C
130 Md. 645, 101 A. 589

Court of Appeals of Maryland.
PATTERSON et al.
v.
MAYOR, ETC., OF **CITY** OF **BALTIMORE**.
No. 9.

June 26, 1917.

Second Appeal from Baltimore City Court; Chas. W. Heuisler, Judge.

Proceeding by the Mayor, etc., of the City of Baltimore against Laura Patterson and others, to condemn and open a street. From an inadequate award, the property owners appeal. Reversed and new trial awarded.

The following is city's prayer No. 3, referred to in the opinion:

The jury are instructed that the measure of damages in this case is the market value of the property taken by the city of Baltimore, in this proceeding, at the time of the taking, considered without reference to the opening of Twenty-Fifth street or any effect that such opening may have upon the property; and, in addition, such damage, if any, as may, by such opening, have been caused to the remaining property concerned. The fair market value of the property taken is the price that a purchaser, willing but not compelled to buy, would pay for it, and which a seller, willing but not compelled to sell, would accept for it.

They are further instructed that the measure of benefits is the increase in the market value of the property in controversy caused by the opening of Twenty-Fifth street through the said property, and that this increase should be considered as the amount which a purchaser, willing but not compelled to buy the property, would pay for it, and which a seller, willing but not compelled to sell, will accept for it, after Twenty-Fifth street shall have been opened, graded, paved, and curbed; it being proper to take into account the fact that the property owner will be burdened when the street shall be paved, with the special paving tax of 15 cents for each front foot on each side of said street for a period of 10 years as a matter of law; and that, as a matter of fact, in order to utilize this property, it will be necessary for the property owner to pave the sidewalk and to grade the property back to a usable depth in connection with that street. (Granted.)

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

West Headnotes

Witnesses 410 ⚿252
410k252 Most Cited Cases
In proceeding to condemn street through undeveloped tract, held that exclusion of plat prepared by witness, showing plan proposed by him of developing the tract, was within the court's discretion.

Eminent Domain 148 ⚿202(4)
148k202(4) Most Cited Cases
In proceeding to condemn land for street, held that it was proper to show availability of tract for city lots, and its special advantages for residential and industrial purposes, though not devoted to such purpose.

Eminent Domain 148 ⚿203(1)
148k203(1) Most Cited Cases
In proceeding to condemn street, evidence as to whether the plan adopted was most advantageous to the property, and would give as high utility as some other plan, held properly excluded.

Eminent Domain 148 ⚿203(1)
148k203(1) Most Cited Cases
In a proceeding to condemn and open a street, evidence that the city for some years had not been exercising its power of assessing the cost of

grading and paving streets on abutting owners was irrelevant.

Eminent Domain 148 ⚿204
148k204 Most Cited Cases
Where in a proceeding to condemn and open a street it is attempted to show the benefits in advance of the paving and curbing, the width of the driveway and sidewalks to be adopted should be shown.

Evidence 157 ⚿507
157k507 Most Cited Cases
Where the subject-matter could be understood by jury of average intelligence, the court below did not err in excluding expert testimony.

Municipal Corporations 268 ⚿266
268k266 Most Cited Cases
Acts 1912, c. 32, amending Baltimore Charter, § 175, and Act 1914, c. 125, relative to paving and grading streets, held inapplicable to proceeding commenced before they were enacted.

Municipal Corporations 268 ⚿413(1)
268k413(1) Most Cited Cases
Under Baltimore Charter, § 6, the city cannot, in a proceeding under an ordinance to condemn and open a street, assess the benefits which will accrue from grading and paving the street.

***590** Arthur W. Machen, Jr., and Raymond S. Williams, both of Baltimore, for appellants.
S. S. Field and George Arnold Frick, both of Baltimore, for appellees.

BOYD, C. J.
This is the second appeal by the appellants in a proceeding for the condemnation and opening of Twenty-Fifth street from the east side of Greenmount avenue to the west side of Harford avenue, under Ordinance No. 416 of the mayor and city council of Baltimore, approved December 9, 1909. The former appeal is reported in 127 Md. 233, 96 Atl. 458. There are 37 exceptions in the record-the last one presenting the rulings of the lower court in rejecting 11 of the appellant's 13 prayers, and granting the city's third and seventh prayers and overruling the special exception to the city's seventh prayer, and the others containing exceptions to rulings on the evidence.

