C
124 Md. 153, 91 A. 966

Court of Appeals of Maryland.
PATTERSON et al.
v.
MAYOR & CITY COUNCIL OF BALTIMORE et al.
No. 24.

June 25, 1914.
Motion for Reargument and Modification Denied Oct. 7, 1914.

Appeal from Baltimore City Court; H. Arthur Stump, Judge.

"To be officially reported."

Proceedings for the opening of a street in the city of Baltimore. From the assessment of damages and benefits by the commissioners for opening streets, Laura Patterson and another, property owners, appealed to the Baltimore city court, and from its rulings again appeal. Reversed, and new trial awarded.

West Headnotes

Eminent Domain 148 96
148k96 Most Cited Cases
On the exercise of the right of eminent domain, the owner is entitled to recover, not only the fair value of the land taken, but also for the injury to the remainder.

Eminent Domain 148 201
148k201 Most Cited Cases
In assessing benefits and awarding damages for opening a street, the effect on the property of the opening of another street, authorized by another ordinance, but not completed, may not be considered.

Eminent Domain 148 238(6)
148k238(6) Most Cited Cases
Under Acts 1912, c. 32, § 1, amending Code Pub.Loc.Laws, art. 4, § 179, on appeal from the award of damages and assessment of benefits by the commissioners for opening streets in Baltimore, the commissioners are competent witnesses, and may be examined as to the principles on which they acted.

Eminent Domain 148 238(6)
148k238(6) Most Cited Cases
A question to one of the commissioners, on appeal from the award by the commissioners for opening streets, to show on what his award was based, and his judgment of the value of a lot into which property was cut by the opening of the street, is proper.

Eminent Domain 148 238(6)
148k238(6) Most Cited Cases
A question to a witness on appeal from the award by commissioners for opening streets, designed to establish his qualification to testify to the value of the property, should be allowed.

Eminent Domain 148 239
148k239 Most Cited Cases
As to the value of the property and the damage by the opening of a street, the jury sent, on appeal from the award, under the power contained in Acts 1912, c. 32, § 1, amending Code Pub.Loc.Laws, art. 4, § 179, to view the property may consider not only the evidence introduced, but the effect on them of their view.

Municipal Corporations 268 278(3)
268k278(3) Most Cited Cases
Before property can be assessed for the opening of a street its grade must be established.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

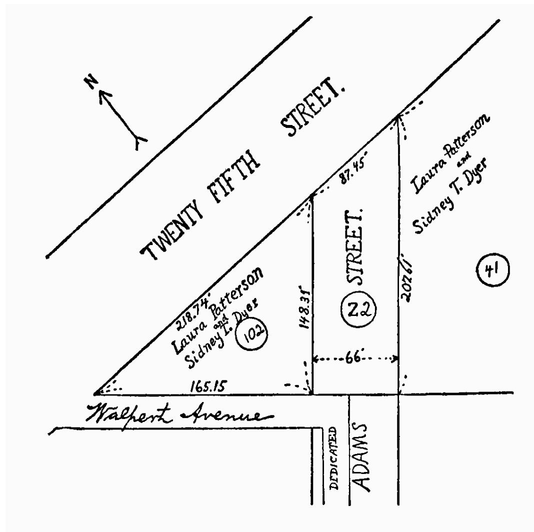
Arthur W. Machen, Jr., of Baltimore, for appellants. Robert F. Leach, Jr., of Baltimore (S.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

S. Field, City Solicitor, of Baltimore, on the brief), for appellees.

BURKE, J.
City Ordinance No. 109, approved May 27, 1912, authorized the opening of Adams street from the west side of Homewood avenue to the south side of Twenty-Fifth street. It provided for the opening of the street "to the south side of Twenty-Fifth street 100 feet wide as now in process of widening." The opening of Twenty-Fifth street had been authorized by an ordinance approved December 9, 1909.

The appellants are the owners in fee of a tract of land which extends northerly and easterly from Walbert avenue. For a clear understanding of the situation of the several streets and the location of the appellants' property with reference thereto, a diagram is here inserted.



The portion of the appellants' land actually taken for the bed street is designated upon the diagram as lot Z2, and the adjoining lots as lots 41 and 102. By the return of the commissioners for opening streets the appellants were awarded $1,174.50 for the lot actually taken, and were assessed $1,168 as benefits-$6.50 less than the damage. Lot 41 was assessed $724 for benefits, and lot 102 $444. A petition for a review of the award and assessment was filed in the Baltimore city court, where a trial was had upon the questions involved. The trial resulted in an inquisition which fixed the damages at $1,174.50 and the benefits at the same figure. This appeal was taken by the appellants from the rulings of the lower court made during the progress of the trial. The main questions in the case are: (1) The effect of the failure of the city to establish the grade of Adams street before making the award and assessment; (2) the competency of the present and prior commissioners for opening streets as witnesses; (3) the admissibility in this case of the ordinance and proceedings for the opening of Twenty-Fifth street.

