No. 211
Office Docket.
April term 1865.

The Mayor & City Council
of Baltimore
vs
Victor Clunet
and others

Decree.

Filed July 12th 1865.

The Mayor & City Council of Baltimore

vs.

Victor Clunet and others.

Appeal from the Circuit Court for Baltimore City

No. 211.

The appeal in this cause standing ready for hearing, and having been argued by the Counsel for the respective parties, the proceedings have since been read and considered: It is thereupon this twelfth day of July in the year of our Lord one thousand eight hundred and sixty five, by the Court of Appeals of Maryland and by the authority thereof, adjudged, ordered and decreed that the Order of the Circuit Court from which the appeal in this cause was taken, be and the same is hereby Reversed and the bill dismissed with Costs to the Appellants. ~~and the Cause remanded for further proceedings.~~

Richard J. Bonil
Jas. L. Bartol

J. Morris Cochran
D. Wesel

No. 211 Office Docket April Term 1865 47. Sides

The Mayor & City Council of Baltimore

vs

Victor Clunet and others.

B. B. G. C. V.

Opinion

Bartol J.

(To be reported)

Filed July 12th 1865.

Dobie

The Mayor & City Council of Baltimore

vs

Victor Clunet next friend of C Clunet & others
Samuel H B Merryman and others

This is an appeal from an order of the Circuit Court of Baltimore City passed on the 6th day of February 1865 granting an injunction to restrain the appellant its officers agents and servants from proceeding to enforce an ordinance entitled "An Ordinance to open a Street in continuation of Holliday Street from Baltimore Street to Second Street", and from taking any further steps or proceedings thereunder for the opening of such street, until the matter can be heard and determined in Equity

The complainants are the owners of property on the South side of Baltimore street, and the apprehended damage and injury to result to them from the execution of the ordinance, are sufficiently alleged on the face of the bill to entitle them to maintain the suit; provided a court of equity has jurisdiction of the cause, and the objections urged to the validity of the ordinance be well founded.

These objections will be first considered, they are ~~pronounced~~ set forth by the bill in a very clear and forcible manner and have been presented in the argument with very great ability and power. Indeed the case has been most ably argued on both sides; and it is a source of regret that in the press of business upon the court, and the desire of rendering a speedy decision; we have not been able to enter upon

so thorough an examination and discussion of the interesting questions involved, as their importance deserves.—

We must content ourselves with a brief statement of the conclusions we have reached, after as full an examination of the authorities and consideration of the subject as we have been able to make.

By the second section of the Ordinance the Judges of the Appeal Tax Court ~~are entitled~~ in the condemnation and opening of the proposed street are required to proceed in accordance with the provisions of Ordinance No 15 of the Revised Ordinances of 1858 approved June 5, 1858 except as otherwise provided by the Ordinance approved February 28, 1861. This last ordinance much abolished the office of Commissioners for opening streets and conferred their powers upon

the appeal tax Court. The exception therefore need not now be more particularly noticed. ~~By reference~~ By the Revised Ordinances of 1858 No 15 sec 7. it is provided "That in every case where it shall be necessary to effect the object proposed, that a part only of a house and lot or of a lot shall be taken and used or destroyed, and the owner thereof shall claim to be compensated for the whole, the Commissioners shall ascertain the full value thereof, as if the whole lot and improvements were necessary to be taken and used for such proposed object"
It then provides for the payment to the owner of the whole of such valuation, and for the sale of the residue of the lot ~~[illegible]~~ not necessary to be taken and used for the street; and the amount which is derived from such sale is

appropriated to the payment of the expense of the improvement, thereby diminishing to that extent the cost of the work assessed upon the parties benefitted.—

It is contended that this provision of the ordinance is illegal and invalid; because it is taking the property of a citizen when it is not required for public use; contrary to the constitution and laws of the State.

