Simon E. Sobeloff – Baltimore City Cases

Before he became the City Solicitor under Mayor McKeldin Sobeloff had an active law practice both as a private attorney and then during the administration of Mayor Broening as Assistant City Solicitor. The opinions listed below, from the Baltimore City Reports, are a cross section of the types of cases that Sobeloff participated in early in his career.

1. Terrence McMahon v. Levi A. Thompson. 4 Balt. City Rpt. 39 (1919).

2. Frank E. Buck v. Louis Hurwitz and Benjamin Pugatch. 4 Balt. City Rpt. 251 (1923).

3. Mortimer W. West and Philip J. Scheck, Petitioners, v. J. Warren Burgess, Defendant and Mortimer W. West and Harry J. McClellan, Petitioners, v. Thomas L.A. Musgrave, Defendant. 4 Balt. City Rpt. 511 (1927).

4. Charles A. Sohl, Charles F. Mosher, Edwin J. Burke, Harry J. Maloney, Mathias Shea, Frank Westrich, John C. Murray, Wm. R. Mason, Bernard J. McElroy and John Bohl, v. William F. Broening, Mayor; R. Walter Graham, Comptroller; Howard Bryant, President of the City Council; Anthony Walter Krauss, City Solicitor, and Charles F. Goob, Chief Engineer, Being and Constituting the Board of Estimates of the Mayor and City Council of Baltimore, a Municipal Corporation. 4 Balt. City Rpt. 645 (1927).

5. In the Matter of the Five Councilmanic Appeals. 4 Balt. City Rpt. 663 (1928).

6. Alexander E. Duncan, v. R. Walter Graham. Et at., Trustees "Employees' Retirement System of Baltimore City," and R. Walter Graham, Comptroller, etc. 4 Balt. City Rpt. 678 (1928).

7. International Union of Operating Engineers, Local Union no. 37, James V. Anderson and William Howard Erskine, Officers and Members, and Michael Chapman, A Member of Said Local Union no. 37, and Individually as Residents, Citizens and Taxpayers of the City of Baltimore, Plaintiffs, v. Milton J. Ruark, Engineer of the Sewers of the City of Baltimore, the Mayor and City Council of Baltimore, A Municipal Corporation, The Ryan Construction Company, A Body Corporate, Pio Marocca, William H. Thompson, Frank Angellozzi, N. Martell, John Matricciani, Peter D. Adams, and Rosse Marino, Trading as Adams & Marino, and Dominick Catalano and Frank Pecora, Trading as Catalano & Pecora, Defendants. 4 Balt. City Rpt. 808 (1928).

VOLUME IV

BALTIMORE CITY REPORTS

Comprising

Opinions of the Various Courts of Baltimore City Since January 1919

Reprinted from Opinions Reported in THE DAILY RECORD

Published

Under the Auspices and With the Assistance of

The Bar Association of Baltimore City

By THE DAILY RECORD

Committee on Publication

The Bar Association of Baltimore City

WALLIS GIFFEN, Chairman

CLARENCE K. BOWIE
OMER F. HERSHEY
REUBEN OPPENHEIMER
AUBREY PEARRE, JR.
HORACE T. SMITH
GEORGE ROSS VEAZEY
JULIUS H. WYMAN

Collaborators

HON. CHARLES F. STEIN
FRANK T. WALLACE

Sub-Committee of the Baltimore Bar

For Digesting of Decisions For Publication

G. Randolph Aiken
Morris A. Baker
W. Lester Baldwin
Paul G. Ballard
Emanuel M. Baum
Joseph Bernstein
F. Fulton Bramble
Philander B. Briscoe
Frederick W. Brune
Hector J. Ciotti
James K. Cullen
Thomas A. deLauder
Elbridge B. Donaldson
C. Arthur Eby
F. Millard Foard
Eli Frank, Jr.
Robert France
Philip C. Friese
Hyman Ginsberg
C. Morton Goldstein
Boyd B. Graham
B. Harris Henderson
William L. Henderson
Frederick H. Hennighausen
W. Carroll Hunter
Lloyd L. Jackson
Louis J. Jira
William M. Kalling
George E. Kieffner
Joseph S. Knapp, Jr.
Ellis Levin
Charles T. LeViness, III
John Henry Lewin
Charles S. H. Lockman
William D. Macmillan
Michael J. Manley
William L. Marbury, Jr.
E. Paul Mason
Julius G. Maurer
William H. Maynard
Gersh I. Moss
Cornelius P. Mundy
Seymour O'Brien
Charles G. Page
Francis E. Pegram, Jr.
S. Wilmer Pleasants
Edward L. Putzel
Ernst S. Romoser
Charles Ruzicka
Philip H. Sachs
W. Conwell Smith
Max Sokol
Charles F. Stein, Jr.
William L. Stuckert
Roszel C. Thomsen
George M. White
John S. L. Yost

Mr. Marchant—I shall not permit Mr. Thompson to abuse any of his powers, whether they are real powers, in my judgment or not, certainly not until this case is finally disposed of, and in order to make myself clear, I will make that to mean until it went to the court of last resort, if it is going there. I do not believe in trifling with rights that are going to be determined until they are determined.

The Court—I think we ought to know whether he is entitled to this office. If he is he ought to have it, and if he is not, he ought not to have it. We have enough confusion in the world as it is, without adding to it.

Mr. McKindless—I feel the same way about it, your Honor.

Mr. Marchant—I will file my answer right away.

CIRCUIT COURT OF BALTIMORE CITY.

Filed December 9, 1919.

TERRENCE McMAHON
VS.
LEVI A. THOMPSON.

Argued before GORTER, DUFFY and BOND, JJ.

Benjamin H. McKindless and *Edward J. Colgan* for plaintiff.

Roland R. Marchant, Augustus C. Binswanger and *Simon E. Sobeloff* for defendant.

1. Injunction — Office and officers — Appointment to fill vacancy.

2. City Charter—Sec. 25 construed—"Recess."

3. Statutes—Sec. 30, Art. IV, Code of Public Laws of 1860 (Sec. 24, Code of 1888)—Construed.

GORTER, J. (Orally)—

Gentlemen, it often happens when cases are brought before a court for trial that the public thinks that the judges have it in their discretion to dispose of the whole case. But that is not always so. The judges have to apply the law to the facts as they are offered at the trial and to reach the conclusions under the law.

I have no doubt with reference to this case, which is a case of considerable public interest, the idea would be that we have the power to decide what, to the public, would seem to be the main question; that is, whether or not Mr. Thompson is entitled to the office of Superintendent of Public Buildings. In this proceeding we are not able to decide that question, nor do we express any opinion upon that subject.

The effort in this case upon the part of the plaintiff, who is the assistant superintendent of public buildings for the city, is to restrain the defendant, who has been appointed by the Mayor superintendent of public buildings, from interfering with the assistant superintendent, or from, you might say, practically assuming the duties of the office of superintendent of public buildings of the city.

The law of Maryland is that an incumbent in office has a right to restrain in a court of equity one who seeks to take possession of that office. That is the law as laid down in 77th Maryland, County Commissioners of Washington County. That is, as I understand, what both sides concede to be the law of the State.

The plaintiff contends that this case comes under that case. The defendant, on the other hand, contends that it does not come under that case. The plaintiff contends that it comes under the case because Mr. McMahon, the plaintiff in this case, since the death of Mr. O'Conor, has discharged the duties of superintendent of public buildings, and, therefore, when Mr. Thompson comes, armed with the commission of the Mayor, and Mr. McMahon thinks that he is not legally appointed to that office, that he, Mr. McMahon, standing in Mr. O'Conor's shoes, is in a position to restrain Mr. Thompson from taking possession of the office, or discharging the duties of the office.

He goes a step farther. That even if Mr. McMahon is not standing in the shoes of Mr. O'Conor, still, as assistant superintendent, he claims that there would be confusion in the administration of the department if he had to obey one to whom he felt he was under no obligation, by reason of that person not being duly and legally qualified to hold office.

The contention, on the other hand, of the defendant is that he comes armed with the commission of the Mayor, that he has taken the oath of office, given bond, and qualified himself to administer the duties of the office, and that Mr. McMahon, not being the superintendent of public buildings, is not in a position to stand in his way, or to ask this court to restrain him from performing the duties of the office of Superintendent of Public Buildings.

We have given the case the most careful consideration, as careful consideration as we have been able to in the time that we have had, and we are all of the opinion that Mr. McMahon is not in a position to ask the court to restrain Mr. Thompson in this case.

Mr. McMahon does not succeed to the duties of Mr. O'Conor, and whether he is performing all of those duties, or whether he is performing part of the duties, or whether he is performing none of the duties, it seems to us, is beside the question. He is still only the assistant superintendent of public buildings and is in no better position to bring this action, except that he is in a little higher grade, than the others who are in the employ of the city under that department of the city. And, looking at the case, the sphere of Mr. McMahon's duties as assistant superintendent of public buildings does not at all necessarily conflict with or overlap the sphere of Mr. Thompson's duties as superintendent of public buildings.

The evidence in the case shows that Mr. Thompson has done nothing to interfere with the carrying out of the duties of the office of Mr. McMahon. He has offered no threat of removal, and we are of the opinion that he is not in a position to interfere with Mr. Thompson in taking up the duties of the office.

We say this without at all expressing any opinion as to whether or not Mr. Thompson is legally entitled to that office. We think in this case that we have not the right to go into that question. There are other ways to test his title that have been suggested, and we believe that those ways exist. Probably, if there was any effort upon the part of Mr. Thompson to remove Mr. McMahon, he would then have rights which he might assert in one way or another. Also, if Mr. Thompson is not duly appointed, probably, any taxpayer of the city could object to his salary being paid.

But, in this application by Mr. McMahon to restrain Mr. Thompson, we are all of the opinion that under the evidence in this case Mr. McMahon has no standing to ask the court to restrain Mr. Thompson from assuming and performing the duties of superintendent of public buildings, and, therefore, the bill will be dismissed.

I want to say one thing more. That it is a natural feeling with me, and I suppose with other judges, that when we have a case we would like to finally dispose of everything that is involved in that case. We think we are not able to reach what is the main question. But sometimes it happens that if matters are left to the judgment and sense of right of those who are interested in the controversy, a wiser solution may be reached than if the court passes upon the case by administering the law applicable thereto.

Gentlemen, I have given you as nearly as I can, the reasons that have actuated us in reaching our conclusions.

I am, therefore, of the opinion that the ordinance giving the right of appeal to the Mayor from the action of the Building Inspector in cases now covered by the Zoning Ordinance was repealed by implication by the latter ordinance. It follows that the action taken in the Wyman Park case in the appeal to the Mayor is no bar to the prosecution of the present appeal in that case.

