No. 213
Office Docket
April Term 1865.

The Mayor & City Council
of Baltimore
vs
Augustus Boulden
Harriet Boulden
Henry Boulden &
Jane A. Boulden

Decree

Filed July 11th 1865.

The Mayor & City Council of Baltimore & others.
vs.
Augustus Boulden, Harriet Boulden, Harry Boulden and Jane A. Boulden

Court of Appeals of Maryland April Term 1865

The appeal in this cause standing ready for hearing, was argued by the Counsel of the respective parties and the proceedings have since been read and considered by the Court: It is thereupon, this eleventh day of July 1865 by the Court of Appeals of Maryland, and by the authority thereof, adjudged ordered and decreed that the decree of the Superior Court of Baltimore City, passed on the 6th day of July, 1864, from which the appeal in this cause was taken, be and the same is hereby reversed and the Complainants' bill hereby dismissed each party paying their own costs.

Richd J. Bowie

Jas. L. Bartol

D Weiss

No. 213. April Term 1865
35 pieces
Office Docket.

The Mayor & City C. of Balto. & others

vs

Aug. Hamett, Henry & Jane A. Boulden

Full Bench

Opinion

Bond, C. J.

Cochran J. dissenting.

To be reported.

Filed Jul. 11. 1865.

The Mayor & City C. of Baltimore
vs
Boulden & others

When this case was before this Court, upon a former appeal, from an order dissolving an injunction, ~~upon~~ on a motion to dissolve, in a case heard upon bill answer & proof taken under the Act of 1835. ch 380. the order dissolving the injunction, was reversed because the Equity of the bill was not fully denied by such an answer as could authorize the passage of the order appealed from," vide 15. Md. 18. to 22.

In the opinion of the Court announcing that conclusion, it is declared, to be established doctrine that unless the owners of a majority

of the feet fronting on a street to be paved, assent in writing to the paving, the proceedings of the city authorities, directing the paving to be done are null and void, and a Court of equity has upon application of the non assenting owners, jurisdiction to prevent by injunction, the sale of their property to pay for such paving. In which they refer to Holland vs The Mayor &c 11. Md Rep 186. That case turned on the 1st section of the ordinance of 1850. No 15. and the acts of assembly therein referred to. The same doctrine is reaffirmed in the more recent case of The Mayor &c vs Eschbach, 18 Md 281. in which referring to the same ordinance it is said.

"The City Commissioner, by the 1st. 34. 35. 36 & 38 Secs of Rev. Ord. No. 15 of 1850, with the approbation of the Mayor, is vested with power and authority, to enter into & make contracts for grading and paving, and to assess taxes therefor, in two classes of cases only, 1st. When the proprietors of a majority of the feet of ground, binding & fronting on any condemned street lane or alley, make application

to him in writing, to have such street lane or alley graded and paved; and 2d when all the proprietors of the ground fronting on a street, lane or alley not formally condemned make a like application for grading and paving."

The learned judge opening the reasons for the decree now appealed from & under consideration, relies upon the case last cited. viz: ——

"It being apparent in this case, that the application to pave the Bel Air Avenue, was not signed by all the proprietors of ground bounding on said Avenue, I will sign a decree overruling the motion to dissolve the injunction & making the injunction perpetual, upon the principle announced in the Mayor & City C. vs Eschbach 18 Md R 276. that as the street in question was not to be considered as a condemned street, on the true construction of the Revised Ord. of 1850. No 15. Sec 1. & 3d. the City Compr had no power" etc.

In Escheators case it was admitted, that Hall Street from Fort Avenue to the Port Warden's line was never formally condemned, and that the application to have it graded and paved was made by only a part of the proprietors of the ground binding & fronting thereon, hence in the language of the Court, "it was obvious that the application was not sufficient to bring the case within the jurisdiction conferred by the ordinance on the Comptr." "nor to give him any official discretion or authority to take any proceedings or make any contract respecting it." That, was also an action at law, in which the plaintiffs had to stand or fall upon strict legal & technical grounds. In this case all these jurisdictional facts are disputed, and to be established by the Appellee, seeking the injunction against legal proceedings which are ~~to~~ prima facie presumed to be legal & regular —

~~is taken~~

The appellants insist that Bell Air Avenue, being already a condemned street, to the extent of 40 feet. The notice preliminary to the exercise of the power of widening it, was legally ~~amply~~ sufficient. & when the street had been widened under Ordinance No. 61. of 1851. it was to all intent & purposes a formally condemned street to which the regulating prescribed for that class of streets, properly applied. The appellees maintain the converse of these propositions, ~~main~~ alleging that the notice that application would be made to widen Bel air Avenue etc as laid down on Poppleton's plat etc could not be made to cover the bed of a street a highway of 40. ft. already existing, but applied only to the enlargement of the width of the St. fr 40. to 50. ft.

