124 Md. 299, 92 A. 770

Court of Appeals of Maryland.
BALTIMORE & O. R. CO.
v.
KAHL.
MAYOR AND **CITY COUNCIL** OF **BALTIMORE**
v.
SAME.
Nos. 22, 23.

Dec. 2, 1914.

Appeals from Baltimore City Court; Morris A. Soper, Judge.

"To be officially reported."

Actions by Elizabeth Kahl against the Baltimore & Ohio Railroad Company and against the Mayor and City Council of Baltimore. Judgment for plaintiff against both defendants, and they appeal. Reversed, and new trial awarded.

West Headnotes

Damages 115 ⚿15
115k15 Most Cited Cases
Compensation for injuries to all classes of property should be precisely commensurate with the injury done.

Eminent Domain 148 ⚿101(2)
148k101(2) Most Cited Cases
A railroad constructing an approach to a bridge for its own convenience held liable in damages to an abutting owner whose property, though not taken, was made less accessible.

Eminent Domain 148 ⚿141(1)
148k141(1) Most Cited Cases
Measure of damages to abutting property from the construction of a railroad approach in front of it held its depreciation in value occasioned thereby, without loss of rent as an additional element of damages.

Evidence 157 ⚿113(19)
157k113(19) Most Cited Cases
In action for damages to property from a bridge approach in front of it, finished August, 1911, a tax bill for 1914 and an assessment for 1913, held inadmissible upon its value after the injury.

Municipal Corporations 268 ⚿385(2)
268k385(2) Most Cited Cases
A municipal corporation, which by ordinance authorized the construction of bridge approaches without taking any of an adjacent owner's property, is not liable in consequential damages for the change of grade.

Trial 388 ⚿253(3)
388k253(3) Most Cited Cases
In an abutting owner's action against a city and a railroad for damages from a bridge approach in front of his property, city's requested instruction on damages held properly refused as ignoring the owner's duty to minimize damage.

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

Duncan K. Brent and W. Irvine Cross, both of Baltimore, for appellant Baltimore & O. R. Co. Benjamin H. McKindless, Asst. City Sol., of Baltimore (S. S. Field, City Sol., and Edward J. Colgan, Jr., both of Baltimore, on the brief), for appellant Mayor and City Council of Baltimore. Edward L. Ward and Edward M. Hammond, both of Baltimore, for appellee.

BURKE, J.
The appellee, Elizabeth Kahl, is the owner of a leasehold lot of ground located on the north side of Hamburg street in Baltimore city. The lot is improved by a building which was formerly used as a private residence, but for some time prior to

the infliction of the injuries complained of in this case was used as a store. The building is located at the northeast corner of Hamburg street and Plum alley. This suit was instituted against the Baltimore & Ohio Railroad Company and the mayor and city council of Baltimore, to recover damages alleged to have been caused to the property by the construction of the approaches and bridge, which were erected on the south side of Hamburg street and over Eutaw and Howard streets for the purpose of carrying the traffic over those streets. In front of the plaintiff's property the approach to the bridge is about 7 feet high, and from the north side of the approach in front of the plaintiff's lot to the curb there is a clear space of approximately 19 feet and from the north building line, or front of the plaintiff's house, to the north side of the approach there is a space of about 29 feet. The north side of Hamburg street from the approach to the curb-a distance of about 19 feet-is not closed or obstructed, and is in practically the same condition as it was before the approach was built. There was no taking of the plaintiff's property. The plaintiff offered evidence tending to prove that the property had been injured by the construction of the approach and bridge.

Ordinance No. 387 of the mayor and city council of Baltimore, which authorized the construction of the bridge and its approaches, and the circumstances which led to its passage, as well as the manner in which the actual work was done, have been fully considered in the cases of Walters v. Baltimore & Ohio Railroad Co., 120 Md. 644, 88 Atl. 47, 46 L. R. A. (N. S.) 1128, and ***771**Baltimore & Ohio Railroad Co. v. Kane et al., 92 Atl. 532. What was said in those cases need not be repeated in this opinion. The trial resulted in a judgment against both defendants, and this appeal was taken by both defendants from the judgment.

At the conclusion of the testimony for both parties, the court granted two prayers on behalf of the plaintiff-her first and third. Her first prayer declared her right to recover against both defendants in case the jury should find the facts therein submitted. Her third prayer related to the measure of damage. The first and second prayers of the mayor and city council asked to withdraw the case as to it from the jury upon the ground that under the pleadings there was no legally sufficient evidence to entitle the plaintiff to recover against the city. The court refused these prayers.