This provision did not originate with the Ordinance of 1858; it is found in that of the 9th of March 1841 passed ~~for the purpose of~~ to carry into effect the powers granted to the Mayor and City Council by the Act of 1838 ch 226. The same provision is found in every ordinance passed of the City since that time, in relation to this subject, and which have been

repeatedly before this Court for examination and construction; and repeatedly declared to be a valid exercise of the power delegated by the act of 1838 ch 226. See Alexander & Wilson vs The Mayor & City Council of Balt 5 Gill 383. Richardson vs Same 8 Gill 433. The Methodist P. Church vs Same 6 Gill 391. Stewart vs Same 7 Md 500. State at the relation of McClellan vs Graves 19 Md 351. ~~In the face of these repeated decisions, we should feel~~ It is true that the particular objection now made does not appear to have been suggested in any of those cases; but the judgment of the Court pronounced in some of them necessarily covered it, and would be inconsistent with the position here taken by the appellees. In the face of these repeated decisions

we should feel very great hesitation in pronouncing unconstitutional and void a provision of an ordinance appearing to have had ~~such~~ so repeatedly the function of the appellate Court, and which has been in operation for twenty four years.

But looking at this as a new question, wholly uninfluenced by any previous decision; we should have little hesitation in saying that this provision of the Ordinance is free from the objection urged. ~~[illegible]~~ It does not sanction the taking of any property from the owner without his consent, not ~~required~~ necessary for the public use. If more land is taken in any case, than is required for the bed of the street, it is always done with the consent of the owner, to whom

the option is given of retaining the fragment of a lot when part is taken by the city, or of claiming compensation for the whole, and allowing the part not taken to be sold for the benefit of the parties charged with the cost of the improvement. They are not injured by the proceeding; for there can be no more certain mode of ascertaining the value of the part of a lot taken, than by selling at public auction the part that is left, and deducting from the value of the whole the sum realized by the sale.

Properly construed the ordinance does no more than to prescribe a mode by which the true value of property taken for public use may be ascertained and the parties benefitted assessed therefor. In the opinion of this

× In the matter of Albany &c. The Supreme Court of New York expressed the opinion that such a provision would be free from objection. 11 Wend. 157.

Court, the ordinance before us is not obnoxious to the objection made by the appellees in the first point of their brief.

We are also of opinion that the objection to the ordinance ~~pre-~~ stated by the bill, and ~~[illegible]~~ presented in the brief of the appellees in their third point, is not well founded. This point is that the ordinance is invalid because it did not provide for an appeal to the Superior Court from the Decision of the Appeal Tax Court. By the terms of the Ordinance of 1858, which governs the case before us, the appeal is ~~given~~ directed to be made to the ~~Criminal~~ City Court of Baltimore. The appellees insist that by the Constitution and laws the right of appeal ~~[illegible]~~ to the Superior Court is granted, at the option of the party appealing; and that it is a fatal objection to the

ordinance, that it deprives a party aggrieved of this option, and limits his appeal to the Criminal Court alone.

At the time of the adoption of the Constitution of 1851, the exclusive jurisdiction over such appeals was in the City Court, by that constitution the same jurisdiction was conferred upon the Criminal Court. It was not given to the Superior Court by the 11th Section of the 4th Article. The general words there used must be construed as defining the original jurisdiction of the Superior Court; and do not refer to appeals from inferior tribunals, or in Street cases; they are regulated by Statute. By the act of 1853 ch 451 the Superior Court was authorized to exercise jurisdiction over appeals in Street cases concurrently with the Criminal Court. We see no reason why that act was not a constitutional exercise

of legislative power. But that inquiry is not involved in the present case; Conceding that act to be constitutional, it was still competent for the Mayor and City Council in legislating on such cases to provide for an appeal either to the Superior or Criminal Court, they having concurrent jurisdiction. Such ordinances are passed in execution of the powers conferred by the Act of 1838 ch 226, which simply requires, by its 2nd section, that provision shall be made securing to the owner, the right of trial by jury; this is fully accomplished whether the appeal be to the Superior or the Criminal Court. It is eminently proper that the ordinance should designate the Court to which such appeal will lie in any

given case; otherwise the greatest difficulty and confusion might arise from conflicting decisions of different juries in regard to the same subject matter of inquiry; if the various parties interested had the ~~option~~ right of prosecuting an appeal, at their option, before one or the other Court.

