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125 Md. 135, 93 A. 393

Court of Appeals of Maryland.
MAYOR & CITY COUNCIL OF CITY OF BALTIMORE
v.
KANE et al.
No. 88.

Jan. 14, 1915.

Appeal from Circuit Court, Baltimore County; N. Charles Burke and Frank I. Duncan, Judges.

"To be officially reported."

Proceedings by the Mayor and City Council of Baltimore to condemn the land of Annie E. Kane and others to augment and improve the municipal water supply. From an order denying an application for removal of the cause, petitioner appeals. Affirmed.

West Headnotes

Eminent Domain 148 ⚿167(4)
148k167(4) Most Cited Cases
Statutory provisions for the appropriation of private property for public use must be strictly complied with.

Venue 401 ⚿36
401k36 Most Cited Cases
Within Const. art. 4, § 8, proceeding to condemn land is an "action at law" involving the exercise of judicial power, but is dependent on statute.

Venue 401 ⚿36
401k36 Most Cited Cases
The city of Baltimore, exercising the power to condemn land conferred by its charter and Acts 1908, c. 214, and Acts 1912, c. 32, must conform to the procedure prescribed by Acts 1912, c. 117, and the cause may not be removed under the Constitution.

Venue 401 ⚿37
401k37 Most Cited Cases
A city may not invoke the constitutional right of removal after obtaining judgment that it is necessary to acquire land for a public purpose.

Argued before BOYD, C. J., and BRISCOE, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

S. S. Field, City Sol., of Baltimore, for appellant T. Scott Offutt, of Towson (R. H. Bussey, of Towson, on the brief), for appellees.

STOCKBRIDGE, J.
This is a proceeding instituted by the mayor and city council of Baltimore on the 15th June, 1912, in the circuit court for Baltimore county, to condemn certain land in the Gunpowder Valley for "augmenting and improving the municipal water supply of Baltimore city." The answer of the defendants to the petition denies the necessity for the acquisition of the land for the purpose named, and this question was submitted to a jury in Baltimore county, which, by its verdict rendered on the 27th June, 1913, found the existence of the necessity, i. e., that the city was entitled to have the land, which verdict was followed by a judgment in accordance with the verdict on the 16th July, 1913. Thereafter an order was passed appointing appraisers to value the land desired to be acquired by the city, and their report was filed. Exceptions to the return of the appraisers, both by the mayor and city council and the landowners, followed next in order, and thereafter the city filed its suggestion and affidavit for the removal of the case under section 8 of article 4 of the Constitution. The circuit court refused to grant the application for removal, and it is from the action of the court in that respect that the present appeal is taken.

There is involved, therefore, but the single question whether or not a proceeding for the condemnation of land is such an one as entitles

either party, upon making affidavit that he or it cannot have a fair and impartial trial in the court in which the same may be pending, to have the case removed to some other jurisdiction. The issue is a narrow one, and was fully and ably presented by counsel upon both sides, both in the oral arguments and in their briefs. The constitutional provision, in so far as it is applicable to the present case, is as follows:

> "The parties to any cause may submit the same to the court for determination without the aid of a jury and in all suits or actions at law, issues from the orphans' court or from any court sitting in equity, and in all cases of presentments or indictments for offenses which are or may be punishable by death pending in any of the courts of law of this state having jurisdiction thereof, upon suggestion in writing under oath of either of the parties to said proceedings, that such party can not have a fair and impartial trial in the court in which the same may be pending, the said court shall order and direct the record of proceedings in such suit or action, issue, presentment or indictment, to be transmitted to some other court having jurisdiction in such case, for trial."

The vital words involved are "all suits or actions at law." The contention upon behalf of the city may be summed up in a very few words, namely, that a proceeding of this character is an action at law, and that, being an action at law, it comes within the terms of the constitutional provision giving a right of removal.

[1] It is not open to question in this state that a proceeding to condemn land is an action at law. That has been distinctly held in the case of Ridgely v. Baltimore City, 119 Md. 567, FN1 and earlier cases. The proceeding is not one according to the common law, and is in derogation of private right, and wholly dependent upon statutory regulation and provision. Fork Ridge Cemetery Co. v. Redd, 33 W. Va. 262, 10 S. E. 405, cited in 1 Lewis on Eminent Domain (3d Ed.) § 387. But in any case the proceeding is a judicial one, and involves the exercise of judicial power. 15 Cyc. 807; Ridgely v. Balto. City, supra. In some jurisdictions it is held to be a proceeding in rem, but it is described with more accuracy in Chandler v. R. R. Com'rs, 141 Mass. 212, 5 N. E. 512, where it is said that it is not a proceeding "in rem, although in some respects" resembling such a proceeding. It is rather in the nature of an inquest, to determine: (1) The necessity upon the part of the city for the acquisition of the land described in the petition, and if this necessity is found to exist; then (2) the proper compensation to be paid to the owners for the land so to be taken.