[1] For the reasons and upon the principle stated in the Kane Case, supra, the city is not liable to the plaintiff for the injuries sued for. There was therefore error in granting the plaintiff's first prayer and in refusing the city's first and second prayers, and inasmuch as there could be, under the facts, no recovery against the city, its third, fourth, fifth, and sixth prayers should have been granted.

[2] Upon the principles announced in the Kane Case, the Baltimore & Ohio Railroad Company is liable for such consequential damages as may have resulted to the plaintiff's property from the construction of the approaches and bridge. It follows that there was no error in refusing the first and second prayers of the railroad company, which asked the court to direct a verdict in its favor because of a failure of legally sufficient evidence to support the action against it.

The measure of damage, which is the most important question in the case, is raised under the plaintiff's third prayer, the Baltimore & Ohio Railroad Company's third prayer, and the city's eighth prayer. That question will now be considered. The plaintiff's third prayer is here transcribed:

> "The plaintiff prays the court to instruct the jury that, if they shall find in favor of the plaintiff, then, in considering the amount of damages to be allowed, they may take into consideration the condition and fair market value of the property in question before the location and construction of the approach, walls, and abutment mentioned

in evidence and the condition and fair market value of the property in question, since the erection and construction of said approach, walls, and abutment, so far as said fair market value has been affected by said approach, walls, and abutment, *together with such loss of rent from said property, if any, occasioned to the plaintiff by virtue of said approach, walls, and abutment*, and allow to the plaintiff such a sum as they may believe the plaintiff has suffered naturally and necessarily resulting from the approach, walls, and abutment mentioned in evidence, except such damages, if any, as the plaintiff could have prevented by reasonable expense and trouble to avoid the same, and excepting also all damage which they may find to have been caused to said property in common with the general public by virtue of said approach, walls, and abutment."

The record shows that counsel for the plaintiff in his argument before the jury read the granted prayers and said:

"You are to consider the fair market value of this property before the construction of the bridge and the fair market value of the property since the construction of the bridge, and the difference in these values is one element of the damage for which the plaintiff is entitled to recover under the instructions; that this is the first element for the jury to consider, the second element being what loss of rent, if any, the plaintiff has sustained by reason of the construction of the bridge. *** the second element of damage is: What loss of rent, if any, has she sustained by virtue of the construction of that bridge? The evidence shows that she got $18 a month rent before and now she gets $13. That makes a loss of $5, of course. *** So she is entitled first to recover the difference in value of the property; and, secondly, the loss of rent, to wit, $5 a month. I think this loss of rent began after the bridge was completed, and not when the bridge was started, which would be in August, 1911, That would be about two years and a half at $5 a month, which would be $150, which she has lost. She is entitled to recover that, we submit."

In arriving at the difference in the market value of the property before and after the construction, the witnesses for the plaintiff used the rental value before and after the injury in fixing the depreciated value of the property. By this method the rental or usable value of the property, as affected by the construction, was allowed for in estimating and fixing its depreciated market value. Having once allowed for the depreciated rental value, it is manifest that an additional allowance for loss of rent would be in effect a double assessment of damages. In case of *permanent* injury to property, either leasehold or fee, we do not know of a case in this state where such a measure of damages as that laid down in this prayer has been announced, and it is not in accord with the rule which has been established by the decisions of this court.

[3] Apart from those cases in which punitive damages may be allowed, the compensation for injuries to all classes of property should be precisely commensurate with the injury done. It should be neither more nor less and this whether it be for injuries to the person or property.

[4] The measure of that compensation in a case of permanent injury, such as we have in this case, is the depreciation in the value of the property occasioned by the acts of the defendant; and, when that depreciation has been ascertained by using the rental value as a basis, it represents the whole damages to which the plaintiff is entitled, and it would be manifestly unjust to superadd the loss of rent as an independent and additional element of damage, as was done by the plaintiff's third prayer. This rule, of course, would not apply in cases of temporary injuries, and it is *possible* that cases of permanent***772** injuries might arise where rent *as such* might be recovered, but there

is nothing in this case to take it out of the general rule.