CIRCUIT COURT OF BALTIMORE CITY.

Filed October 25, 1923.

Reversed—147 Md. 566.

FRANK E. BUCK
VS.
LOUIS HURWITZ AND BENJAMIN PUGATCH.

Baldwin & Sappington and *Jacob S. New* for plaintiff.

Enos S. Stockbridge and *Simon E. Sobeloff* for defendants.

1. Easement—Right to use walls for advertising an easement when acquired for valuable consideration.

2. Lease—Recording — Acknowledgment—Not necessary when for 5 years with option for another term and not an extension of term.

3. Mandatory injunction.

FRANK, J.—

Prior to the hearing in this case, all of the acts to prevent the doing of which a prohibitory injunction was prayed, were fully done and performed by the defendants. The only relief which this Court can now effectively give, if any relief can be given, is to issue mandatory injunction as prayed in paragraph (c) of the prayer for relief. The case was heard on bill, answer and testimony taken in open Court.

The decisive facts are few and substantially undisputed. The plaintiff has occupied the premises numbers 102 and 104 Clay Street as a Lady's Boot and Shoe Shop since 1915. The building is a flat iron one in shape and the point thereof approaches to within about 10 feet of Liberty street, but the building has no frontage on Liberty street. It cannot be seen from Lexington street and not from Liberty street until the observer is almost at the corner of Clay street. There extended along Clay street from the easternmost end of 102 and 104 Clay street to the building line of Liberty street, a blank wall, which is part of the south wall of the property No. 218 North Liberty street. Upon this wall plaintiff had maintained signs advertising his business during the whole term of his occupancy and a portion of these signs could be seen from the south from below Lexington street, and most of the signs and finally all of them could be seen on Liberty street as one approached Clay street from the direction of Lexington street. The plaintiff expended large sums of money in advertising his business using reproductions of these signs in his advertisements.

The plaintiff became the tenant of the Clay street property by virtue of a lease to him from one Wilson who at that time owned not only the Clay street property, but also No. 218 North Liberty street. Plaintiff remained in possession under a series of leases from Wilson the last of which that involved in this litigation, was dated December 11th, 1918, was for the term of five years, "with the privilege of renewal for the term of five years at the same yearly rental of $1,200, beginning on the first day of January, 1919, and ending on the thirty-first day of December, 1923." One provision of this lease read: "The landlord further agrees that the tenant shall have the right to place signs on the south wall of No. 218 North Liberty street provided they do not interfere with those already there." This lease, although not acknowledged, has actually been recorded among the Land Records of Baltimore City. Subsequently, the defendant, Hurwitz, purchased the property No. 218 North Liberty street. Moreover, it is conceded that Hurwitz did not have actual notice of the lease at the time that he acquired the Liberty street property, but that he was acquainted with the actual contents thereof for two and a half years before the present controversy arose.

Just prior to the institution of this suit, the defendant, Pugatch, under the direction of Hurwitz, made an opening in the wall in controversy destroying certain of the signs and at the time of the hearing all of plaintiff's signs had been completely obliterated.

The authorities bearing upon the questions here involved are rather meager and such as can be found cannot be completely reconciled. I have, however, reached the conclusion that the right to use the walls of another's property for advertising purposes constitutes an easement and not a mere license, where that right as here is acquired for a valuable consideration. Where, as here, the easement is acquired in connection with, and as an incident to, the conveyance of an estate in other land, it should be held to be appurtenant to such other land rather than in gross.

1 Tiffany, Real Property, Sec. 305, p. 686. 19 C. J. p. 868.

Two questions remain to be considered:

1. Was the easement to maintain the signs involved here validly created by the lease of December 11, 1918?

2. Did Hurwitz have notice of the existence of the easement sufficient to bind him?

First: As already stated the lease for a term of five years, renewable for a further term of five years, though not acknowledged, was recorded among the Land Records of Baltimore City. Not being a paper entitled to be recorded, the record did not operate as constructive notice.

Harbor Co. vs. Smith, 85 Md. at p. 543.

This was conceded at the hearing.

While an easement is usually perpetual in duration, and is spoken of as an incorporeal herditament, there is no sound reason why an easement may not be created for a term of years. Where the easement is freehold or for a greater term than seven years, being an interest in land, the instrument creating it must, as required by Section 1 of Article 21 of the Code, be executed, acknowledged and recorded.

Dawson vs. Western Md. Ry. Co., 107 Md. 70, 93.

Where a term of less than seven years is created by a lease, an easement appurtenant to property leased can certainly be created for the term of the lease. No authority would appear to be needed for this proposition. It is self-evident, and this fact possibly accounts for the scarcity of authority sustaining it. Still there is authority for it.

Goddard on Easements, p. 519.

See also cases of decisions in favor of bill posting companies holding that an easement in gross has been created, e. g.

Borough Bill Posting Co. vs. Levy, 114 App. Div. 784.

Willoughby vs. Lawrence, 116 Ill. 11.

The next inquiry, then, is was this lease for five years with the privilege of renewal for five years more on the same terms and conditions validly executed? If equivalent to a lease for a term of ten years, it should have been acknowledged. If it be a lease for five years only and the renewal constitutes in effect a new lease for five years more, then it was properly executed without acknowledgment. Both sides cite King vs. Kaiser, 126 Md. 213, as sustaining their respective contentions. In that case the lease was for five years with the privilege of an additional twenty years at an increased rent, and the Court held that the additional term being for a different period than the original term, and upon a different rental, could not be regarded as an extension thereof, but was a new term and that the lease did not require acknowledgment and recordation for its validity.

In the case at bar, the original term of five years had not expired at the time of the commission by the defendants of the alleged wrongful acts and has not yet come to an end. The privilege of renewal has not yet been exercised and may never be exercised. The question of whether the privilege, if exercised, will provide for a new term to be created by a new lease, or will operate merely as an extension of the original term is a difficult one depending for its solution upon the intention of the parties at the time of the execution of the lease.

King vs. Kaiser, supra, at page 220.

If the former be held to have been their intention, then the lease here involved was validly executed and needed no acknowledgment or recordation

even as against third parties. If, however, the intention was that the original term should be extended at the option of the lessee, then the privilege does not constitute a covenant to renew, but a present demise which becomes operative immediately upon the exercise of the option. The holding then is under the original grant and not under the election.

24 Cyc. 1008 (II).

In the latter case, the lease to be valid as against third parties should have been acknowledged and recorded.

King vs. Kaiser, supra, page 220.

No testimony appears in the record that throws any light on this question of the intention of the parties to the lease. In addition to the privilege already quoted the lease provides: "That this agreement with all its provisions and covenants shall continue in force from term to term after the expiration of the term above mentioned provided however, that the parties hereto or either of them can terminate the same at the end of the term above mentioned or any term thereafter by giving at least sixty days previous notice thereof in writing." It appears, therefore, that by this provision the term of the agreement would be automatically extended unless the notice to terminate should be given.

From this language it appears that the parties knew how to use apt language to accomplish the extension of the term of the lease—"shall continue in force, etc." As contrasted therewith, the words, "privilege of renewal" would indicate an intention to require a *renewal*, the making of a new lease and not the mere extension of the term of the old one upon the exercise by the tenant of his option to renew. I conclude, therefore, that taking into consideration all of the provisions of the lease, the parties intended, in the language of King vs. Kaiser, supra, page 220 "an option for another term, or an agreement to lease at a subsequent time" and not "an extension of the term." This view is borne out by the decisions in.

Kollock vs. Scribner, 98 Wis. 104, cited in King vs. Kaiser, supra.

James vs. Kibler, 94 Va. 165.

The lease in this case being thus for a term of five years only did not require acknowledgment or recordation and is valid even as against third parties. The conclusion thus reached renders it unnecessary to consider the effect of the notice to the defendant, Hurwitz, of the plaintiff's rights growing out of the open notorious and continuous use of the wall in question by the plaintiff for the display of his signs.

King vs. Kaiser, supra, at page 221.

I shall sign a decree directing the mandatory injunction to issue as prayed against the defendant, Hurwitz.

BALTIMORE CITY COURT.

Filed July 13, 1927.

MORTIMER W. WEST AND PHILIP J. SCHECK, PETITIONERS,

VS.

J. WARREN BURGESS, DEFENDANT.

MORTIMER W. WEST AND HARRY J. McCLELLAN, PETITIONERS.

VS.

THOMAS L. A. MUSGRAVE, DEFENDANT.

Isaac Lobe Straus and *Edgar Allan Poe* for petitioners.

Roland R. Marchant, Simon E. Sobeloff, Enos S. Stockbridge, William M. Kerr and *Daniel Ellison* for defendants.

1. Municipal corporations—Qualifications of members of City Council of Baltimore—How determined.

2. Elections—Qualifications of member of City Council—How determined.

3. Mandamus—When available.

4. Appeals—Under City Charter, Sec. 217—"Parties aggrieved."

5. City Charter—Secs. 210 and 217, construed.

6. Parties—Who are "parties aggrieved."

OWENS, FRANK and STANTON, JJ.—

(The Court) The two cases present the same legal propositions, based upon substantially the same facts, and are presented upon the same state of the pleadings.

The facts as stated in said petitions, as far as necessary to be here set out, are these:

J. Warren Burgess, and Thomas L. A. Musgrave were elected members of the City Council of Baltimore at the election held in this city on May 3rd. 1927, the former was elected from the 3rd Councilmanic District, and the latter from the 5th Councilmanic District of the city.

The City Charter requires, among other qualifications, that the members of the Council, representing the Councilmanic Districts, shall each be assessed with property to the amount of $300, on which the taxes have been

paid by the Councilman one year prior to his election. City Charter, Sec. 210.

The petitioners in each case are Mr. Mortimer W. West and a defeated candidate in each of the two Councilmanic Districts, who file the petitions as citizens of Baltimore and voters and taxpayers in said city.

In each petition it is alleged, Paragraph 3: "That the defendant at the time of said municipal election was not assessed with property upon the tax books of said city in the amount of three hundred dollars or in any amount whatsoever upon which he had paid one year prior to said election and therefore did not possess the qualifications prescribed by Section 210 of said Charter of Baltimore City for membership to said Council and was therefore at the time of said election not eligible as a member of said Council.

