue of fact,-an issue of fact going to the very root of the case,-an affirmance on the one side and a denial on the other that a necessity existed for supplying the board of park commissioners with those 83 policemen. Under section 7, art. 60, of the Code of Public General Laws, the court below had authority to determine that issue of fact, provided both the relators and respondents agreed that it should. Eichelberger v. Sifford, 27 Md. 321. There is no such agreement in the record. Nevertheless, in the face of that condition, the Baltimore city court, without hearing a word of testimony or a particle of evidence, ordered the peremptory writ to issue. If, in truth, it had appeared at the hearing that there was no real necessity for supplying these 83 men and the additional 6 men, or 44 policemen to the square mile, whilst the balance of the city was left with but 21 to the square mile, can it be pretended that a writ of mandamus would have been ordered merely because the park commissioners had made a demand for that number of patrolmen? The writ must not only serve some just and useful purpose, but it must be "necessary to secure the ends of justice"; and if in fact there was no necessity-or, what is the same thing, if it did not appear that there was a necessity-for that number of men, no just or useful end could have been subserved, and the ends of justice could not have been promoted, by ordering the police commissioners to furnish them. How could the trial court assume that the necessity existed in the teeth of the flat denial made in the answer? And yet, before the writ could issue, the existence of the necessity must have been assumed, in asmuch as there was no evidence adduced to establish it. This court must make the same assumption before the order appealed against can be affirmed. It is clear, then, laying aside all other reasons, that because of this vital defect-this failure to establish the material allegations of the fifth paragraph of the petition-the writ should not have been issued. A writ of mandamus must issue as prayed if it is issued at all. Wells v. Commissioners, 77 Md. 142, 26 Atl. 357, 20 L.R.A. 89. If the writ issues as prayed in this case, it will mean, when issued, that by an order of court 83 men shall be detached from the police department, and placed under the control of the city through the park board, though this court said in 15 Md. 376, the city had been deprived of all control over the police, and though section 759 of the local law, transcribed from Acts 1860, c. 7, § 19, and continually in force for more than 42 years, says precisely the same thing. It will mean, when issued, that those 83 men shall be detached for a whole year from the police department, though the most the park board could require, under any view of section 95, is that the men should be detailed "from time to time," and, therefore, occasionally, and not for continuous service in the parks; it will mean, when issued, that these 83 men shall be assigned to the parks for service there during a year, and consequently for service nowhere else, whereby the strength of the police force will be impaired to the extent of 12 per cent. of its available number; it will mean, when issued, that the material allegations of fact in the petition which have been flatly denied by the answer may be assumed to be true in the absence of any evidence to sustain them; it will mean, when issued, that a divided, and most likely a conflicting, authority and control over the police will be established; and it will mean that a prerogative writ, which is a discretionary writ, ***960** and should never be issued unless the relator's right clear, distinct, legal right, and unless the respondent's duty is definite and mandatory, may, in Maryland, now and hereafter be availed of where there is no such right or duty accorded or imposed, and where the ultimate effect may be the creation of discord in the government of a great city, to the detriment of the public peace and tranquility.

Order reversed, and petition dismissed, with costs.

Md. 1902.
Upshur v. City of Baltimore

94 Md. 743, 51 A. 953

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