Counsel for the appellee rely in support of the prayer upon the cases of Lake Roland Co. v. Webster, 81 Md. 529, 32 Atl. 186, and Birch v. Lake Roland Co., 83 Md. 362, 34 Atl. 1013, and assert in their brief that they "are conclusive of the proposition that the recovery includes the difference in the market value of the property, together with the loss in the rental or usable value of such property to the date of such trial." But this is an evident misapprehension of the decisions in those cases. In the Webster Case the plaintiff's granted prayer on damages was as follows:

> "The plaintiff, by his counsel, prays the court to instruct the jury that if they shall find from the evidence that the rental value of the premises known as Nos. 206 and 208 North street, and occupied by the plaintiff as tenant of William H. Birch, under the written lease offered in evidence, has been diminished by the construction and use of the elevated railway of the defendant corporation on North street, then the plaintiff is entitled to recover, and the measure of damages is the amount which the jury shall find said rental value has been so diminished."

That the court did not understand the prayer to mean what the plaintiff's counsel insist it did mean, and that the court did not decide what they insist it did decide, is perfectly clear from the language of Judge Bryan, who wrote the opinion in that case.

> "The plaintiff's prayer," he said, "claims damages for the diminution of the rental value of his leasehold property. His testimony was that, before the building of the road, the annual value of the property was $1,200, and the construction and use of the road reduced this value so much that it was worth nothing. His landlord remitted $300 of the rent, leaving him still bound to pay $900 a year. If the jury found that the usable value of the property was destroyed or diminished by the cause alleged, they were justified in finding a verdict for the damage done. Great exception is taken to the language of the prayer. But it seems to us that its fair meaning is that the jury are to find the damages which the plaintiff sustained as tenant of the premises by the diminution of its rental value. It could not easily be construed as meaning that they were to find the damages which the landlord had suffered. It is not questioned that the draughtsman of the prayer might have presented the question of damages in a different manner, as was done in Rice's Case, 73 Md. 307, 21 Atl. 181. He has chosen, however, to ask compensation for the diminution of the usable value of his premises. This was certainly an injury to him, and he certainly ought to recover for it."

In Rice's Case, which was referred to and approved, the court said, in discussing the prayers on the measure of damages:

> "In the first prayer of the city the court instructed the jury that they could award him only the fair market value of his interest in the brick yard, less the fair market value of his interest in so much thereof as would remain after the opening of Clare street. This seems to cover the whole question. The prayer granted in behalf of Rice presents the same theory of the law in a different form."

The Birch Case was, as stated by the court in its opinion, "in almost every material respect" identical with the decision in the Webster Case, and the rule of damage laid down in that case was followed. In the Birch Case the court quoted from the opinion of Chief Judge McSherry in MacKenzie's Case, 74 Md. 51, 21 Atl. 694, 28 Am. St. Rep. 219, that:

> "Where the land of the plaintiff is not taken nor this soil actually invaded, the measure of damages, as adjudged in many cases, is either,

first, the extent to which the rental or usable value of the particular property has been diminished by the trespass or injury complained of (Baltimore & Ohio Railroad Co. v. Boyd et al., 67 Md. 41 [10 Atl. 315, 1 Am. St. Rep. 362]; Wood, etc., v. State, Use of White, 66 Md. 61 [5 Atl. 476]); or secondly, the difference in the value of the property before the construction of the pole, and its value afterwards, if the depreciation in value has been caused by the erection and maintenance of the pole."

It is clear that neither in the Webster Case nor the Birch Case did the court decide that, in addition to the diminution of the rental or usable value of the property, there could be a recovery for loss of rent.

Had the italicized portion of the prayer been omitted, it would have announced the true measure of damage applicable to the case. It follows that the third prayer of the Baltimore & Ohio Railroad Company, which was on the subject of damages, should have been granted.

[5] The eighth prayer of the city ignored the duty of the plaintiff to minimize the damages, and it does not exclude such damages as she might have suffered in common with the general public, and it was properly refused.

[6] The record contains two exceptions taken by the defendants to the refusal of the court to strike out the testimony of William E. Ferguson as to the value of the plaintiff's property after the construction of the bridge. The grounds of the motions were that, in arriving at the value of the property after the work was completed, the witness used the tax bills for the year 1914 and the assessment for 1913. The bridge was finished in August, 1911, and it was undoubtedly improper for the purpose of ascertaining the expenses on the property with a view of fixing its value after the injury to have used the assessment and tax bills for years so remote from the date of the injury. While this was improper, and may be avoided in the retrial of the case, we would not, in view of the whole testimony of the witness, reverse the case for these reasons. What we have said, we think, is sufficient to indicate our opinion on all the questions presented by the record.

Judgment reversed, and new trial awarded; the appellee to pay the costs above and below.

Md. 1914.
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