That notwithstanding such disqualification and ineligibilty the defendant claiming to have been elected at said Municipal Election held on May 3, 1927, as a member of said City Council on Thursday, May 14th, 1927, presented himself to Honorable William F. Broening, Mayor of Baltimore City, who thereupon administered to him the oath required to be taken by members of said City Council and thereupon the said defendant took his seat as a member of said City Council, and since that time, has attempted to act, and has acted as a member thereof and has declared his intention of continuing to so act.

Paragraph 4: "That at a session of the City Council on June 6th, 1927, the City Council by a vote of 11 to 8 held that the defendant was duly qualified according to law and was entitled to his seat as a member of the City Council, and your petitioners feeling aggrieved by said finding and decision have brought this proceeding in order that the alleged disqualification of the defendant may be judicially inquired into and determined."

And the petitioners in each case pray:

"That a writ of mandamus may be issued directed to the defendant commanding him to vacate the office of Councilman of the City of Baltimore and to cease from exercising any of the functions of said office."

The petitions in each case are filed under oath.

A demurrer, verified by affidavit, is filed by the defendant in each case, worded as follows:

"The respondent in the above entitled cause demurs to the whole of the petition herein filed and for ground of demurrer says: That the same is bad in substance and insufficient in law, and for further ground says that the facts set out in said petition do not entitle the petitioner to the issuance of the writ of mandamus as herein prayed. The specific point presented is as follows: Section 217 of the present City Charter contains this provision: "'The City Council shall judge of the election and qualifications of its members subject to appeal by petition of the party aggrieved to the Baltimore City Court."

It is contended by the defendants that this provision of the City Charter provides a specific and adequate remedy for the conditions complained of in the petitions and therefore mandamus will not lie.

The procedure in mandamus cases is set out in detail in Article 60 of the Annotated Code of Maryland and it is provided specifically that the Defendant shall answer the petition and there is no express authority for a demurrer to the petition, and our Court of Appeals, in Sudler vs. Lankford, 82 Md. 148, and Beasley vs. Ridout, 94 Md. 641, say that in a purely statutory procedure such as has been provided by our Code for Mandamus, a demurrer does not admit the facts alleged in the petition.

In the cases at bar, however, the demurrers rely upon the written law as contained in the City Charter, and practically assert that the law controls the situation, independently of a denial of the facts alleged in the petitions.

And the demurrers filed in these cases were apparently recognized by both sides to be the appropriate pleading and the Court, therefore, so accepts it.

The petitioners contend, under the authority of Hammelshime vs. Hirsh, 114 Md. 59, that mandamus is the appropriate remedy, and if this is not so, and an appeal to the Baltimore City Court is the appropriate proceeding the petitions filed herein are of such a character that the Court may properly consider them as the "Appeal by Petition," provided for by Section 217,

of the City Charter. This second contention clearly can not be sustained by authority.

The proceeding by mandamus is of common law origin, and at the beginning was a voluntary exercise of kingly power, arising from his innate sense of justice, in cases in which the subject possessed an undoubted right for the enforcement of which there existed no legal machinery. After the establishment of the Court of King's Bench, in which, in theory, the king presided, jurisdiction in mandamus cases was vested in that tribunal, and in full keeping with the origin of the proceeding, from the beginning of regulated Court procedure, it was established as a fundamental proposition regarding mandamus that it was a prerogative writ, issuable only in cases where there was no other adequate remedy.

The Maryland Colonists brought with them the Common Law of England, and during the Colonial period the Common Law of England was the basis of the law of the land. Mandamus was even then a recognized Common Law procedure. As far back as 1709 our Provincial Court had before it the Mandamus Case of Bordley vs. Lloyd, which is reported in 1st Harris & McHenry, at page 21.

When the Colony became a State, it was set out in the Declaration of Rights: "That the inhabitants of Maryland are entitled to the Common Law of England, and the trial by jury according to the course of that law and to the benefit of such of the English Statutes as existed on the 4th day of July, 1776, and which by experience have been found applicable, to their local and other circumstances, and been introduced, used and practiced by the Courts of Law and Equity." And so from the earliest days of the State Government, the Writ of Mandamus was in use, whenever the occasion required its use, in fact, in our Maryland Reports there are a great number of mandamus cases, from the case of Runkel and Winemiller, 4 Harris & McHenry, down to the present time, and it has always been conceded in this State that the underlying rule with reference to mandamus is that the writ will not be issued when there exists another specific and adequate remedy.

It, therefore, becomes necessary to consider whether or not the remedy provided by Section 217 of the City Charter is a specific and adequate remedy under the circumstances presented by the petitions.

The City of Baltimore is the metropolis of the State. Within its ninety-six square miles of territory more than one-half of the entire population of this State lives and conducts its life's work. Estimating its population at 800,000 in this restricted area, there are living more than 8,000 people to the square mile. It is manifest that the government of a population so congested presents problems infinitely more intricate and of an entirely different character than those presented with reference to the outlying sections of the State, where the average density of population does not exceed 75 to the square mile. As far back as the Constitution of 1851, Baltimore was taken out of Baltimore County, and made a separate political entity. In the Constitution of 1867, a special Article was contained applicable to Baltimore City, giving it large self-governing powers, but still retaining to the State in most particulars the ultimate control of the Municipal Government.

The constantly increasing population of the city, made evident the necessity of a more effective autonomy, and after continued demands upon the Legislature, Article 11A of the State Constitution was passed by the Legislature and approved by the people of the State in November, 1915. Under this Article the City of Baltimore was authorized by a vote of its people to adopt a charter. This was done in 1918, and our Court of Appeals has upheld this Charter. This Charter was amended in many particulars by a vote of our people on November 7th, 1922, and among these amendments, the City Council was made to consist of a single branch instead of the two branches as theretofore existing.

Section 210 and 217 of this amendment are the Sections under consideration, the former prescribing the qualifications of the councilman, and the latter containing the provisions now to be construed "The City Council shall judge of the election and qualification of its members, subject to appeal by petition of the party aggrieved to the Baltimore City Court."

Bearing upon the construction to be placed upon the Charter of Baltimore City, as amended, attention should be called to the fact that Section 4 of Article 11A of the State Constitution provides "that from and after the

adoption of this Charter by the City of Baltimore" no public local law shall be enacted by the General Assembly for said city on any subject covered by the express powers granted by said Amendment, 11A.

Section 217, as heretofore stated, provides that the City Council shall judge of the election and qualification of its members, subject to appeal to the Baltimore City Court. Somewhat similar language appears in most of the State Constitutions with reference to the powers of the State Legislatures. In the Constitution of the United States the form of this grant of power is as follows: "Each house shall be judge of the elections, returns and qualifications of its own members."

Section 5, of our State Constitution has the same power in this form: "Each house shall be judge of the qualifications and elections of its members, as prescribed by the Constitution and Laws of this State."

No question would now be raised that this grant of power to the Congress of the United States, and to the Legislature of our own State is subject to judicial control.

But when the people of this City, acting under the authority of the Constitution of the State, came to the consideration of the qualification of their Councilmen and the method of securing a council of qualified men, they fully realized two things: That the law making body of this city must be composed of men who had a share in the community, and if one was selected who lacked that qualification that there should be a sure and speedy way to get rid of such disqualified person, and the best way to do this appeared to them to be to leave the final determination of this question to our local Courts in such manner as to prevent the delays incident to protracted litigation. The ability promptly to exercise a power in cases such as are here presented, is as valuable as the existence of the power. This plan carried forward as the peoeple understood it—the principle of complete autonomy. To leave the matter subject entirely to the determination of the council might defeat the very purpose of prescribing qualifications for our councilmen, but to let the matter be primarily determined by that body, subject to the control of the Courts, was eminently safe and eminently effective.

The appeal provided is by petition of the party aggrieved to the Baltimore City Court. This is a simple and effective remedy.

As an answer to the suggestion that when Section 217 was framed the draftsman had only in mind a simple election contest, and that the words "party aggrieved" mean the defeated person in such contest, attention is called to the fact that Section 217 of the City Charter provides that the Council shall judge the *election* and *qualifications* of its members and gives the right of appeal by petition to "the party aggrieved." Two classes of cases are here involved. First, a disputed election and, second, the question of the qualifications of members returned as elected. In the first class of cases the contest would evidently be between the elected and defeated candidate, and the unsuccessful contestant would clearly be "the party aggrieved." In the case of a dispute over the qualifications of a member returned as elected, no question of the number of votes cast being involved, the defeated candidate, as such, obviously would have no special right involved. Regardless of the result of the controversy, he would not be affected as a defeated candidate. His only interest in the result would be that of any other tax payer and citizen. In such a controversy, he could not be held to be "the party aggrieved" as a defeated candidate, regardless of the outcome of the controversy. In this class of cases, it is clear that "the party aggrieved" must be a tax payer and citizen generally. The conclusion, therefore, is inescapable that in the sort of controversy involved in the pending proceeding "the party aggrieved" must be a tax payer. A fair construction of the language makes it sufficiently broad to cover all the situations that might arise. It could not be supposed that the people intended that the City Council should pass upon an election contest that might require a recount of the ballots of an entire district and, at the same time, be denied the power to bring the City Tax Collector and the requisite books before it which are housed in the same building in which the council meets, and ascertain from him and his books whether or not a certain man is assessed for $300 worth of property and if his taxes for the past year are paid. That a taxpayer in Baltimore City is "the party aggrieved" within the prop-

er construction of this provision seems clear from the opinion of the late Judge Thomas in the Hummelshime case, to which reference has hereinbefore been made, and also from the matter of the Appeal of John T. Cottrell and others reported in 10 Rhode Island at page 615.

The distinction between the case at Bar and the Hummelshime case, upon which the petitioners rely, consists primarily in the fact that the City Council in that case refused to consider the protest made to it, and also there was no such specific grant of power to it, as is given to the City Council of Baltimore by Section 217 of the Charter.

If in his case the City Council had refused to consider the matter a different situation than the one here presented would have arisen, but it did consider the eligibility of the defendants and it did decide they are both eligible, and the right of appeal to the Baltimore City Court is still open and can be availed of by these petitioners.

Looking at the matter from another point of view, attention is called to the fact that the case of Spitzer vs. Martin, 130 Md. 428, is authority for the statement that when the defendants presented their credentials to the Mayor of the city, even if he knew, as alleged in the petitions, that they did not possess the requisite qualification, it was incumbent upon him to administer the oath of office mentioned in the petition, and had he refused mandamus would have been the appropriate remedy to compel him to administer the said oath.

Had the mandamus petition been filed between the time of the administration of the oath by the Mayor and the meeting of the City Council, seeking to restrain that body from admitting the defendants as members of the City Council, it seems perfectly obvious that the answer of the City Council would have been: Such proceeding is premature because the City Council has the right to pass upon the qualifications of its members, as provided by Section 217 of the City Charter, subject to the right of appeal to Baltimore City Court.

