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96 Md. 361, 54 A. 85

Court of Appeals of Maryland.
GARDNER
v.
MAYOR, ETC., OF **CITY** OF **BALTIMORE**.
Jan. 15, 1903.

Appeal from the circuit court of Baltimore city; Pere L. Wickes, Judge.

Bill by the mayor and city council of Baltimore against John C.R. Gardner and others for leave to pay into court money awarded for property condemned for the use of the city. From a decree granting the petition, the defendant Gardner appeals. Affirmed.

West Headnotes

Appeal and Error 30 ⚿870(5)
30k870(5) Most Cited Cases
A decree overruling a demurrer to a bill by the mayor and city council of Baltimore for leave to deposit money in court in condemnation proceedings is not reviewable on an appeal from a decree entered after answer and hearing, under Code, art. 5, § 26, providing that, on an appeal from a final decree, all previous orders shall be open to revision, but can be reviewed only on a direct appeal from such decree, under section 24, allowing an appeal from any final decree.

Eminent Domain 148 ⚿158
148k158 Most Cited Cases
Evidence in an action to determine conflicting claims to money awarded for condemnation of a tract of land for a street examined, and held to justify a finding that a certain portion of the tract had previously been dedicated as a street, and that defendant had no right thereto.

Eminent Domain 148 ⚿158
148k158 Most Cited Cases
Under Acts 1892, c. 165, now New Charter of Baltimore, § 827, providing that when property shall have been condemned for the city, and in consequence of conflicting claims, refusal to accept, or any other cause, the money cannot be safely paid to any person, the mayor and city council may file a bill in equity, and the court may decree that the money be paid into court, the court has jurisdiction of a bill showing that defendant claimed that a tract owned by him and condemned extended into a street, and included a portion of such street which the city claimed, and that he refused to accept the sum awarded for so much of such tract as was not in the street.

Eminent Domain 148 ⚿158
148k158 Most Cited Cases
Where property claimed adversely by different persons is condemned by a city for a street, the title to the property passes to the city; and an action to determine which of such claimants is entitled to the award therefor is not an action to determine title to land, and may be prosecuted in equity.

Equity 150 ⚿150(1)
150k150(1) Most Cited Cases
A bill in equity filed with the single object of condemning lands for a street is not multifarious because all persons interested in any of the lands to be condemned are made parties.

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

James Hewes, for appellant.
Wm. Pinkney Whyte, Olin Bryan, and Jas. W. McElroy, for appellee.

PEARCE, J.
This is an appeal by John C.R. Gardner from a decree of the circuit court No. 2 of Baltimore city, passed May 21, 1902, in the case of the mayor and city council of Baltimore against John C.R. Gardner and others. The bill was filed under the

act of 1892, c. 165, now section 827 of the new charter of Baltimore city, which is as follows: "Whenever any property shall have been condemned in any form of proceeding for the use of the mayor and city council of Baltimore, and in consequence of infancy, insanity, absence from the city of any persons entitled to receive any money awarded in such proceeding, conflicting claims, refusal to accept, or any other cause, such money cannot be reasonably or safely paid to any person or persons, it shall be lawful for the mayor and city council of Baltimore to file a bill or petition in any court of equity in the city or county where the property is condemned, or any portion thereof lies, and whenever such court shall be satisfied for any of the persons aforesaid that such money ought to be paid into such court, it shall pass such decree as it shall deem proper, and the payment of any money into court under such a decree or order shall be considered in all respects equivalent to a tender thereof to any person or persons entitled to such money, and who may be made a proper party to such proceeding." The original bill filed set forth that under Ordinance No. 44, approved April 4, 1892, land was condemned to open Ensor street from Eager street to the south side of Chase street, and that damages and benefits were awarded thereunder to the various owners or alleged owners of the land condemned, and that, among these, damages were awarded to John C.R. Gardner and Sarah R. Gardner, his wife, as joint tenants, or to such persons as may be legally entitled thereto, for the fee-simple interest in lot designated on the plat accompanying this opinion by the letter "J," in the sum of $2,801.33, less benefits assessed on lot 44 on plat B, returned by the commissioners, in the sum of $223 (the net damages in their case being $2,578.33 for the fee-simple interest in the lotsaforesaid), but that in fact the said Gardner and wife were not entitled to any allowance for that part of lot J which comprised the bed of Little Ensor street, as shown on the plat accompanying this opinion, because the same was, before said condemnation, a dedicated highway, and that said Gardner and wife had, by petition in the Baltimore city court, asked for a writ of mandamus to compel the then ***86** city official known as the "Examiner of Titles" to issue a certificate for the net amount of said damages, which the said Baltimore city court refused to order. The bill further alleged that said portion of lot J previously dedicated as aforesaid was valued by the commissioners for opening streets at $1,193.33, and that the true and just amount due said Gardner and wife under said condemnation was $1,385, arrived at as follows:

Total award.	
Deduct benefits.	$ 2
Deduct value of bed of Little	$1,1
Ensor street dedicated.	
	1,4

-And then tendered said Gardner and wife said sum of $1,385, which they refused. And the bill further alleged that they could not reasonably or safely pay said award to said Gardner and wife. The prayer of the bill was that the net sum alleged to be due Gardner and wife and the other parties to the bill, all of which have since been adjusted, be paid into court to the credit of the cause, and that the defendants answer the bill and adjust their respective demands.