There are some subsidiary questions presented upon the rulings upon the evidence and prayers which will be considered later.

[1] As to the first question: The grade of Adams street has never been established. It was decided in the recent case of the Mayor & City Council v. Johnson, 91 Atl. 156, January term, 1914, that the city cannot lawfully assess benefits against abutting property until the grade of the proposed street shall have first been established. In that case Judge Pattison, speaking for the court, said:

> "When a public street or highway is to be opened, and land is to be condemned for the bed of the street or highway, it is but fair and equitable that the grade of such street or highway should first be established, in order that those who are to determine the benefits, if any, that the opening of such street or highway will be to the abutting lands may estimate the necessary costs of placing such abutting lands in a condition to receive the advantages of the street or highway as opened and graded; and the grade so established should be the one, so far as it can then be determined after a proper consideration of the rights and interests of the

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

> adjacent landowners, that for all times will best subserve the public interest and convenience. Not to establish a grade at the time when the street is open, but at such time to assess the benefits without regard to the costs and expenses to which the adjacent landowners may be subjected in cutting or filling their lands so as to enable them to receive the advantages of the road so opened, would, we think, be unfair and inequitable to them. The grade of the street is so materially involved in ascertaining the amount of benefits to be assessed against the abutting lands that it is right and proper, in our opinion, that a permanent grade, and not a tentative one, such as is here referred to by the city engineer, should be established before the city should be permitted to assess benefits to abutting lands, caused by the opening of such street or highway."

Under the authority of that case there was reversible error in refusing the appellants' sixth prayer, which asserted that there was no evidence legally sufficient to justify an assessment of benefits against lot No. 41, and in refusing their seventh prayer, which, for the same reason, declared that there could be no assessment for benefits against lot 102. The eighth prayer, for the same reason, should have been granted.

[2] Under section 179 Code Pub. Loc. Laws, art. 4, of the Acts of 1912, c. 32, § 1, the commissioners for opening streets were competent witnesses in the case. That section provided that, upon the appeal from the award and assessment, the court "may require the said commissioners, their clerk, surveyor, or other agents and servants, or ***968** any of them, and all such other persons as the court may deem necessary, to attend, *and examine them on oath or affirmation*," etc.

The city, in condemning and opening Adams street, was exercising through the commissioners for opening streets the power of eminent domain, and in Consolidated Gas Co. v. Baltimore City, 105 Md. 43, 65 Atl. 628, 121 Am. St. Rep. 553, the court said that:

> "Ever since the case of Tidewater Canal Co. v. Archer, 9 Gill & J. 479, the practice in Maryland has allowed the examination of jurors, who sign the inquisition as witnesses, on return of such inquisition for confirmation, 'upon all subjects whatever relating to the controversy, as fully as any other persons who might be sworn as witnesses in the cause, that they may be examined as to the grounds and motives for their finding, in order to ascertain whether, in coming to their conclusions, they had not mistaken facts as well as the law.'"

This proceeding is analogous to the old proceeding by condemnation, and it is proper that the persons who made the award and assessment should be required to state the principle upon which they acted.

[3] We are of opinion that the questions of the opening of Twenty-Fifth street and their effect upon the appellants' property should not be injected into this case. That was a separate and independent proceeding, and it may never be carried to completion. If it should be, all grievances which the landowners may have against the action of the commissioners may be remedied by an appeal to the court. Such questions are not properly open for determination in this case.

The record presents 20 bills of exceptions taken to the rulings of the court on evidence. It results from the views we have expressed that there was no error in the ruling embraced in the first, second, and third exceptions, which relate to the refusal of the court to admit in evidence the ordinance for the opening of Twenty-Fifth street; the record of proceedings in the opening of that street; and testimony as to the establishment of the grade of that street.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

[4] [5] There was error in the rulings in the fourth and fifth exceptions. The question asked Mr. Grannan, one of the commissioners for opening streets, to show upon what his award of damages was based, and his judgment of the value of lot Z2, should have been answered. The question set out in the sixth exception has reference to the opening of Twenty-Fifth street, and we find no error in that ruling. Mr. Budnitz should have been allowed to answer the question embraced in the seventh and eighth exceptions, and the questions propounded to John L. Sandford in the ninth and tenth exceptions were likewise proper, and he should have been permitted to answer them. They were designed to establish the qualification of Mr. Sanford to testify to the value of the property. Had the answers to these questions established his qualification to speak as to values, he should have been permitted to answer the questions embraced in the eleventh exception. But, as we do not know whether or not he was qualified, we cannot pronounce that ruling erroneous. The same observation, for the same reason applies to the twelfth exception.