If this is so, it is apparent that after the City Council has done its part by passing upon the qualifications of the defendants, that the equally efficacious answer now to be made is that the time has not arrived for the issuance of the writ of mandamus, assuming, but not deciding, that such a proceeding is necessary, because there yet remains to be taken the deciding step authorized by the City Charter, and this proceeding intercepts the orderly and regular proceeding provided for in Section 217.

The Court, therefore, holds: That the provisions contained in Section 217, regarding the determination of the qualifications of Councilmen, furnishes a specific and adequate remedy in the situation set out in the petitions, and for that reason mandamus does not lie. An order will be signed sustaining the demurrer filed in each case and dismissing the petitions.

It only remains to say that this decision does not determine in any manner the rights of the respective parties in these cases. It only determines the regular and orderly procedure thereto applicable.

The Court calls the attention of the counsel on both sides to the fact that our Courts, notwithstanding the summer recess, are capable of functioning to the full extent of their jurisdiction, and a jury is at all times available. Therefore, should the determination of this Court be accepted, arrangements may be made for the immediate hearing of the matters involved on appeal to the Baltimore City Court.

The Court feels it is but due counsel to say that these cases were presented on both sides not only with zeal but with great ability and eloquence. The Bar is, indeed, to be congratulated that it can call from its midst upon such short notice so many men who stand, and are entitled to stand, in the front ranks of the profession.

COURT OF COMMON PLEAS OF BALTIMORE CITY.

Filed November 23, 1927.

CHARLES A. SOHL, CHARLES F. MOSHER, EDWIN J. BURKE, HARRY J. MALONEY, MATHIAS SHEA, FRANK WESTRICH, JOHN C. MURRAY, WM. (WILLIAM) R. MASON, BERNARD J. McELROY AND JOHN BOHL

VS.

WILLIAM F. BROENING, MAYOR; R. WALTER GRAHAM, COMPTROLLER; HOWARD BRYANT, PRESIDENT OF THE CITY COUNCIL; ANTHONY WALTER KRAUS, CITY SOLICITOR, AND CHARLES F. GOOB, CHIEF ENGINEER, BEING AND CONSTITUTING THE BOARD OF ESTIMATES OF THE MAYOR AND CITY COUNCIL OF BALTIMORE, A MUNICIPAL CORPORATION.

Charles C. Wallace and *Edward H. Hammond* for petitioners.

A. Walter Kraus, City Solicitor; *Simon E. Sobeloff*, Deputy City Solicitor, and *Lindsay C. Spencer*, Assistant City Solicitor, for respondents.

1. Public officers—Office of constable.

2. Constitutional law—Constitution, Art. 3, Sec. 35, applies to constables.

3. Mandamus—To require payment of salaries of constables.

4. City Code—Ordinance 1147, approved May 16, 1927.

O'DUNNE, J.—

Judge Stanton and I are in entire accord on all the points involved.

From the petition, answer and demurrer to answer, we are of the opinion:

1. That the ten constables on May 16th, 1927, were duly appointed, qualified and acting constables, pursuant to the ordinance passed by the City Council, approved May 16th, 1927, by the then Mayor.

2. That the office of Constable is a "public office" under the Constitution of Maryland, for a definite term of two years.

3. That their term of office of two years began on the third Monday in May, the date of their appointment and qualification, May 16th, 1927.

4. That Sec. 35 of Art. 111 of the Constitution applies to said constables as such public officers, to wit:

"Nor shall the salary or compensation of any public officer be increased or diminished during his term of office."

Little vs. Schul, 118 Md. 454.

Levin vs. Hewes, 118 Md. 624.

Gould vs. Baltimore, 120 Md. 534.

5. That it is, therefore, beyond the power of the City Council, or the Legislature itself, to either diminish the number of those constables validly appointed, or to reduce the amount of their salary or compensation *during the tenure of their two years term of office*, and this, irrespective of the judgment of the Board of Estimates as to the present necessity for the number so appointed, or as to the amount of their salary already fixed by law as to their present term of two years, from May 16th, 1927.

6. That the high prerogative writ of mandamus is a proper remedy to invoke in the case presented on the pleadings.

7. That the mere fact that there is also another, though perhaps not wholly adequate or entirely *satisfactory* remedy, such as suing for salary at the People's Court as the same becomes due each two weeks, is not, *of itself*, a *complete* legal answer as to why it should not issue in this case.

Levin vs. Hewes, 118 Md. 624, was a case in which mandamus was applied for to compel one of the old line justices of the peace to remove a case to the People's Court. Petition for mandamus was dismissed "upon the ground that the applicant had a right to appeal from any judgment which the justice might render, to the Baltimore City Court, and before that tribunal, the petitioner could have the equity and right of his case determined."

The action of the lower Court was *reversed*. The Court of Appeals said (at page 630):

"But it is not enough that a tribunal should be found in which a litigant can have his case fairly heard and determined; he is entitled to have it so heard and determined in the forum provided by law."

8. We further recognize that there is a large question of *public policy* not to be wholly lost sight of in our ultimate action in this case. The budget of the City of Baltimore on which the tax rate of $2.39 has been established for the ensuing year, has been duly advertised, at a cost stated in oral argument of around $4,000. The present issuance of a writ of mandamus would considerably *delay* the action of the City Council on that budget. It would necessitate readvertising the budget, with a consequent loss of some $4,000. It might change the entire tax rate, and cause considerable delay and perhaps great inconvenience.

Therefore, we are *strongly of the opinion*, that if the legal rights of the petitioners can be *adequately* protected, without subjecting the public at large to the manifest inconvenience and loss such course would entail, that it ought, if practicable, be avoided.

On the other hand, we feel that the petitioners *are* public officials under the Constitution, and that they cannot be deprived, either of their office, or of their salary, during their two-year term of office; and that they should not be required to resort to frequent or semi-monthly suits for the collection of their salary, with its incidental unnecessary expense to them; neither should they be left in a situation where no appropriation exists in the present budget for the payment of their salaries, when and as payable. Nor should they be told that it will be necessary for them to wait until next year to be included in the levy in next year's budget, to provide for *this* year's and next year's salary.

We do not know whether the contingent fund in this year's budget is sufficient for the purpose of paying their salaries (should our present views be sustained by the Court of Appeals).

If the City Solicitor gives satisfactory assurances that the "contingent" or other fund, provided in the present budget, is sufficient for that purpose, *and will be used to that end* (in the event our views of the law are sound), we feel that the larger question of public interest would, in such case, justify us, in the exercise of a sound discretion, in *refusing* the mandamus and *dismissing* the petition. Upon such assurances being filed in the case, we

will sustain the demurrer and dismiss the petition of the ten constables. Otherwise the writ will issue.

9. As to the petition of the clerks, we sustain the demurrer and dismiss the petition without any limitation.

Filed in proceedings before 4 P. M.
City Solicitor's Office
November 23rd, 1927.

To the Honorable Eugene O'Dunne and
Robert F. Stanton,
Judges of the Supreme Bench,
Court House,

Baltimore, Maryland:

Gentlemen — Immediately following the conference had at noon today I communicated to his Honor, the Mayor, your views in respect to the cases of the People's Court Constables and Clerks.

The Mayor instructed me to express his appreciation of the courtesy shown him and the other members of the Board of Estimates by the Judges, and I am authorized by him to say that out of deference to the views expressed by your Honors, the Constables appointed by Ordinance No. 1147 will be paid the salaries provided them by that Ordinance during their present incumbency, in the event that the views expressed by your Honor should become final by affirmance in the Court of Appeals or through the failure of the parties to note an appeal from your action. The salaries will be provided for out of the Contingent Fund or such other fund as may be later determined, but the Constables may be assured that they will not be caused any inconvenience or delay.

Accordingly, I am submitting herewith, for your Honors' signature, separate orders for the dismissal of the petition filed by the Constables and by the Clerks of the People's Court.

Respectfully,
SIMON E. SOBELOFF,
SES/AA Deputy City Solicitor.

Thereupon petitioners' demurrer to defendants' answer (in Constables' case) sustained, and petition for mandamus refused on the strength of this letter filed in the proceedings.

In Clerks' case, demurrer overruled and petition dismissed.

CIRCUIT COURT NO. 2 OF BALTIMORE CITY.

BALTIMORE CITY COURT.

Filed January 20, 1928.

IN THE MATTER OF THE FIVE COUNCILMANIC APPEALS.

Edgar Allan Poe and *Isaac Lobe Straus* for petitioners Charles J. Murphy and William Miller Mullen; *Roland R. Marchant, Enos S. Stockbridge, Simon E. Sobeloff* and *William M. Carr* for defendants Thomas L. A. Musgrave and J. Warren Burgess; *Roland R. Marchant, Enos S. Stockbridge* and *Simon E. Sobeloff* for petitioners Henry Dusch and John Bauersfeld; *Willis R. Jones* for defendant Philander B. Briscoe; *Robert R. Carman* for defendant James B. Blake, and *William Curran* for defendant Frank J. Bauer.

1. Appeal—Qualification of City Councilman.

2. Appeal—Citizens and taxpayers.

3. Appeal—Action of City Council.

4. Appeal—Party entitled to.

5. Baltimore City — Charter — Appeal from action of City Council, approving qualification of members—Property qualification of Councilmen—Assessment of property held jointly.

6. Municipal corporations—Council's approval of qualifications of own members.

7. Parties — When person becomes aggrieved party—Meaning of "party."

8. City Council—Approving qualifications of own members—Appeal by citizen and taxpayer.

OWENS, STANTON and FRANK, JJ.—

We have for determination five appeals by citizens and taxpayers of Baltimore City from the action of the City Council of Baltimore City in determining by formal resolution that each of the five Councilmen, whose qualifications are attacked herein possess the qualifications for office as prescribed by Section 210 of the Baltimore City Charter. That the proceeding, by way of appeal to the Baltimore City Court, is the proper and sole procedure under the provisions of Section 217 of the City Charter, has been finally determined by the decision of the Court of Appeals in the recent case of West vs. Musgrave, filed December 8th, 1927, and reported in The Daily Record of December 16th, 1927.

At the threshold of our consideration of the appeals, we are confronted with the contention, based upon undisputed facts, that not one of the five petitioners in the respective appeals has ever in any manner made himself a party to any proceeding in the City Council. The action of the Council in approving the qualifications of the five members had been entirely sua sponte and not one of the petitioners had in any manner appeared in the Council to contest or question its action. It is urged, therefore, that the petitioners are not "aggrieved parties" within the meaning of Section 217 of the City Charter, which makes the Council "judge of the election and qualifications of its own members, subject to appeal by petition of the party aggrieved to the Baltimore City Court."