A few days later an amended bill was filed, under leave of court, asking that the whole amount awarded to Gardner and wife, less benefits, viz., $2,578.33, be allowed to be deposited in court. Gardner and wife demurred to the original and amended bill: (1) Because they alleged the bill did not state a case within the operation of section 827 of the new charter; (2) because the bill was multifarious, in making the other landowners mentioned parties to the cause; and (3) because the bill did not state any case entitling the plaintiff to relief in equity. This demurrer was, after argument, overruled by Judge Wickes on December 8, 1900, and correctly, as we think, for

reasons which will hereafter appear.

Gardner and wife then answered the original and amended bill, admitting the condemnation proceedings set forth in the bill, but denying that there had ever been any dedication of that part of lot J comprising the bed of Little Ensor street, or that the commissioners for opening streets had ever valued that part of said lot so dedicated at $1,193, or at any other sum, and averring that at the time of said condemnation they had a fee-simple title to the whole of lot J, and filed as an exhibit a deed to them from Olivia Wolfe, dated February 23, 1889, embracing the whole of lot J within its lines. The answer also alleged that plaintiff was estopped from disputing the title to lot J, and to the whole of the award, by article 48 of the City Code of 1893, and that the decree prayed would operate as a taking of their property without due process of law, in violation of the fourteenth amendment of the constitution of the United States. The bill and answer were considered without testimony, and on December 8, 1900, the court (Judge Wickes being of opinion that the sums of money mentioned in the original and amended bill should, under section 827 of the new charter, be paid into court as prayed) passed a decree that said sums be paid into court, subject to its order, "in full settlement and satisfaction of all claims and demands of all parties against the said mayor and city council growing out of the condemnation of said lots. *** But it appearing that there is a contention between the mayor and city council and the said Gardner and wife as to the actual ownership of a portion of the fee-simple estate in lot J, *** it is adjudged, ordered, and decreed that the said net amount of $2,578.33 awarded for the fee-simple interest in lot J shall await and abide the final adjudication of the said contention over lot J." This decree further appointed James W. McElroy trustee, to grant and convey to the mayor and city council all the lots condemned as aforesaid, and such conveyance was accordingly made. No appeal has ever been taken from this decree, which was passed December 8, 1900, and is consequently, by lapse of time, final and conclusive as to every matter therein determined, provided the decree was within the jurisdiction of the court. Barrick v. Horner, 78 Md. 253, 27 Atl. 1111, 44 Am.St.Rep. 283.

We do not doubt that the court had full jurisdiction to pass this decree. The allegations in a bill determine the question of jurisdiction, and the true test in all cases is whether a demurrer will lie to the bill. Tomlinson v. McKaig, 5 Gill, 276. The allegations of this bill state a case clearly within the scope of section 827 of the new charter, and there can be no doubt of the power of the legislature to make that enactment. The bill is not multifarious, since its object is the single one of making the condemnation under the ordinance for opening Ensor street effective, and all of the parties to the cause are interested in that condemnation. The third ground stated in the demurrer we understood from defendant's argument to mean that the cause is one involving title to land, which, it is well settled, cannot be tried and determined in equity. But we think it is plain there is no question of title to land in this case.

Under Ordinance No. 44, approved April 4, 1892, the mayor and city council condemned and opened Ensor street from Eager street to the south side of Chase street, as shown on the plat in this case, and awarded to Gardner and wife, as already stated, net damages of $2,578.33, upon the supposition that they owned the whole of lot J. When this award was made, the city had no right of appeal. Baltimore City Code 1893, art. 50, § 60. But no money could be paid on account of any condemnation without a certificate from the examiner of titles that the person or persons claiming the payment of any money therefrom are the owners of the ***87** property for which such money was awarded, and, when these proceedings

were submitted to the examiner of titles, he refused to give such certificate to the Gardners, because, as he stated in his testimony, he discovered that they did not own that part of lot J which constituted the bed of Little Ensor street. Thereupon the street commissioners valued and assessed that part of lot J (which, it will hereafter appear, had been previously condemned for the use of the city) at $1,193, and tendered the Gardners the residue of the award made to them, viz., $1,385, which they refused to receive, and some time in 1898 filed a petition for a mandamus compelling Mr. Story, the examiner of titles, to certify that they were the owners of the whole of lot J, and were entitled to the whole of the award therefor, and also compelling Mr. Fenhagen, the city comptroller, to pay that amount, but this was refused by Judge Phelps; and thus the matter stood until this proceeding was instituted.