[1] [2] The first 20 exceptions relate to damages. Undoubtedly an important element in estimating damages for land taken under condemnation proceedings may be its availability for or adaptability to certain purposes. In this case, although the tract of land owned by the appellants had not been laid out into lots, but had been held by them and those under whom they claim for many years as an unimproved and undeveloped tract of land, it was admissible to show that it was available for city lots, and to point out the special advantages for residential or industrial purposes the particular parts of it had. In the testimony of Mr. Atwood, a witness for the appellants, who was shown to be an experienced civil engineer and surveyor, and had been a commissioner for opening streets for one term and city surveyor for two terms, he was permitted to state fully his views as to the effect of locating Twenty-Fifth street according to the location made in these proceedings. The appellants, however, did not deem that sufficient, but sought to introduce two plats made by the witness. The first, second, third, fourth, fifth, sixth, eighth, ninth, tenth, twelfth, thirteenth, and nineteenth exceptions relate to those plats. The Belt Line of the Baltimore & Ohio Railroad Company runs through the tract of the appellants, dividing it into two parts of about equal areas, each part containing in the neighborhood of 50 acres. It is only the part south of the railroad which is involved in this case. Mr. Atwood testified that Twenty-Fifth street, as proposed to be located, was 100 feet wide and runs, roughly speaking, parallel with the railroad and approximately from 100 to 120 feet from it. His theory was that by thus laying out the street,

the depth between the railroad and the north side of the street was not sufficient "to utilize it for most businesses of any large character," and if that side of the street was used for residences, they would run back to the railroad, which would be disadvantageous to them. He spoke a good deal about the irregularly shaped lots, and said that the proposed location of the street had the effect of forcing the irregularities to the south of the street, instead of putting them along the railroad. The lots were not actually laid out on the ground, and the plats prepared by him were simply of a plan he proposed as the best method of developing the tract. While we do not see any particular injury that would likely have been done by admitting the plats in evidence, it is possible that they might have misled and confused the jury, rather than helped them. The jurors were taken upon the ground, and could see for themselves the actual conditions there. Presumably the location of the proposed street was pointed out to them, as well as such other locations as were relevant. Considerable discretion in such matters must be left to the trial judge, and if there be room for a difference of opinion as to whether the plats offered by the appellants could have aided the jury, without the danger of misleading them, the action of the lower court was at least within the discretion that must be allowed it; especially was that so as to the plat on the blackboard referred to in the third exception. The plat used in the condemnation proceedings and one used by the appellants at the former trial were before the jury, and with a witness as intelligent as Mr. Atwood on the stand, there ought to have been no difficulty in his making his views plain to the jury with the use of the plats which were before them, for all legitimate purposes. There was therefore no reversible error in the rulings in any of those exceptions, although some of the questions possibly might have been admitted without injury.

[3] [4] In the seventh exception Mr. Atwood was asked to say whether he was able to state whether or not this land "possesses a special adaptability for use for the laying out through the same of streets or roads or rights of way for the purpose of constructing or making or creating building lots or lots for commercial and industrial purposes, and, if so, *state to the jury what plan would be the highest utility of this property for those purposes.*" He was permitted to answer the question except as to the last clause, which we have italicized. The court was clearly right in excluding that. The question for the jury was not "what plan would be the highest utility of this property," but what damages the appellants were entitled to by reason of taking the land, in the way proposed. It may be that some other plan might produce better results to the appellants than the one proposed, but, if that be so, that was one of the questions the jury could consider. The city cannot be required to adopt the plan which "would be the highest utility of the property" for the purposes named, and to permit different experts to answer such a question, we might have as many opinions***591** as there were experts. They would soon get into the realms of speculation. This record well illustrates how conflicting the views of experts are on such questions, and, while their opinions, if kept within proper bounds, are admissible and helpful, if not, they are confusing and of no use in attaining the ends of justice. Mr. Atwood was permitted to testify to the effect this location of the street had on the property. The eleventh exception more clearly illustrates what we mean, in that Mr. Atwood was asked whether the opening of the streets, "of the width and location proposed in these proceedings would accord with the best plan for the development of the property-by best, I mean the most advantageous to the owners of said property rather than the city as a whole." The city was not laying out a plan for the development of the property. It might well be that a street of less width and differently located would cause less damage to the owners than the one proposed, but if such a rule be adopted as the question suggested, a city might be compelled to adopt

plans for the benefit of the owners of the land being condemned, rather than those for the public good. We do not understand that to be the law of this state. Sometimes it happens that a public improvement of this kind is materially and injuriously affected by the effort to please or benefit some particular person, but such action by public officials should be condemned, and not sanctioned by the courts. Of course owners are generally entitled to more compensation for taking 100 feet in width than they would be if only 60 feet were taken, and if the location is specially injurious, that fact can be considered in fixing the damages. The seventh, eleventh, fifteenth, sixteenth, and eighteenth questions were properly held to be inadmissible. The fourteenth was harmless, as the witness had already said he "would not put any blind street out there." We see no special objection to the seventeenth, unless it was already sufficiently answered in the previous evidence. The twentieth did not require an expert to answer. If the jurors were men of sufficient intelligence to sit on a jury, they could answer the question as well as the witness. So while there is no doubt that the appellants had the right to show the uses for which the property was adaptable, we cannot agree with them as to the methods adopted for the purpose, and we find no such error in any of the 20 exceptions already referred to as would justify us in reversing the case.