Authorities have been cited from out of the State, in which it has been held that a person does not become an "aggrieved party" for the purpose of appeal, unless he has in some manner intervened in the tribunal of the first instance. Most of these cases are cases of formal Court proceedings. Some of the cases, however, are cases of appeal from the decision of merely quasi judicial bodies, such as board of county commissioners, of election supervisors, of school commissioners, police boards, etc. There is some authority for the contrary contention. What is the attitude of the Maryland courts with respect to this question? No decision completely in point has been cited to us, nor have we been able to find any. We do find, however, interesting analogies. One of these appears in the provisions of the law for appeals from the Orphans' Court of this State. These courts, of course, are judicial tribunals and exercise judicial functions. They have, however, always been looked upon as the courts of the people, and are conducted with a great deal of informality. Thus, technically speaking, according to the principles of common law and equity pleading, there are no formal parties or pleadings. Bagby's Maryland Law of Executors and Administrators, page 223, Section 147. In this respect at least their procedure might be likened to that of the City Council in passing on the qualifications of its members under its Charter power. The provision of the law with respect to appeals from the decisions of

the Orphans' Court is to be found in the Code, Article 5, Section 64, as follows:

"From all decrees, orders, decisions and judgments made by the Orphans' Court, the party who may deem himself aggrieved by such decree, etc., may appeal to the Court of Appeals."

It is interesting to compare this language with the language of Section 217 of the Charter. This latter provides that "the City Council shall judge of the election and qualification of its own members, subject to appeal by petition of the party aggrieved to the Baltimore City Court."

The only difference in the description of the party entitled to appeal is that in the case of the Orphans' Court that party is described as "the party who may deem himself aggrieved," while in Section 217, the appeal is given to "the party aggrieved." We do not think that any real difference is worked by the use of the words "who may deem himself aggrieved," rather than merely the word "aggrieved."

The term "party" in Article 5, Section 64, is not used in a technical sense. In consideration of the peculiar character of the jurisdiction of the Orphans' Court, of the informal nature of the proceedings therein and of the fact that it often acts ex parte, it means any one against whose interests or rights the Court's action directly tends to operate injuriously.

Bagby: Executors and Administrators, p. 261, Sec. 170.

The appellate Court hears the appeal on the record of the case below, transmitted by the Register of Wills, Code, Art. 5, Sec. 1.

The party aggrieved may have appeared in the Orphans' Court. His order for the appeal must, of course, be filed in that Court in order that it may send its record up to the Court of Appeals.

In Stevenson vs. Schriver, 9 G. & J. 324, 335, the terms "party," it was held, "is not used in a technical sense, *necessarily importing a litigant before the Court* in the proceedings in which the decree *or order was passed, at the time or antecedently to its passage;* but may also mean one on whose interest the decree or order has a direct tendency to operate injuriously, and who, *after the passage*, may appear in Court and claim the privilege of appeal." (Italics supplied.)

In Dorsey vs. Warfield, 7 Md. 65, the appeal from the order of the Orphans' Court was taken by Rebecca H. Dorsey, one of the legatees under the will of Fielder Warfield. The order revoked and annulled the probate of the will and annulled letters previously granted Kitty Warfield. It does not appear that Rebecca was a party to these proceedings, but the Court of Appeals held that there could be no question as to her right of appeal as she was "directly interested in the decision of the Orphans' Court."

The test of the right to appeal is not the presence of the appellant in the proceedings of the Orphans' Court, but the injurious effect on his interests of the action of that Court. Hopper vs. Stonestreet, 6 Md. 303; Gunther vs. State, 31 Md. 21, 23; Cecil vs. Cecil, 19 Md. 72, 77; Meyer vs. Henderson, 88 Md. 585, 590.

In Wingert vs. Albert, 127 Md. 80, 84, the administrators had not been made parties to the petition for the removal of the appraisers. The administrators' appeal was dismissed solely on the ground that they had not been injured by the rulings of the Orphans' Court. No point was made of the fact that the administrators had not been parties in the lower Court.

The Code requires the order for the appeal from the Orphans' Court to be filed with the Register of Wills. No similar provision of the City Charter requires an order of appeal to be filed with the City Council. On the contrary, the appeal is to be "by petition of the party aggrieved to the Baltimore City Court." This requirement would seem to relieve the appellants here from any need to appear for any purpose in the City Council, unless such an appearance is necessary to make them parties aggrieved. That we find not to be necessary. By analogy to the law governing appeals from the Orphans' Court, a party aggrieved is any one on whose interest the action of the City Council has a direct tendency to operate injuriously. That the petitioners herein, taxpayers of Baltimore City, have such interest is not open to question. Hummelshime vs. Hirsch, 114 Md. 39, 51 and fol.; West vs. Musgrave, Court of Appeals of Md., filed Dec. 8, 1927, Daily Record, Dec. 16, 1927.

Appeals to the Baltimore City Court from the action of various quasi-judicial bodies are provided for by statute. From the Appeal Tax Court by "any person * * * claiming to be aggrieved." Art. 81, Sec. 24. A similar provision exists with respect to the counties. Art. 81, Sec. 25. Appeals may be taken from decisions of the State Tax Commission. Art. 81, Sec. 253. The assessments of damages and benefits by the Commissioners for Opening Streets of Baltimore City are reviewable on appeal. City Charter (1927). Sec. 179. In none of these cases has it ever been suggested, so far as we know, that, before appealing, the dissatisfied or aggrieved party was required to appear in the lower tribunal. His right to appeal has been considered as arising from the doing of the act or the making of the decision affecting his interests. These cases furnish striking analogies to the question now before us, and not improbably were in the minds of the framers of Section 217 of the City Charter.

Our conclusion thus is that each of the petitioners was entitled to take his respective appeal, and that this Court has full and ample power to consider and decide the same.

Let us take up the consideration of the five cases seriatim.

Case of Frank J. Bauer.

The question to be determined in this case is whether Frank J. Bauer was assessed for $300 worth of property, in the manner required by law, when on May 3, 1927, he was elected to the City Council, and, if so, had he paid taxes on the same one year prior to his election.

Two things are relied upon as gratifying the Charter requirements to qualify the defendant for membership in the City Council.

(1) The payment of taxes on property No. 734 W. Baltimore street, as to which he testifies he contributed one-third of the amount due;

(2) The assessment of 29 shares of the capital stock of the Central Fire Insurance Company.

A very thorough and careful review of the evidence discloses that Mr. Bauer was not assessed, so as to make him personally liable for any amount of taxes at the time of his election; that his name did not appear on any of the tax assessment records of Baltimore City, and the manner in which the property, No. 734 West Baltimore street, is owned and was carried on the field books of the Appeal Tax Court cannot in our opinion supply the qualifications necessary for a member of the City Council.

(1) In order to show the requisite assessment, it is claimed that the field books of the Appeal Tax Court for the years 1925 and 1926, carry the entry of assessment for the property 734 West Baltimore street in the name of "Elizabeth M. Bauer et al."; and the assessor's card for the year 1925 (prepared by Mr. Oscar J. Martinet, one of the assessors of the Appeal Tax Court, for the years 1925 and 1926), carries the name of the owner of this property, 734 West Baltimore street, as "Elizabeth M. Bauer et al." The records in the Bureau of Receipts (formerly the office of the City Collector), for the year 1926, which are in substitution of what before that year had been known as the tax roll, carry the property in the name of "Elizabeth M. Bauer, *without "et al."* This condition prevailed, with reference to the property, 734 West Baltimore street, every year since 1920, down to and including 1927. The evidence further shows that before 1925, the list of owners of property, and the amount for which each was assessed for the purposes of taxation, was an exact copy of the entries pertaining to each piece of property as they appear in the field books of the Appeal Tax Court, which books were official records in that Court. These lists, when duly certified by the Judges of the Appeal Tax Court, and delivered to the City Collector, are designated in the City Charter as the *tax roll* for the current year. (Sec. 171). These tax rolls consist of specially arranged sheets or pages bound in book form, authenticated by a certificate of the Judges of the Appeal Tax Court. On the tax rolls in the City Collector's office from the year 1920, down to and inclusive of 1924, property 734 West Baltimore street was carried in the one name of Elizabeth M. Bauer, whereas upon the field book for those years the entry, as it now appears, shows the property, 734 West Baltimore street, assessed to "Elizabeth M. Bauer et al." The list sent to the City Collector is prepared from the field book by one

of the clerks of the Appeal Tax Court, and checked as to the correctness of the entries, by a different clerk than the one who prepared the list. This circumstance of the conflict of the records in these two departments is significant in support of the contention of the petitioner that the property 734 West Baltimore street has always (prior to 1925), appeared on the field books in the Appeal Tax Court, without the addition of the words or characters "et al." Since 1925, however, it is very likely that the field books have carried the entries as appearing on the assessor's card for 1925; namely, "Elizabeth M. Bauer et al.," although the stubs bound as a loose leaf ledger since the year 1925, and used in place of the bound records in book form, known as the tax roll, continued to carry the property in the name of Elizabeth M. Bauer alone.

Frank J. Bauer says in his testimony that he gave his brother a paper in April or May, 1919, on which was written the names of Elizabeth M. Bauer, William J. Bauer and Frank J. Bauer, and which paper the brother was to take to the Appeal Tax Court and request the property, 734 West Baltimore street, to be transferred to those names on the tax books. The brother, William J. Bauer, testified that he took this paper at that time to the Appeal Tax Court, and requested that the property, 734 West Baltimore street, be put on the tax books in the names of the three owners—but that some clerk at the Appeal Tax Court informed him that it was not the practice to put property in three names, that they did not have space on the books for so many names for each piece of property, that they would put it on the books in the name Elizabeth M. Bauer and keep the memorandum, which would show that the three of us owned the property. Notwithstanding this statement, the field books offered in evidence disclose many instances where entries are made in two and three, and sometimes, more than three names. William J. Bauer says further that on one occasion only did he go to the Appeal Tax Court with a paper or letter written by his brother. There was offered in evidence a letter written by Frank J. Bauer on April 29th, 1925, accompanied by signed interrogatories issued by the Appeal Tax Court, which had been sent to Elizabeth M. Bauer, notifying her of an increase in the assessment of property at 734 West Baltimore street.