These objections involve 1st the authority to widen 2d the right to pave –

The act of 1838 Ch 224. Sec 1. invests the Mayor & City Council of Baltimore with power & authority to provide for laying out, opening, extending, widening straightening or closing up in whole or in part, any street, etc within the bounds of said City, which in their opinion the public welfare or convenience may require; to provide for ascertaining damages & benefits, for assessing & levying the same either generally on the whole assessable property within said City or specially on the property of persons benefited, the whole or any part of the damages & expenses which they shall ascertain will be incurred in locating, opening extending, widening etc, to provide for granting appeals, for jury trials, etc, provided nevertheless that before the Mayor & City Council proceed to execute any of the powers vested in them by that act, at least sixty days notice shall be given of any application which may be made for the passage of any ordinance, by advertisement in at least two of the daily newspapers in the City of Baltimore

The powers granted by this act, are such as are essential to the existence and Expansion of a great Municipality, and confided to a local legislature, selected by its Citizens for the government of its Concerns. It would be fatal to the objects for which these powers are delegated by the General Assembly of the State, to require, all the Notices for the application for ordinances, to carry into effect these powers — to specify with technical precision, the objects for which the ~~appli~~ applications will be made. Such particularity would embarrass all the subsequent proceedings dependent on the Notices, and render the rights acquired under them, so precarious, as to destroy all confidence in the local legislation of the City.

The notice in this case, was in our opinion, sufficient compliance with the proviso of the act, above cited, in accordance with which, ordinance No 61. of 1851, was passed, by the Mayor & City Council. The authority conferred by this ordinance on the Commissioner, "to widen & condemn North Gay Street or Bel air Avenue, to the width of which it is laid down on Popplers ~~Plat~~ Map" was a legitimate exercise of the power conferred by the act. Such being the case, it follows, that the proceedings of the Commissioner under that ordinance, are subject to the regulating of ordinance No ~~15~~. approved April 30. 1850, and ordinance No. 15. 1850. approved 20. May 1850. under which, arises the question, whether Bell Air Avenue, was a "Street formally condemned under any law, or ordinance"

What constitutes a formally condemned street, becomes a material question in commencing any proceeding for paving or grading, as in the one case, the owners of a majority of the front feet is sufficient; in the other, the unanimous consent is required. This question has not been as far as we are informed judicially determined. In the case just cited, the learned Counsel for the appellants, contended that according to the true construction of the laws and ordinances relating to the paving of streets and especially of Rev. Ord 1850. Sec 15. Sec 1. & 36. a majority was sufficient to vest jurisdiction in the City Compt. in every case where the title to the bed of the street, was at the time of the application owned by the City authority, either by formal condemnation or by deed or dedication, vide Delaney's Arg.t 277. 1860.

The ~~first~~ 1st and 3d Sections of the ordinance upon the true construction of which, the decision in this case mainly depends, will be better understood when placed in juxtaposition. The ordinance is entitled: "

"An ordinance establishing a system for grading paving or repaving the Streets" etc.

Sec. 1. Enacts, That when the City Commissioner shall receive an application, in writing, for paving to be done in any unpaved street etc, from the proprietors of the Majority of the feet of ground bounding & fronting on such street etc or the part thereof to be paved, it shall be the duty of the Comrs. to give seven days public notice, by an advertisement in one or more newspapers in the City of Baltimore of the fact of such application as also of the time & place when said Comrs. intends to act for the purpose of determining on such application.

In this section, no distinction is made between condemned and uncondemned streets.

Sec 34. Enacts that the several regulations prescribed by ordinance relative to streets, shall be construed to extend to all streets, lanes and alleys which are opened, but which have not been formally condemned as public, as fully as to any streets, lanes or alleys which have been regularly condemned in pursuance of any law or ordinance, provided the proprietors of all the lots binding on such street, lane or alley shall assent to the extending of such regulations."

The distinction here made is between streets opened, but not formally condemned as public, & streets which have been regularly condemned, in pursuance of any law or ordinance.

"Condemned as public," must be synonimous with appropriated to the public, or streets belonging to the public; the means being put for the end.

II

Condemnation of streets, is ~~but a~~ one of the means of extinguishing the private right or title of the owner of the land, & vesting it in the public. Where that title has been transferred, the subject matter, to be graded or paved, being already public property, the owners of a majority of front feet are deemed most competent to judge of the expediency of the proposed improvement. On the other hand, where the bed of the proposed road is still private property, every proprietor to be affected by the change, must be consulted and consent. Hence it was ~~held~~ said in Moseley case 5. Allen, 322.

"We hold that a person owning a lot lying on the bed of the street which is taken for public use, is entitled to be compensated for it precisely as if no street was opened over it. Of course this rule is wholly independent of all question of dedication. In such a case there could be no claim for damages, for the party having given the ground to the community, can set up no just claim to be compensated for it.