[2] [3] The power of the city to acquire lands for the purpose specified in the petition by resort to condemnation is fully conferred by chapter 214 of the Acts of 1908, and by section 6 of the charter of the city as framed in 1898, and the procedure to be followed in such cases was fully set out in the acts above named, and chapter 32 of the Acts of 1912. That procedure involved the application, upon the part of the city, to a justice of the peace of the county in which the lands were situate, to issue his warrant to the sheriff for the summoning of a jury, and then after certain other proceedings, it provided that:

> "The said jury shall reduce their inquisition to writing and shall sign and seal the same, and it shall then be returned by said sheriff to the clerk of the circuit court for said county, and be filed by such clerk in his office, and shall be confirmed by said court at its next session, if no sufficient cause to the contrary be shown; and when confirmed shall be recorded by the said clerk at the expense of the city."

By chapter 117 of the Acts of 1912 a somewhat different method of procedure was provided, to be followed in cases of condemnation, the material element in which was that the application was to be made in the first instance to the court, instead

of to a justice of the peace. This act, however, affected no substantive right of either the landowner or the condemning party; it related only to the method of procedure to be pursued in such a ***395** case. As has already been pointed out, the proceeding for the condemnation of land was one involving the exercise of judicial power; that power was necessarily applied prior to the adoption of the act of 1912, in that there was required the confirmation of the inquisition of the jury by the court, and the same power is equally involved under the provisions of the act of 1912. Provision was made in both cases for the filing of exceptions, either to the inquisition of the jury, or the return of the appraisers, and the condemning party could acquire no rights under the proceeding, in either event, until after the confirmation of the inquisition or appraisement by the court. The distinction attempted to be drawn by the city solicitor that prior to the act of 1912 the court in reality sat as an appellate tribunal, but under the act became a court of original jurisdiction, is without force.

This court does not understand that it is seriously contended that any right of removal is claimed to have existed prior to the passage of the act of 1912, but whether this is true or not is of slight importance. The right of condemnation, being one purely of statutory creation, is one to be strictly construed, and where the Legislature which has conferred the right has also laid down the mode of procedure for the acquisition of property under it, that method and none other is the one to be followed.

It is not every case on the law side of the court in which the parties are entitled to a removal upon the suggestion and filing of affidavit specified in the Constitution. It has thus been repeatedly held that an equity case may not be removed from one jurisdiction to another (Hoshall v. Hoffacker, 11 Md. 364; Cooke v. Cooke, 41 Md. 362), nor appeals from a justice of the peace (Geekie v. Harbourd, 52 Md. 460) nor an application for the forfeiture of a charter (Bel Air Club v. State, 74 Md. 297, 22 Atl. 68), nor an appeal from the commissioners for opening streets (Chappell v. Edmondson Ave. Co., 83 Md. 512, 35 Atl. 19).

As a result of a somewhat peculiar phraseology of the statute a change of venue has been allowed in Minnesota and Missouri in cases of condemnation of lands, while in California in a water case, under a statute not very dissimilar from the one now involved, the removal of such a case was held to have been correctly refused. Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 Pac. 1123, 1136. When we turn to the statutes in this state we find no provision whatever enacted by the Legislature providing for the removal of a condemnation case; nor in the opinion of this court is such a case one in which the right of removal exists under the phraseology of the Constitution, unless that right be expressly conferred by statute. In that respect it is quite analogous to the case of Gardiner v. Baltimore, 96 Md. 361, 54 Atl. 85, in which it was held that no right existed in the municipal corporation to appeal from an award of damages, in the absence of statutory authorization for such appeal. The reasoning of the court in that case is equally applicable in the present one.

[4] But again, as appears by the record in this case, the initial question of the necessity for the acquisition of the property having been determined in favor of the city, and that by the verdict of the jury it was at least equivalent in effect to a judgment by default, therefore it comes directly under the rule as applied in Northern Central Railway v. Rutledge, 41 Md. 372, where it was laid down that where a judgment by default had been entered, and the sole question remaining was the inquisition of damages, it was too late to invoke the constitutional right of removal. The question of first importance here was the existence, vel non, of the necessity for the

acquisition of the property by the city. If upon the petition for a condemnation being filed the defendants had, by inaction, permitted a judgment by default to go against them, it would have presented the exact question that was before this court in the Rutledge Case, and a fortiori when, after hearing, a verdict and judgment had been entered in favor of the city, with even greater reason an application for removal came too late, granting for this purpose only, that there ever was a time when the case could have been removed.

The judgment of the circuit court for Baltimore county will therefore be affirmed.

Judgment affirmed, with costs.

Md. 1915.
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