It is most unusual to find a person, only twenty-four years of age, so insistent to get his name on the tax assessment books. The ordinary and usual effort is to avoid such a result. The existence of the letter of April, 1925, coupled with the testimony of William J. Bauer, that there was only one communication written by his brother, and taken to the Appeal Tax Court by him, raises very grave doubt that any such incident occurred in 1919, especially as during that year the property was on the books of the office of the City Collector in the name of Lawrence F. Bauer, the father of Frank J. Bauer. The tax bill went out for the year 1919 in the name of Lawrence F. Bauer, notwithstanding the field book in the Appeal Tax Court makes it appear that the property for 1919 was assessed in the name of "Elizabeth M. Bauer et al." The deed to Frank J. Bauer, &c., covering property, 734 West Baltimore street, was not executed until November 11th, 1918, which is about seven weeks after the tax assessment roll was closed for the year 1919, and the presence of the entry in the field book for the year 1919, showing the property as assessed to "Elizabeth M. Bauer et al.," is a circumstance for which no satisfactory explanation has been given. Then again why should the owners wait from November, 1918, until April or May, 1919, to request a transfer on the tax records? Is the fact that the 1925 letter, which William J. Bauer admits he delivered to the Appeal Tax Court in person, is dated April 29th, without significance in suggesting to his mind the month of April? And is it not conclusive that he was not there in April or May of 1919, when he further admits (record, pages 55 and 56), that he only delivered one written communication or memorandum to the Appeal Tax Court? This letter of April 29th, 1925, reads as follows:

"Appeal Tax Court,

City Hall.

Gentlemen:

In reference to the attached, we claim the proposed assessment on the lot to be excessive as there is no improvement on the rear of the lot.

We pay an annual ground rent of $60.45. The owner of the ground has offered us the ground repeatedly at $1,500 which he thinks is a fair value on the ground.

The ground can be purchased at any time for this price for anyone who cares to buy the same.

Respectfully submitted,
ELIZABETH M. BAUER ET AL."

This letter does not disclose the names of the owners of the property nor does it show who is included in the "et al." attached to the signature. There is nothing in this letter which requests that the property be entered on the tax records in the three names, nor any complaint that such a request had ever been made and not complied with. The reasonable inference is that the property was placed on the land records in the names of the present owners as joint tenants in 1918, to avoid administration in the event of the death of Elizabeth M. Bauer; and that the sons were well content to allow the property to be, and remain on the tax records, in the name of the mother. It appears to us probable that the idea of having the name of Frank J. Bauer placed on the tax records never entered the minds of the owners of the property until the present situation developed in the affairs of Frank J. Bauer. If this is not true why then have the owners continued to accept, and pay every tax bill in the name of Elizabeth M. Bauer from 1920, down to and including 1927, without a word of protest or complaint? It is this circumstance that makes a sharp distinction between this case and the case in 136 N. Y. Supp. 273, where the tax bills were sent out in the names of the owners of the property involved in that case, after they had endeavored to have them placed on the tax roll, whereby they were led to believe that their names appeared on the tax records, when in fact they did not. Mr. Bauer cannot complain that he was misled by the form of the tax bills, because they all were issued plainly in the name of Elizabeth M. Bauer.

In our view of the effect of the use of the words or characters "et al." it is absolutely immaterial whether they were on the field book, or the tax roll, or both, for all of the years from 1920 down to and including 1927. Under the authorities, their presence cannot avail to qualify the defendant as being assessed within the meaning of the City Charter.

The Charter provides that persons to be qualified for the office of members of the City Council "shall be citizens of the United States, above the age of twenty-one years, residents of the City of Baltimore three years prior to their election, and for the same time residents of the Councilmanic district for which they are elected, and assessed with property to the amount of $300 each, who have paid taxes on the same one year prior to their election." (City Charter, Sec. 210). The manifest purpose of this requirement is to enable any official or, for that matter any citizen, to go to the tax record and for himself to see if any person submitting himself as a candidate, or any City Councilman after election, has his name on the tax books, and is assessed for three hundred dollars worth of property, and whether he has paid taxes on the same one year prior to his election. An assessment for taxes carries a personal liability for which an action in personam may be maintained. Spitzer vs. Martin, 130 Md. 428, 433; Vanneman vs. Pusey, 93 Md. 686, 690.

For the purpose of enforcing this personal liability "et al." means nothing. It has no fixed, definite or certain meaning, but requires extraneous evidence to give it significance. It is as easy to disavow identity under such a designation, as it is to claim to be within its scope. And in itself "et al." does not carry responsibility for purposes of taxation, and is not the equivalent of the presence on the tax roll of the name of the owner of property. The authorities almost universally hold that as an assessment against a known person, "et al." is invalid, at least as to all the owners, except the one named.

This must be so in Maryland where the Court of Appeals ignores the facts of ownership and of payment of taxes, where the law requires assessment. Electric Power &c. Co. vs. Maryland, 79 Md. 70; Monticello Distilling Co. vs. Baltimore, 90 Md. 416.

Cooley on Taxation, 4th Edition, Vol. 3, Sec. 1104, reads as follows:

"*Joint Owners*—There is considerable conflict in the decisions as to the method of assessing property held jointly or in common. Generally, however,

it is held that the property should be assessed to the owners jointly, *stating the names of all.* An assessment to one of the joint owners by name is generally insufficient, even though the words "et al." are added, although there is some authority to the contrary. An assessment of land to a named person "et al." *ordinarily is invalid, at least as to all the owners except the one named.* An assessment of land to a named person "et al." is in legal effect an assessment to such person and other persons unknown. In some jurisdictions, an assessment of the entire property in the name of one of cotenants is valid as to the interest of the person assessed, *but not as to the interest of the other co-tenant.*"

In the case of McWilliams vs. Gulf, 111 La. 194, the property was held in States Land and Improvement Co., joint ownership by one Clarence J. Harvey and seven others. Assessment was made against Clarence J. Harvey "et al." The Court held that the assessment was invalid as insufficiently describing the joint owners and said:

"Assuming as we must for present purposes these allegations to be true, the assessment was certainly bad as to all the owners save the one named, and possibly so as to him; from which it follows that the exception of no cause of action must be overruled and the case remanded to be tried on its merits."

To like effect is the case of Clark vs. Grogdon, 37 N. H. 562. Property was owned by Amos Clark, John S. Lamprey and William Clark, but was assessed in the name of William Clark "et al." The Court struck out the assessment as invalid, saying:

"The description of the plaintiffs on the list in this case was entirely insufficient, and the warrant was consequently illegal and void as to them. 'Et al.' may as well mean any other person residing in Hampstead as John S. Lamprey and Amos Clark. Used as it was, it is unintelligible; it gave no description whatever of the plaintiffs and no authority to take their property; and the warrant afforded no protection to the defendant."

The cases cited in the note to the above section on Cooley on Taxation to support the text, clearly show that, by the decided weight of authority, the assessment to "Elizabeth M. Bauer et al." is to be regarded as an assessment against her only. Where there is any deviation from or qualification of this rule, statutory provisions will be found to have controlled the situation, or the cases presented questions different from that involved in this case, to wit: the personal liability of an unnamed person for taxes. See also: 37 Cyc. 1006, sub-paragraph F, annotated cases 1914 A, 568; Tasker vs. Garrett, 82 Md. 150.

The other point on which Mr. Bauer relies is that he is joint owner of 29 shares of the capital stock of the Central Fire Insurance Company of Baltimore, issued in the name of "Elizabeth M. Bauer, Trustee, in trust for herself and Frank J. Bauer, joint owners for their joint lives, on the death of either to belong absolutely to the survivor." The testimony is that these 29 shares of stock were reported to the State Tax Commission as being owned by Elizabeth M. Bauer, "*Trustee.*" Under such an assessment there is no liability for taxes on Frank J. Bauer. Latrobe vs. Baltimore City, 19 Md., page 13. It is not ownership of property alone which qualifies for the office of City Councilman, but ownership plus assessment in the name of owner. County Comm. vs. Claggett, 31 Md. 210; Spitzer vs. Martin, 130 Md. 428. The fact is, that the Fire Insurance stock is not on the tax roll of the City of Baltimore, either in the name of Elizabeth M. Bauer, trustee, or Frank J. Bauer, nor does the name of Frank J. Bauer appear on the tax roll as owner of the stock, whether it be the field book or records of the City Collector. Nor was the transfer of the stock to the name of Elizabeth M. Bauer, Trustee, reported to the State Tax Commission until January, 1927.

We conclude, therefore, that at no time during the year 1926, was there any assessment on any tax record of Baltimore City, be it field book or tax roll, inuring to the benefit of Frank J. Bauer, as assessing any interest he might have, either in this fire insurance stock, or in the property, No. 734 West Baltimore street.

It is not a reasonable construction of the law nor a sound one, in our judgment, to strain the letter of the law, in order to enable a person to claim qualifications to hold public office under this Charter provision, when both the spirit and letter of the law require that this provision be given a

meaning such as will enable the man on the street to understand and apply it, if he should have occasion so to do.

The evidence in the Bauer case has been reviewed at length because of the inference sought to be drawn in favor of Mr. Bauer, and also because the legal questions in that case are more complex than in the cases of the other respondents.

The evidence, under the petition filed against Philander B. Briscoe, shows that Mr. Briscoe had real estate valued at more than $300 assessed on the tax records in his name from 1924 up to and including the year 1927, and had paid taxes on the same for one year before the election held on May 3, 1927; that is to say, that he had paid taxes on this property for the year 1926, and, therefore, he was qualified on May 3, 1927, to become a member of the City Council.

The evidence, under the petition filed against J. Warren Burgess, shows that Mr. Burgess was assessed on the tax records for the year 1927, and for five or six years prior thereto, on personal property to the amount of $300, but he had not in fact paid taxes on the same for the year 1926, for that reason, he was not qualified on May 3, 1927, to be a member of the City Council.

That, as to Thomas L. A. Musgrave, the evidence shows that property No. 2952 Clifton avenue, was bought by Mr. Musgrave in May, 1926, and was conveyed to him and his wife on June 18, 1926, but was not assessed to him on the tax records until June, 1927. Mr. Musgrave had not paid any taxes on this property for the year 1926. Taxes were, however, supposed to be paid by the building association out of weekly instalments paid into the building association for that purpose. The building association did not pay the taxes for the year 1926, and on June 3, 1927, Mr. Musgrave paid the overdue taxes, but was reimbursed by the building association some time thereafter. Consequently, Mr. Musgrave had not paid taxes on any property assessed in his name for the year 1926, and, therefore, was not qualified on May 3, 1927, to act as a member of the City Council.