Condemnation proceedings are proceedings in rem, and bind all persons interested in the rem, even though not technically parties to the proceeding. All questions of title to the rem are transferred to the money awarded, after a valid and final condemnation. Here the city could not, under then existing law, appeal, and the Gardners did not within the time allowed them for that purpose. This case is therefore one of valid condemnation, and the question is no longer one of title to land, but of title to money substituted for land. As stated by this court in Norris v. Mayor and City Council of Baltimore, 44 Md. 604, where the question was whether an assessment for damages carried interest from its date, the condemnation proceeding might be abandoned at any time before actual payment of the amount assessed, "and until that time no title to the property condemned vests in the corporation. *** But when this sum is paid or tendered, the title vests." We are of opinion, therefore, the court had jurisdiction, and that the demurrer was properly overruled. It was to just such a situation that section 827 of the new charter applied, and the decree of December 8th, passed on the overruling of the demurrer, is in full conformity with the provisions of that section. Nor is that decree open to revision on this appeal. In Hopper v. Smyser, 90 Md. 378, 45 Atl. 206, we held that a decree which exonerated certain lots of land from sale under a certain mortgage until the exhaustion of other mortgaged properties was in the nature of a final decree, and not open for revision under section 26 of article 5 of the Code , but only upon appeal directly therefrom under section 24 of article 5.

Coming next to the consideration of the decree of May 21, 1902, passed by Judge Wickes, awarding to Gardner and wife $1,385 (being the sum tendered them by the mayor and city council), and awarding the residue of the whole award ($1,193) to the mayor and city council, a brief review of the testimony will suffice to show the correctness of that decree. Under an ordinance approved October 8, 1857, the city commissioner was authorized and directed to condemn and open Ensor street from Chase street to Harford avenue, as shown on the plat by the letters A, B, C, D, E, F. The evidence shows that this was done at the earnest solicitation of Marcus Wolfe, who was then the owner of lot J, and also of the adjoining lot, marked "184" on the plat. His son Alonzo Wolfe and his daughter Olivia Wolfe both testified to this fact. Olivia says her father paved that part of lot J which constituted the bed of Little Ensor street, and gave it to the city, in order to improve his property; and Alonzo says a deed was prepared for this bed of the street to the mayor and city council, and he is sure his father executed it. They both say the street, after being paved, was always used as a street by the public, and that the city authorities put up a sign at the corner of Harford avenue and that street, bearing on it the words "Ensor Street." Marcus Wolfe died in 1875, and by his will, made July 29, 1875, devised to his daughter Olivia "my homestead, No. 184, on the northwest side of Harford

avenue," without otherwise describing it. Wm. P. Price and wife, by deed of July 27, 1849, conveyed to Marcus Wolfe a lot on the northwest side of Harford avenue, the metes and bounds of which embraced lot 184, and also lot J, as shown on the plat, and nothing more. In 1857, as already stated, lot J was condemned, and was conveyed or given by Marcus Wolfe to the city, and from that time, up to the condemnation of 1892, and the institution of these proceedings, has constituted part of the bed of Little Ensor street; and neither Marcus Wolfe, in his lifetime, nor Olivia Wolfe, since his death, ever claimed any ownership or interest therein. On February 23, 1889, Olivia Wolfe sold and conveyed to John C.R. Gardner and Sarah A. Gardner, his wife, a lot on the northwest side of Harford avenue, by metes and bounds, designating it as the same devised by Marcus Wolfe "to my daughter Olivia, *** No. 184, my homestead"; but this conveyance followed the metes and bounds contained in the deed from Price and wife to Marcus Wolfe, and thus embraced that part of lot J which had been condemned in 1857, and had since constituted a part of the bed of Little Ensor street. Olivia Wolfe testified that the house on lot 184 fronted on Little Ensor street, and that, after the condemnation and opening of that street, the homestead did not include any part of the bed of that street. Gardner testified that, when he purchased the dwelling and lot from Olivia Wolfe, she gave him the Price deed "to go by," and that he had the property surveyed, and would not have purchased it "without getting the old deed," and that Olivia Wolfe told him if the street was ever ***88** opened he would be paid for the street. Olivia Wolfe testified in rebuttal that the street was never mentioned by her to Gardner, and that she knew the homestead devised to her by her father did not include any part of lot J, and that when she executed the deed to the Gardners she did not know it included any part of lot J, and that she would not have attempted to sell what she knew she did not own, and, further, that she never knew until this controversy arose that he claimed to have purchased any portion of the bed of the street. Gardner testified on cross-examination that his father-in-law advised him to have Price's lines put in his deed, but it nowhere appears that Gardner informed her this had been done when the deed was presented for execution by her, and the fact that his father-in-law's advice led to the insertion of the Price lines is strong presumptive evidence that Gardner would otherwise not have inserted these lines, and that he understood lot No. 184 did not, in fact, embrace any part of lot J.

We find no error in the decree disposing of the fund before the court. Decree affirmed, with costs in this court to the appellee, but each party is to pay its respective costs below, as provided by the decree of the circuit court No. 2 of Baltimore city.

Md. 1903.
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