It may be well to add here that in addition to evidence being admitted on the subject, the lower court by the appellants' second prayer expressly instructed the jury that:

> "In arriving at the market value of the land to be taken, the jury must take into consideration its availability for building lots and for industrial purposes, if they find it had such availability, even though they also find that said land is not at present used for such purposes," and that, in fixing the damages for injury to the remaining land of the petitioners, "they should also consider whether the availability, if any, of said remaining land for use as building lots or for industrial purposes will be decreased at all, and, if so, to what extent, by the condemning and opening of Twenty-Fifth street of the width and of the location proposed in these proceedings."

[5] The most important question in this case is the measure of benefits to be assessed against the appellants. The city's prayer No. 3, which was granted, so directly presents the question as to suggest the advisability of considering that before considering the other exceptions to the rulings on the evidence. We will request the reporter to publish that prayer in his report of the case. The time fixed by that instruction for the consideration of the jury, as to the benefits was:

> "After Twenty-Fifth street shall have been opened, graded, paved and curbed; it being proper to take into account the fact that the property owner will be burdened when the street shall be paved, with the special paving tax of 15 cents for each front foot on each side of said street for a period of 10 years as a matter of law, and that as a matter of fact, in order to utilize his property, it will be necessary for the property owner to pave the sidewalk and to grade the property back to a usable depth in connection with that street."

These proceedings were begun under "An ordinance to condemn and open Twenty-Fifth street from the easternmost side of Greenmount avenue (formerly York road) to the northwesternmost side of the Harford turnpike road." The new charter of Baltimore city in section 6, art. 4, Public Local Laws, under the head of "General Powers," subhead "Streets, Bridges and Highways," is subdivided in the revised edition of the charter published in 1915 by the law department of the city. Under subdivision "(A) Opening, Extending, Widening, Straightening, or Closing up Streets," the city is authorized "to provide for laying out, opening, extending, widening, straightening, or closing up,

in whole or in part, any street, square, lane or alley within the bounds of the city, which in its opinion the public welfare or convenience may require." It then provides for damages and benefits, and authorizes the city "to provide for assessing or levying, either generally on the whole assessable property of said city, or specially on the property of persons benefited, the whole or any part of the damages and expenses which it shall ascertain will be incurred in locating, opening, extending, widening, straightening, or closing up the whole or any part of any street, square, lane or alley in said city." After providing for appeals to the Baltimore city court from the decisions of the commissioners for opening streets, or other persons appointed by ordinance to ascertain the damage which will be caused or the benefit which will accrue to the owners by locating, opening, etc., any street, it contains this clause:

> ***592** "To provide for collecting and paying over the amount of compensation adjudged to each person entitled *** before any street, square, lane or alley, in whole or in part, shall be so opened," etc.

It authorizes the city to acquire the fee-simple interest in any land for the purpose of opening, etc., the street. That part of the section says nothing whatever about grading, paving or curbing.

Later the section provides under the subdivision "(B) Grade Line of Streets" for grade lines, and under subdivision "(C) Grading, Paving, Curbing, etc., Streets" it specifically gives authority "to provide by ordinance for grading, shelling, graveling, paving and curbing," or for regrading, etc., of a street, lane or alley "now condemned, ceded, opened as a public highway, or which may hereafter be condemned, ceded, opened, widened, straightened, or altered," etc. Then under subdivision (D) it authorizes the city to provide by general ordinance, subject to section 85, for grading, graveling, shelling, paving, or curbing or for regrading, etc., of any street, lane, or alley, whenever the owners of a majority of the front feet of property binding such street, etc., shall apply for the same, etc. There are thus made distinct provisions for opening, etc., streets, from those in reference to grading, paving, and curbing.