The evidence proposed to be offered in the thirteenth exception was whether certain proceedings which had been taken for the opening of Twenty-Fifth street would affect the saleable value of lot ZA. The court refused to admit this evidence, and, for the reason above stated, there was no error in the ruling. The question propounded in the seventeenth exception related to the pending proceeding for the opening of Twenty-Fifth street, and the ruling was correct. Inasmuch as the city could not make an award and assessment of benefits until the grade of Adams street had first been established, the evidence proposed to be introduced in the nineteenth and twentieth exceptions to show the effect on the value of the lots by reason of the failure of the city to establish the grade was wholly immaterial. The evidence proposed to be offered in the fourteenth, fifteenth, sixteenth, and eighteenth exceptions had a tendency to enlighten the jury upon the question of damage. The court should be careful to see that the rights of the property owners are fully protected, and we do not think there are any well-founded objections to these questions.

[6] There remains for consideration the rulings of the court on the prayers. The sixth, seventh, and eighth prayers we have already passed upon. The appellants submitted 15 prayers. Their first and second were granted as offered. Their third, fourth, fifth, twelfth, and fourteenth were refused as offered, but were granted with modifications by the court. Their other prayers were refused. The appellants excepted to the refusal of their prayers as offered and to the modifications made by the court. Their third and twelfth prayers were upon the subject of "damages," and are here transcribed:

(3) In estimating the damages to be paid for condemnation of property, the jury must include in their award of damages not merely the market value of the land actually to be taken, but also a due allowance of damages for injury to the remaining land owned by the appellants, Laura Patterson and Sidney T. Dyer, if the jury shall find that any such injury will be caused.

(12) If the jury find that Laura Patterson and Sidney T. Dyer are the owners of the ground binding on the southernmost side of Twenty-Fifth street as proposed to be opened in the proceedings now pending for that purpose, and bounded northwardly by Twenty-Fifth street and southwardly by Walbert avenue and the dividing line between the land known as the Patterson Cold Stream property and the land known as the Walbert property, and if the jury further find that the opening of Adams street as proposed in this proceeding will be injurious to the petitioners, Laura Patterson and Sidney T. Dyer, in an amount greater than the present market value of the ground contained in lot No. Z2, shown on the plat marked A and B in evidence, then the jury, in ascertaining***969** the

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

damages to be paid to said petitioners, are not confined to the market value of the ground contained in said lot No. Z2, but they may and should award to the said petitioners as damages such sum of money as will fully compensate for all the injury which the jury shall so find will so be done to them by the opening of said Adams street as proposed in the present proceedings.

These prayers, as offered, should have been granted, as they stated the correct rule of damage.

[7] Under the power contained in section 179 of the Acts of 1912, c. 32, the court sent the jury of inquest to view the land condemned. There is a broad distinction between the nature and effect of a view of the premises by a jury in a condemnation case and that of an ordinary action at law. In the first class of cases the jury is not confined to the duties and limitations which the principles of the common law impose upon a common-law jury. This subject has been fully treated in Tidewater Canal Co. v. Archer, supra. While we are not to be understood as holding that all the principles announced in that case upon the subject we are now considering are applicable to this case, we do hold that the jury may be very properly influenced as to the value of the property and the damage that would be done by the opening of the proposed street by their view of the property.

In Kurrle v. Baltimore City, 113 Md. 63, 77 Atl. 373, the court said:

"In eminent domain proceedings, the jury goes upon the land for the purpose of *ascertaining its value*, and their view should have more effect than in ordinary cases where they are generally and primarily permitted to go to the locus in quo so as to better understand and apply the evidence."

The effect of the modifications made by the court to the appellants' third and twelfth prayers was to confine the jury to the evidence produced at the trial, and to shut out from their consideration the effect which the view of the property may have had upon their minds. In this the court fell into an error. The appellants have abandoned their exception to the refusal of their fourteenth prayer and to the modification thereto made by the court, and they do not insist upon their fifteenth prayer.

Their fourth, fifth, and thirteenth prayers relate to "benefits." As the question of benefits could not be determined under the circumstances of this case, there was no error in refusing these prayers, and they should not have been granted as modified. The tenth and eleventh prayers have reference to the opening of Twenty-Fifth street, and, for the reasons already stated, were properly rejected.

The record contains three prayers offered by the appellee. The first was modified by the court and granted as modified. It related to the question of "benefits." There was a special exception to this prayer, which was overruled by the court. The exception was based upon the ground that there was no legally sufficient evidence to show that the property would be benefited. It results from what we have heretofore said that the exceptions should have been sustained and the prayer refused. We find no error in granting the second and third prayers of the appellee.

What we have said disposes of all the questions presented, and for the errors pointed out in the rulings of the lower court, the case must be remanded for a new trial.

Rulings reversed, and new trial awarded; the appellee to pay the costs.

Md. 1914.
Patterson v. City of Baltimore
124 Md. 153, 91 A. 966

END OF DOCUMENT

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.