That such legislation by the City has not heretofore been objected to, will appear from the case of Stewart vs The Mayor & C.C. of Baltimore 7 Md 500, in which this Court had before them the Ordinance of 1853 No 58 approved June 18th 1853, after the act of 1853 went into effect, and in which ~~the~~ parties were tied down to their appeal to the Criminal Court.

But on this question we think the Code Vol 2. Art 4 Sec 837 is conclusive, and free from all doubt or difficulty. By that section the power and option is plainly given to the Mayor and City Council, in providing for appeals, to direct that they shall be taken either to the Superior or the Criminal Court.

One more objection to the validity of this ordinance was insisted on in the argument and remains to be considered, this is fully set out in the bill and very clearly stated in the second point of appellees' brief. It arises upon the construction of the 4th and 5th Sections.

By the 4th Section it is directed that "in the Settlement with Wm H. McClellan "or Catharine M Raborg for any dam-"-ages which may be awarded him or "her for property condemned under the

provisions of this ordinance" certain sums shall be deducted before received by them under Ordinance No 59 approved October 21, 1858, and also that one of the sums so deducted shall be paid over to A Horn & Co. or credited therefor upon any assessment that may be levied upon them under the ordinance.

By the 5th Section it is enacted and ordained that "the ordinance shall "not take effect" until certain things therein specified shall be done; and ~~[illegible]~~ McClellan and Ruborg or their representatives "have given their written assent to the provisions of the 4th section."

These provisions it is said render the ordinance void because it was not ~~competent for~~ competent for the Mayor and city Council to delegate ~~[illegible]~~ their legislative power over the subject, and make the ordinance depend

for its force and efficacy upon the will of others; and because it appears from these sections that the ordinance was not passed on consideration of public necessity and convenience; but was the result of a bargain or contract between the Mayor and City Council and the parties, whose consent is required to give it effect, and operation.

The decision of this point involves considerations of much interest and importance, and by no means free from difficulty; while on the one hand municipal corporations having ~~[illegible]~~ delegated to them a limited jurisdiction, and being entrusted with the power of dealing with the property and rights of the citizen, ought to be restrained within the strict limits of their authority; and when they transgress those limits, it is the

duty of the Courts to declare their acts void, insofar as they have exceeded their powers; yet on the other hand when the exclusive jurisdiction and power to legislate upon a given subject have been conferred by law upon such a corporation, every intend-ment and presumption ought to be made in support of their acts, and Courts of justice should never pronounce them void, unless their nullity and invalidity are placed beyond reasonable doubt.

The rules and principles governing Courts of justice, when dealing with such subjects, are very clearly expressed by Chief Justice Shaw in his able opinion pronounced in the case of Wellington & others. 16 Pickering 95, 96, 97. In that case the Court was dealing with an act of the legislature; but the rules of construction there laid down are equally

applicable to the legislative acts of a municipal corporation passed within the scope of their delegated powers.

The Ordinance before us was passed in the exercise of the power of eminent domain delegated to the corporation by the general assembly, and defined in the Code vol 2. Art. 4 Sec 837. By that section the power to lay out and open a street, "which, in their opinion, the public welfare or convenience may require", is clearly conferred; it is to be exercised for the public good, and only when in the opinion of the Mayor and City Council "the public welfare and convenience "requires"; to their discretion alone the law confides the decision of the question of the propriety of opening any street, their judgment upon that question is therefore final, and cannot be examined or reviewed by courts of justice. The subject

-is confided to their judgment and discretion which they alone must exercise and cannot ~~confer~~ delegate to others.