5. Allen, 322.

To require the process of condemnation by inquest, (the legal mode of exercising the right of Eminent Domain) to be resorted to where the property was already in the public, would be such an anomaly as the law could not intend. There would be nothing for such an inquest to find, no damages to assess; an idle ceremony, productive only of costs and delay; hence, such an interpretation, is not to be adopted unless inevitable. The decision in Kane vs Mayor 15. Md. 149. shows, that the title acquired by condemnation, is not an absolute unqualified fee, but an appropriation of private property to public use, consistent with the objects of the Corporation for which it is condemned. This right had already been acquired by the City, in so much of Bel Air Avenue as was a public highway, prior to the ordinance directing it to be widened & condemned.

† See Geo. 20 original Opinion, sec. 1.

¶ The question, who is a "proprietor" or "owner" within the purview of the 1st & 3d. sections on whose application, the Compt. is to determine, to grade or pave, is not without difficulty.

The act of 1833. ch 40. entitled an act for repaving streets etc in the City of Baltimore, declares in sections 3. & 5. that a tenant for 99 yrs renewable for ever, and the Exr or admr. of such tenant, a mortgagee in possession, or the guardian of an infant owner shall be deemed and taken as an owner within the meaning of that act; In Holland vs The Mayor etc, 11. Md 196, this Court determined although the power to pave an unpaved street was not vested in the Corporation by that act, yet it being in pari materia, the legislative definition of the word owner, therein, was to be applied to its "synonyme" proprietor, as used in the acts of 1797. ch 54. & 1817. ch 148. and which has been adopted since in the revised ordinance of 1850. No. 15. Establishing the system for grading & paving –

The reasons which induced this legislative declaration, of the estate, interest, or office, which would constitute an owner, must weigh with this Court, in interpreting the same word or its synonyme. It does not require an absolute legal & equitable estate in fee, yet there must be such an interest, as would protect the property to be affected, from incumbrances which would prejudice the tenant in reversion, and secure to the City a free right of way. The presumption of law is, that the improvement to be made, will enure to the benefit of the Majority and promote public convenience, those who have such a stake in the subject matter, as that they could not encumber it without injury to themselves, would therefore be qualified to apply: if their title is an equitable title in fee depending on contract to be consummated, such an interest would be enough to protect the interest of the vendor

from prejudice, by wanton application.

An equitable estate in fee, accompanied by possession; or an interest equivalent to that of a tenant for 99 yrs renewable for ever, an Ex.r or admr of such, or mortgagee or mortgagor in possession. or the application of a vendee under a deed of trust, who subsequently acquires a title to the fee, would be an owner or proprietor to require an absolute unincumbered legal estate in fee; would arrest all improvement,

We think therefore that the title of Messrs Leach, Kilberg & Heinkelman was such as authorized them to sign for the number of feet represented by them. The act of the Trustees of the second Presbyterian Church, was ratified & confirmed by their subsequent payment of the tax levied on them, which was equivalent to the most formal & legal prior authority, "omnis ratihabitio mandato equiparatur".

The signatures of Rockwell by Van Ramsdell, were made

in pursuance of an express verbal request, by the trustee and cestui que trusts, such authority would have been sufficient in law to bind their interests in a contract for sale made by their attorney — the authority of the agent need not be in writing to bind the principal in such cases.

The argument "ab inconvenienti" that purchasers might before payment of their purchase money, by signing such applications, encumber the property purchased, is met by the consideration, that vendors may guard against such incumbrances, by proper stipulations in the contracts of sale, or taking such indemnity as would entirely protect them. Whereas the absence of this power or right to sign might retard almost indefinitely, the ~~next~~ developement and prosperity of the most valuable sections of the City —

The improved value would operate to the advantage of the vendor in case forfeiture

The 4th point of the Appellees & 5th of the Appellants involve the Construction of the 8th Section of Ord No. of 1855. being an ordinance supplementary to an ordinance, ~~providing~~ for the appointment of and compensation & prescribing the duties of an Auditor. Without recapitulating the Section, it is sufficient to say, that in our judgment, the interpretation given by the Counsel for the Appellee, was correct that it did not require readvertisement by the Auditor to enable him to proceed to enforce the collection of the taxes, under the circumstances of this Case, the previous notice having been given by the Collector, as required by the Ordinance as then existing.

The objections made to the legality & regularity of the proceedings of the Commissioner, under the 2. & 4th Sections of Ordinance No 17, are such as could properly have been received by appeal under the 9th Section, of that ordinance — to which the language of the late learned Chief Justice Dorsey in the Case of the Methodist P. Church vs The Mayor

6. Gill 402. applies:

"To sustain a Court of Equity in the Exercise of such powers, would be to confer on it appellate jurisdiction, where it is incompetent to administer justice, and render full and adequate relief to all concerned, on whose rights, if it act at all, it ought to adjudicate."

The conclusion from these premises is, that in our opinion, the learned Judge below, erred in continuing the injunction in this case & making the same perpetual, and that the decree of the 6th July 1864 to that effect, should be reversed, and bill dismissed, each party paying their own costs.

Decree reversed & bill dismissed.