The testimony further shows that Mr. Musgrave formerly owned property at 1533 West Lanvale street, and had owned and paid taxes on same for about eight years before August, 1925, at which time he sold and conveyed the property to one Kirsner. This property, 1533 West Lanvale street, was not transferred on the tax records and, for the year 1926, stood assessed to Thomas L. A. Musgrave. He had no interest in it, nor did he pay any taxes on it after the date of its transfer, but the fact of the assessment remaining on the tax records in his name, without the payment of taxes by him, would not avail to qualify him under Section 210 of the City Charter.

James B. Blake bought property, No. 1113 Valley street, on August 23, 1926. The taxes for 1926 were adjusted to the day of transfer, and a refund was allowed to the seller for the balance of the year, because the seller had paid the taxes earlier in that year. But this property was not assessed to Mr. Blake on the tax records until after the tax bills had been made up and mailed out some time about or after the middle of January, 1927. His name is written in ink over the typewritten name on the stub, which is the name in which the property was assessed at the time the tax bills were mailed for 1927 taxes, and the evidence tends strongly to prove, and in our judgment conclusively shows, that this property was not put on the tax records in the name of Blake until May, 1927, so that Mr. Blake had no property assessed to him in 1926, nor did he pay taxes on the same for one year before the election held on May 3, 1927, and, therefore, he was not qualified to become a member of the City Council on May 3, 1927.

Under the evidence and the law controlling these cases, we are of the opinion that on May 3, 1927, Philander B. Briscoe possessed the qualifications for membership in the City Council, set forth in Section 210 of the Baltimore City Charter, but that Thomas L. A. Musgrave, James B. Blake, Frank J. Bauer and J. Warren Burgess were not so qualified.

We will sign an order dismissing the petition as against Philander B. Briscoe, with costs upon the petitioners; and will sign appropriate orders in each of the other four appeals.

Judge Owens dissents in the Bauer case. He is of the opinion that when Bauer in 1919 informed the Appeal Tax Court of his interest in the property on Baltimore street that, from the

time of the delivery of that letter, he was "assessed," as far as the purposes of the Charter provisions are concerned, and he, in a proceeding such as this it not chargeable with the failure of the Appeal Tax Court to properly act upon his letter.

In all other respects the findings of the Court are unanimous.

CIRCUIT COURT OF BALTIMORE CITY.

Filed April 4, 1928.

Reversed—155 Md. 507.

ALEXANDER E. DUNCAN

VS.

R. WALTER GRAHAM, ET AL., TRUSTEES "EMPLOYEES' RETIREMENT SYSTEM OF BALTIMORE CITY," AND R. WALTER GRAHAM, COMPTROLLER, ETC.

Charles C. Wallace and *Roger B. Williams* solicitors for complainant.

A. Walter Kraus, City Solicitor, and *Simon E. Sobeloff*, Deputy City Solicitor, solicitors for defendants.

Charles Morris Harrison solicitor for Edith Mae Bell, widow of J. Archer Bell.

1. **Injunction — Taxpayer, against City Pension Fund—Pensions to City employees.**

2. **Baltimore City—City Pension Fund—Restraining payment of pensions to City employees by taxpayer's suit.**

3. **Courts—Jurisdiction and right to review evidence taken before Board of Pensions, or to take testimony.**

4. **Appeal — Ruling of trustees of City Pension Fund—Review by courts.**

5. **Ordinances—Baltimore City No. 553 of February 1, 1926, Sec. 9, reviewed.**

6. **Statutes—Act 1924, Ch. 411, reviewed.**

O'DUNNE, J.—

This is a bill filed by complainant as a taxpayer to restrain the Board of Trustees of said retirement system and the defendant as comptroller from making payment as pension to the widow of the deceased, J. Archer Bell, City Register, killed June 27, 1927, at the corner of Lexington and St. Paul streets, a little after 9 A. M. It is alleged in the bill that the complainant would be injured as a taxpayer by the unlawful diversion in the payment of pensions under the ordinance, and particularly Section 9 thereof, the validity of which is attacked in these proceedings, and it is stated that something over thirty million dollars is involved in the present controversy because under the terms of the ordinance the system provided for covers a period of thirty years in the creation of the fund and in the working out of the system of retirement provided for in said ordinance, and that the levy on the taxpayers of the municipality for the year 1928 for use for this purpose is the sum of $1,035,700.

The case has been very carefully prepared by the respective counsel on all sides, has been zealously, ably and fully presented in oral argument covering over ten hours on two respective days devoted almost exclusively to oral presentation. Subsequent to submission, counsel on both sides have filed elaborate briefs, reply-briefs and surreply briefs in rapid succession. All of which briefs have been carefully read by the Court and most of the cases cited on each side have been examined, together with such additional examination as this Court has been able to make consistently with the pressure of trial work, including two extended trips to the Peabody Library.

Briefly, the question narrows itself to two main contentions:

1st. The jurisdiction and right of the Court to review the evidence or to take testimony.

2nd. The validity of Sec. 9, of the Ordinance of 1926, with reference to the Enabling Act of 1924, Ch. 411.

I will, therefore, in my consideration of the question, treat it under two chapters; part one, dealing with the jurisdiction of the Court to review the facts; and part two, a consideration of the legality of the ordinance (especially Sec. 9) with relation to the Enabling Act of 1924, and in connection with part two briefly review the general nature and scope of what may be called social legislation during the past 25 years or more, of which the present public service retirement system is but another chapter in the general book which is now in the process of making.

PART I.

Can the Court review the facts? Yes, and enjoin payment of the pension if found to be "arbitrary," "fraudulent" or "without warrant of law."

It is contended by the city that the Court is wholly without jurisdiction to either review the findings or to take additional testimony on any question of fact, which, it is claimed, is a duty committed exclusively to the board of trustees of this pension or retirement fund, and that their decision is FINAL, without right of appeal or right of review.

As an abstract proposition, this cannot be true. The illustration used in argument perhaps is sufficient answer to this contention. It was there suggested that if Mr. Bell, as City Register, had been expressly authorized by a formal resolution of the board of finance to examine and report upon the securities of the city held in the safe deposit vault of one of the trust companies, and that while so doing the wall or ceiling of the vault fell in upon him and killed him while thus discharging his official duties, and that if upon this evidence being brought to the attention of the board of trustees of the retirement fund they decided he was *not* killed while in the performance of official duty, and that, therefore, they disallowed his pension, that under such circumstances application could be made to the Court by mandamus, or otherwise, to compel the trustees to take appropriate action on the undisputed facts and authorize the issuance of the pension. Would the Court in such case be powerless to act? Certainly not.

As said by Mr. Justice Brandeis in B. & O. vs. U. S., 264 U. S. 258:

"To refuse to consider evidence introduced or to make essential finding without supporting evidence, is arbitrary action."

The Courts are the legal safeguards against "*arbitrary*" action of boards.

"Review by injunction proceedings or certiorari is among the commonest of all the modes of testing administrative determinations." "Administrative Justice," by Dickenson, p. 309.

"While a statute may not in terms make any provisions for a review of the proceedings of a particular administrative body, it does not follow that such proceedings are beyond investigation in the Courts; through proceedings by way of injunction certiorari or mandamus, the party aggrieved may have his hearing and obtain relief." 35 Harvard Law Review, p. 128.

"While the sufficiency of evidence is a matter for the Commission to decide, yet the legal effect of it is a question of law, to be reviewed by the Court." I. C. C. vs. L. & N. 227, U. S. 88, 91.

35 Harvard Law Review, p. 787:

Extracts from articles, "The Judicial Power," by Cuthbert W. Pound:

Page 790: "The protection of individuals from the arbitrary, capricious and unauthorized exercise of power is an essential attribute of free government. The Court may not substitute its own judgment for that of the Legislature or the administrative board in determining what is fair and reasonable, but it will probably overturn any action, legislative or executive, when clearly of the opinion that such action is fundamentally or constitutionally wrong, arbitrary, capricious or unauthorized. At least the circumstance that the question is not within the purview of judicial power will be the sole deterrent of judicial relief."

Page 794: * * * The orders of administrative boards shall be in accordance with the State and Federal Constitutions: within the powers delegated to such boards; resting on law and evidence; and — considering the inter-

ests of both of the public and the corporations or persons regulated—not arbitrary but reasonable, discreet and judicious. The Courts could not, under the pretext of exercising judicial powers, consistently with the decisions of the Supreme Court of the United States, set aside orders lawfully made, for nothing is more elementary than that power to make such orders may be given to such boards even when judicial power is expressly vested in the Courts, as it is under the Federal Constitution."

One of the most illuminating cases I have been able to find in my extremely limited opportunity for independent research, because of the trial work of the pending Whitehurst litigation, is a Wisconsin case, decided in 1909, State, ex rel. McManus, vs. Board of Trustees, reported and annotated in 20 L. R. A., N. S., p. 1175. It has many marks of similarity to the instant case, in that it was a police pension case of death benefits requiring a construction of a statute as to the word "injury" in the discharge of duty and whether "*injury*" included pneumonia contracted on a trip to New York for the purpose of arresting a prisoner.

Secs. 8 and 9 of the Pension Act provided:

"Sec. 8. If any member of the Police Department, while *engaged in the performance of his active duty as such policeman, be injured*, and found, upon an examination by a medical officer, ordered by said board, to be physically or mentally permanently disabled by reason of such injury, so as to render necessary his retirement from service in such department, such board shall retire such disabled member from service; provided no such retirement on account of disability shall occur unless the member has *contracted such disability within the hours of each day or night when he is required to be on active duty by the rules of the department, or while he is engaged in the performance of 'emergency duty' during his regular 'off hours.'* * * *

"Sec. 9. If any member of the Police Department shall, while in the performance of his duty, be *killed, or die as the result of an injury received while in the line of his duty, as described in the preceding section.* * * *" his widow and minor children, if any, shall receive a pension.

The Court said:

"The word 'injury' in ordinary modern usage is one of very broad designation. In the strict sense of the law, especially the common law, its meaning corresponds with its etymology. It meant a wrongful invasion of legal rights, and was not concerned with the hurt or damage resulting from such invasion. It is thus used in the familiar phrase, damnum absque injuria. In common parlance, however, it is used broadly enough to cover both the *damnum* and the *injuria* of the common law, and, indeed is more commonly used to express the idea belonging to the former word: namely, the effect on the recipient in the way of hurt or damage; and we cannot doubt that at this day its common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by anyone. Hence, unless some reason to the contrary is presented, it should be so understood in these statutes. Sec. 4971, subd. 1, Stat. 1898. The respondent contends that, nevertheless, the word should be limited to the results of external violence. By itself the word 'injury' or 'injure' has no more application to the result of violence than to the result of any other injurious influence. A disease resulting from negligence of a physician in failing to give treatment is just as much an injury in common phrase as if it resulted from affirmative maltreatment or external violence. Therefore there is nothing inherent in the word to limit the injuries to which this statute applies to those from physical or external violence. If one be tortiously exposed to extreme cold, he may suffer the freezing and consequent loss of a limb, or the chill of an internal membrane or tissue, or resultant congestion or disease. No reason is apparent why either is more or less an injury than the other.