If an ordinance were brought before us passed by the Mayor and City Council, manifestly not in the exercise of their discretion looking to the public welfare alone; but based upon other considerations, as the result of a bargain with individuals interested in the work, or depending for its efficacy upon their will, or upon matters wholly extraneous to the subject of legislation and altogether unconnected with the question whether the public convenience required the street to be opened, or the expediency of undertaking the work. If such a case should arise, this court would not hesitate to say, both upon the plain words of the Code, and upon the highest grounds of public policy that such an

ordinance would be null and void, notwithstanding it might profess on its face to be passed for the public convenience alone.

In our opinion that is not the case with the ordinance now under consideration. The bill does not charge that there was any fraud in procuring its passage or that it was based upon any corrupt or dishonest bargain between the Mayor and City Council and the parties named in the 4th and 5th sections; ~~[illegible]~~ ~~[illegible]~~ The objection is founded upon the provisions contained in those sections, and the ordinance must stand or fall according to the construction of these provisions.

The 4th Section does no more than provide the mode by which the damages that may be awarded to McClellan & Mrs Raborg shall be adjusted, retaining out of the amount so awarded a sum previously received by them from the City under the ordinance No 59 of October 1858, which was an ordinance providing for opening this same street, and which was afterwards repealed, after having been in part executed.

No valid objection can be made to this provision, no additional burden was thereby imposed upon any of the property holders.

The arrangement is one founded in justice, and this Court is not at liberty to presume that such an arrangement constituted an unfair or corrupt bargain.

The 5th Section provides that the Ordinance shall not take effect until certain cases of Mandamus lately pending in the Court of Appeals, and removed thence by writ of Error to the Supreme Court, shall have been dismissed, and other

cases against the city, growing out of the repeal of the ordinance of October 1858, shall have been released and abandoned; and further requires the assent of McClellan and Mrs Raborg to the provisions of the 4th section, as a condition precedent to the ordinance going into effect. This is not delegating to others the discretion vested by law, in the Mayor and City Council. A valid law may be passed, to take effect upon the happening of a future contingent event, even where that event involves the assent to its provisions by other parties. That was decided in "The M & C. C of Balto" vs The Northern Central R.W.Co. at the Term 186 . The same principle applies to an ordinance passed by a Municipal Corporation, provided the subject matter of the ordinance is within the legislative powers delegated to the corporation; and provided it does not appear that the contingent event is foreign to the subject matter of the ordinance and wholly unconnected with the

consideration of the public convenience upon which alone the ordinance must be based.

The same observation will apply to the other contingencies mentioned in the 5th section. A reference to the cases of Mandamus reported in 19 Md 351. will show the connexion between them and the subject of the ordinance; and the great importance of the provisions in the 4th and 5th sections, without which much confusion and difficulty might result from the execution of the ordinance.

These provisions appear to us to be germaine to the subject of the ordinance, and as embracing items or elements which might properly enter into the consideration and decision of the question of public convenience, or the expediency of undertaking the contemplated improvement, and therefore might properly constitute contingencies upon which the ordinance was to depend. Such would be the intendment and presumption of the law; even if the subjects embraced in these sections were less obviously and closely connected with the very question of the expediency of passing the ordinance than they appear to be.

We have said it is necessary to the validity of such an ordinance that it shall be passed only upon ~~the ground~~ consideration of the public good, and be based upon the judgment and decision of the Mayor and City Council that the public convenience requires its passage.

By the first section it is adjudicated in unqualified terms, that the public convenience requires the street to be opened. We see nothing in the other provisions to justify us in saying that this is a mere colorable pretence; and that the ordinance was passed upon any other ground, or consideration than that which the law prescribes, and which is left to the exclusive jurisdiction and control of the Mayor and City Council.

These conclusions are the result of an examination of the authorities cited by the Counsel in argument

all of which have been examined, but it is unnecessary to refer to them here.

As we are of opinion that the Ordinance is not invalid for any of the reasons set forth in the bill of complaint; it becomes unnecessary for us to express any opinion upon the question of jurisdiction. Conceding the jurisdiction to exist in equity; the appellees are not entitled to relief by injunction upon the allegations of their bill. An order will be passed reversing the order of the Circuit Court and dismissing the bill — with costs to the appellant.

Order reversed & bill dismissed —