We have at some length referred to the charter, as it seems to us its provisions settle the question, independent of authority. When this ordinance was passed (1909) this section was the same as what we have stated above, and the revised edition of the charter only makes the subdivisions and refers to the original acts and decisions of the courts for convenience. It is difficult to read those provisions of the charter and reach a conclusion other than that the Legislature intended the acquisition of the land for a street before it was graded and paved. This proceeding was begun under what is above referred to as subdivision (A), and not under subdivision (B). At the time the ordinance was passed there was no provision in the charter for an ordinance to include the opening *and grading* of a street, but it was clearly intended to require the city to first condemn the land for the opening (if it was not dedicated or otherwise acquired), and then afterwards provide for the grading, paving, and curbing. It is true that Act 1912, c. 32, § 175, which relates to the duties of the commissioners for opening streets, was amended to read:

> "Whenever the mayor and city council shall hereafter by ordinance direct the commissioners for opening streets to lay out, open, extend, widen, straighten, *grade* or close up, in whole or in part, any street," etc.

-but that act, which made a number of changes, expressly provided that:

> "Nothing herein contained shall be construed to affect any right or liability of any party accrued, or any proceeding begun or pending prior to the passage of this act, but all such rights shall remain and such proceedings shall continue, in

> the same manner, and to be of the same effect, as if the provisions hereinabove mentioned had remained as they were prior to the passage of this act."

Then it was expressly limited to a case when the mayor and city council "shall hereafter by ordinance direct," etc. But regardless of that it is clear that the Legislature itself made a distinction between opening and grading, paving or curbing, and therefore it is difficult to see how an ordinance for *opening* a street can be construed to include the *grading, paving or curbing.* Indeed, until the city acquires title to the land to be used for the street, a number of practical difficulties suggest themselves. Just how, in assessing benefits in a case like this, the cost of paving a street can be accurately ascertained has not been made clear. As we have seen from the charter, there are a number of materials which can be used, either of which will be a compliance with the statute, and the kind of material used is a very important matter, as the cost must depend upon that. It may be a long time before the street is paved, and prices necessarily vary. If, for example, the price is estimated now, and the street is not paved for a year or more, who can say that the price may not be greatly reduced by that time? In that instance the property owner would sustain the loss, but, on the other hand, if the paving had been estimated several years ago, the probabilities are that by this time the cost of the material has greatly increased. Judge Miller said in Dashiell v. Baltimore, 45 Md. 615, 626:

> "A street may be and often is opened and condemned for many years, before any steps are taken to pave it."

In our judgment the ordinance under which these proceedings were instituted, and the statutes then in force, must control, and the ordinance did not include grading, paving, and curbing.

Our examination of the authorities strengthens the views we have on the subject. It was said in Reed v. City of Toledo, 18 Ohio, 161:

> "By the term 'opening' we do not understand the improvement of a street or highway by grading, culverting, etc.; the term is generally (we think always) clearly distinguishable from such kind of improvement. The term 'opening' refers to the throwing open to the public what before was appropriated to individual use, and the removing of such obstructions as exist on the surface of the earth, rather than any artificial improvement of the surface. And we think in the charter this distinction is very clearly drawn."

Or, as said in 3 Dillon on Munc. Cor. (5th Ed.) § 1042:

> "So authority to *open a street and assess the damages* on the property benefited does not give the power to assess for anything more than opening the street and paying for the right of way; it does not include the power to assess other property for the *improvement* of the street by grading, culverting, and the like."

***593** In Municipal Corporations in Maryland, by the present Attorney General (section 12) it is said:

> "The two systems for opening and condemning streets and for grading and paving them are essentially different from each other. They are provided for by different laws and ordinances, executed by different officers and governed by different rules and regulations."

He referred to Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686; Dashiell v. Baltimore, 45 Md. 615, and Baltimore v. Hook, 62 Md. 371. While it is true the conditions in those cases differed from those in this case, the principles are, for the most part, the same. In Douglass v. Riggin, 123 Md. 18, on page 22, 90 Atl. 1000, on page 1002, it was said:

> "It constituted an opening of the street for the use of the lots according to the evident sense in which the term 'open' was used in the reservation under the agreement of sale. It was

> plainly employed in this connection as equivalent to the 'laying out' of the proposed street, and this has been defined to mean 'the adoption of outlines or locations, and not the work of construction or improvement.' Oberheim v. Reeside, 116 Md. 273 [81 Atl. 590]; 5 Words and Phrases, 4037."

See, also, Bauman v. Ross, 167 U. S. 548, 586, 17 Sup. Ct. 966, 42 L. Ed. 270; Hutt v. Chicago, 132 Ill. 352, 23 N. E. 1010. In Baltimore v. Smith, 80 Md. 458, 31 Atl. 423, which case only involved benefits, and at that time the question of damages for opening a street was not open for review on appeal from benefits alone, the jury was instructed that the only matter for their inquiry was the amount of increase in the actual market value of the lots fronting on the street opened which would be caused by the acquisition, through those proceedings by the city, of title to the land in the bed of the street to be used as a public street, and the verdict should be limited to such increase. The sixth prayer granted in Baltimore v. Megary, 122 Md. 20, 89 Atl. 331, was to the same effect.

There would seem to be no doubt that the city would still have the power to assess the property owners with the whole cost of grading, paving, and curbing in a proceeding taken for paving, etc., after the property is condemned. Section 6 of the charter so authorizes. If the city has no authority to now assess for those purposes, but did so in this case, we are not prepared to say, as it contends, that it would be estopped from doing so again. There may be circumstances under which it would be estopped from collecting the same assessment twice, but in a case such as this, where the property owners can undoubtedly be assessed for some benefits, if the measure of benefits established be erroneous, it would, to say the least, be difficult for them to be protected. But independent of that, if, as we think, the benefits can now properly include those to accrue from the street after it is "opened, graded, paved, and curbed," the appellee has no right to assess the appellants with them in this proceeding and, besides, the appellants have the right to a correct interpretation of the law.

[6] It was conceded by the appellee that it was formerly the established rule not to take into consideration the cost of grading, paving, etc., in a proceeding of this kind, for opening, but the learned solicitor contends that the contrary rule has, for some years, been in force. We find no change in the law to authorize it, which is applicable to this case. We have already indicated that the Acts of 1912 and 1914 do not apply. The provision quoted above from the act of 1912 can leave no doubt as to that act, and we find nothing in the act of 1914 indicating an intention on the part of the Legislature to repeal or change that provision. The case of Cahill v. Baltimore, 129 Md. 17, 98 Atl. 235, was relied on in support of the city's contention, but, without discussing the question as to burden of proof, which is all of that case which can be claimed to be applicable, it is sufficient to say that that proceeding was not instituted until after the act of 1912 was passed, and hence was not included in the saving clause of that act as this one was. As seen by reference to the first appeal, Baltimore v. Cahill, 126 Md. 596, 95 Atl. 473, the ordinance was not passed until April, 1913.

[7] [8] We do not understand the relevancy of evidence tending to show that the city had not, for some years, been exercising its powers of assessing the cost of grading and paving on the abutting owners. If a municipality has the power to grade and pave under either of several methods, and it for some years adopts one of them, it does not follow that the other cannot be exercised, unless the charter is amended or the law prohibits it. Administrations change, and frequently with such changes entirely new ideas are introduced. Or new conditions may require or suggest changes. But this case shows the dangers of such

evidence, as the appellants contend that ordinances of the city show that the witness was mistaken. At any rate, the evidence ought not to have been admitted. It is proper to add that we think the jury would be entitled to know, in cases where the cost of grading and paving is involved, the width of the driveway and sidewalks to be adopted, if the benefits are attempted to be shown in advance of the paving and curbing. How can a jury tell whether in the particular case the driveway is to be 40, 60, 66 or other number of feet when the street condemned is 100 feet wide and it is left to the city authorities to determine the width. Such evidence as that in the thirty-first, thirty-second, and thirty-third exceptions was therefore inadmissible even under the appellee's theory of the case as to the measure of benefits. Without further pursuing this question, we are of the opinion that under these proceedings the city was limited to benefits as the result of the opening of the street, and such benefits as grading, paving, and curbing cannot be considered.***594** There was therefore error in granting the city's third and seventh prayers. The petitioner's first was properly rejected, as it was entirely too broad. Attorneys can, and frequently do, explain to juries what the law is if not in conflict with the granted instructions, or no instructions are given by the court on the particular subject. Their second was granted. The third was properly rejected for reasons stated above in passing on the exceptions to evidence. The fourth was properly rejected. The fifth and sixth ought to have been granted. The seventh was not necessary. The eighth and ninth were calculated to mislead. The tenth could not have been granted under the theory which prevailed in the lower court, as it would have been in conflict with the prayers granted, but if at the new trial evidence is introduced in reference to the grading, etc., as authorized in Baltimore v. Smith, 80 Md. on page 471, 31 Atl. 423, an instruction as to its effect will be proper. The eleventh was granted. The twelfth and thirteenth are immaterial in view of what we have said.

In the above discussion we think we have sufficiently referred to the questions involved in the exceptions to evidence not already passed on to relieve us of discussing them further.

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

Md. 1917.
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