* * * "*The purpose of the act*, too, would seem to require the *broader meaning of the word*. Why is not the policeman who, in the faithful performance of his duty, exposes himself to a danger like smallpox or diphtheria infection, as worthy of provision for his disability or for his widow as one who exposes himself to the knife or the club of the lawbreaker? Why is it not as promotive of the efficiency of the force for the protection of public welfare that he be encouraged in the

one case as in the other? These considerations, and many others like them, which might be mentioned, constrain us to the conclusion that the word *'injury'* is used in this statute in a sense broad enough to include the *contracting of a disease;* provided, of course, that such injury is suffered in the course of and by reason of the performance of the distinctive duties imposed upon the suffered as a policeman.

* * * "Our view as to the legislative intent results in the conclusion that it was within the power of the board of trustees to award the pension in question if they *found that the pneumonia from which Sullivan died was contracted in the actual performance of his duties, and caused thereby. Their resolution of that question of fact from the evidence before them was within their jurisdiction, and cannot be reviewed upon certiorari.*" 20 L. R. A., N. S., 1176. (Italics mine.)

Would there not be ample opportunity here for reasonable minds to honestly differ in the application of a legal standard to the facts of this case? The legal standard being *"injured"* in the course of duty. All minds might not agree that contracting pneumonia while travelling to New York on business was being *"injured"* in the performance of duty.

The following case was cited in argument, illustrative of when one is *not* entitled to a pension:

In McAuliffe vs. Policemen's Pension Fund (Ky.), 115 S. W. 808, it was held that where a policeman, while at his home, and not on duty, undertook to clean his pistol, and in so doing accidentally killed himself, his widow was not entitled to a pension under a statute providing for pensioning the widow or children of any officer, member or employe of the Police Department who "shall, while in the performance of his duty, be killed or die as the result of an injury received in the line of his duty."

As further illustrative of the proposition that acute legal minds may differ in the application of facts to a legally prescribed standard:

In Gummerson vs. Toronto Police Benefit Fund, 11 Ont. L. Rep. 194, it was held that an injury sustained by a policeman while vaulting over a wooden horse in a gymnasium (this being part of a manual exercise prescribed by an inspector in the police force) was received while engaged in the execution of his duty, within the meaning of a rule of a police benefit fund, providing for pensioning policemen who receive injuries *in the execution of duty.*

A lay or even a legal mind might honestly conclude that a policeman whose duty it was to have his firearms clean might, while cleaning his police pistol for police use, be considered "as engaged in the performance of police duty" in so cleaning his *official weapon.* If a board of pension trustees, concluded one way or the other, it seems to me they might be acquitted either of "fraud," or "arbitrary action," requiring judicial review and legal reversal of their deliberately formed, and honestly arrived at, conclusion—even though *some* judicial mind might think otherwise.

The board of trustees of the retirement fund carefully scrutinized all the facts apparently obtainable and thereupon concluded, on the entire history before them (undisputed) that the City Register, J. Archer Bell, began his official business that day at 9.10, and that while on the way from one official visit to the City Hall to engage in further official duty, he was struck and killed by an automobile near the northwest corner of the Courthouse.

In the absence of fraud, or arbitrary action on the part of the trustees, to whom alone is committed this duty (subject to implied judicial authority to review *arbitrary action* or set aside fraudulent findings), I do not think the Court would be warranted in substituting in each such case the judicial mind for the administrative mind, to whom this duty of determination is primarily committed. The law did not contemplate the *finding of fact* to be made by the judge, instead of by the trustees. It seems to me it should be interposed only in those cases where the conclusion of the judge would not be a mere conclusion of fact, but a legal and judicial determination of the facts as a legal question distinct from a jury question.

I think the following authorities, though on different facts, support this general conclusion.

Baltimore vs. Flack, 104 Md. 121; Funeral Directors vs. State Board, 150

Md. 294; Henkel vs. Millard, 97 Md. 24; Manager vs. Board, 90 Md. 659, and other Maryland cases of the same general class.

On the record in this case, and on the testimony taken, this Court will not attempt to substitute its conclusion for the finding of the trustees, whatever legal fiction it may be to say that J. Archer Bell as City Register was actually engaged in the performance of official city duty at a little after 9.10 A. M. the morning he was killed. It is not more finely attenuated than some of the cases found in the law books under the workman's compensation laws in the various States, under somewhat similar provisions. The question of fact presented is one on which honest minds may well differ. Honest and acute minds *did* in fact differ. The conclusion of the board of trustees was by a majority vote only, a divided vote of 3 to 2.

The important fact is that their minds were acute, and their differences honest, deliberately arrived at, after careful investigation of all the facts. In no legal sense was their action *arbitrary*, or their findings mere fiat conclusions—unsupported by evidence.

PART II.

Is the Ordinance No. 553, Feb. 1, 1926, Sec. 9 (accidental death benefits) broader than the Enabling Act of 1924, Ch. 411, authorizing "general system of pensions and retirement for its officers, servants, agents and employees?"

In attempting to properly construe the Act of 1924, Ch. 411, we must first seek to ascertain the legislative intent (indulging in every legal presumption possible in favor of the constitutional exercise of legislative authority).

When our Court was called on to construe the provision in the Bill of Rights, guaranteeing the right of jury trial (Margaret Glenn case, 54 Md.), it was intimated that to ascertain the intention of the framers of that provision, we must step back in legal history to the *age* and the *times* when the provision was incorporated in the organic law. That the right as then spoken of was the right as *then* known and understood—the right as then existing at common law which it was thought desirable to preserve, and there was no intention to give a future vested right of jury trial in all cases, but only as then known, exercised and enjoyed.

Therefore, by the same analogy, when the Maryland Legislature in 1924 provides that the municipality may enact for its members a "*general pension and retirement system*," at its own expense, in order to determine what it had in contemplation, by the use of the term "*general pension and retirement system*," not only the condition of law and public thought in that era are to be taken into consideration, but also how the terms used are generally understood in connection with the subject matter with which the Legislature was attempting to deal.

During the last 25 years, and never more so than *now*, there has been a legal renascence in public social law. The country, because of great industrial growth and consequent necessity, is definitely committed to a large program of this general character. A mere bird's eye review will suffice to illustrate my meaning.

The Socialization of the Law.

Courts are ever potent to protect the constitutional guarantees of liberty nothwithstanding the process of socialization of the law. With the ever increasing demands of our complex society, and cosmopolitan population, with its industrial activity and mass production, social law is still in a state of flux.

The close technical legal reasoning of the judicial minds of the Elizabethan period are ill adapted to the constructive legalistic thought required for the industrial world of the 20th century. The concept of personal liberty, private property and personal security while still recognized in the abstract, must admit of reasonable limitations, in the public interest, because of constantly changing conditions of society.

The power of the State must be exercised in regulating and promoting not only public health, morals, education, safety, but also the general welfare.

Barber vs. Connally, 113 U. S. 27, 31.

"It is familiar law that even the privilege of citizenship and the rights inherent in personal liberty are subject in their enjoyment to such reasonable

restraints as may be required for the public good."

Holter vs. Nebraska, 205 U. S. 34, 42.

Our very home, even though boasted of in the law as our "castle" may be taken from us "if the State hath need of it," either for a playground, park or public school, or for other public purpose — subject only to the requirement of making due compensation therefor. Even this limitation is not *universal*. To arrest a great conflagration, it may even be taken without compensation. Some of us recall the memorable Sunday in February, 1904, when the municipal authorities were debating the wisdom of dynamiting the block of the Rennert Hotel, as means of saving the whole northern section of the city. The sudden shifting of the winds made the decision, and carried the conflagration eastward to the waterfront.

Diseased cattle may be taken and killed. (50 N. J. L. 308.)

Trees with dangerous infection may be cut down and destroyed.

Quarantines established (181 U. S. 248). Factory nuisances of noise and odors, eliminated, regardless of financial loss (29 Cyc. 1185). All sorts of public safety regulations may be enforced (95 U. S. 465). Our passage on the public highway is by the red, yellow and green route, subject to constant interruption (29 C. J. 649).

Game laws, with seemingly arbitrary and varying restrictions, are more or less familiar to the sportsmen, and serve as *minute* illustrations of the ever increasing restrictions on the abstract concept of the right of *personal liberty*.

We are not even free to *contract*— unreservedly, but only with regard to legal subject matters, and then, not counter to declared public policy. Williston Contracts, Vol. 3, Sec. 1628.

Freedom of speech and freedom of the press go hand in hand with the right of personal reputation, itself as fully respected as the right of life, liberty or property. (Detroit Free Press, 72 Mich. 560).

In the great world of industry, the law recognizes, or creates, the distinction between private enterprise, and those *charged with a public interest*. From time to time, the law, as conditions change it, promotes to membership in the latter class, recruiting from the former. To that end, and for the more efficient regulation thereof, our Legislatures establish Public Service Commissions, Interstate Commerce Commission, Boards of Public Health, Zoning Boards, Boards for Medical Examination, Undertakers, Electrical Boards, Boards of Pharmacy and so forth, almost without end.

Perhaps the most noticeable illustration of recent social industrial legislation may be found in the Workmen's Compensation Commissions, beginning with the first successful product to run the gamut of the Courts, in the Washington State law in 1910. Others rapidly followed in its wake. In a few years, legislation of that character swept the country, took all the legal hurdles, not without some spills, but with immediate remounts, this branch of social legislation is now firmly established in 43 States and three Territories. In a short span we have witnessed the funeral procession, in industrial life, of the corpse of "assumed risk," "fellow-servant" and a large part of "contributory negligence" law. Automobile accident will be the next to be interred in some legal grave, where the theory of *compensation* to the injured will supplant the doctrine of "*damages*" against the negligent or reckless. They are now making cultures for it in the New York legal laboratories, and studying the nature of this legal germ.

The poor we always have with us. Hence society today is studying the problem, not only of the flotsam and jetsam of industrial life, and trying to eliminate its almshouses and eleemosynary institutions, but has, as above indicated, devised ways and means by which the *industry* assumes the burdens of its own wreckage, the cost being thus absorbed by society as part of the overhead of the business.

The New York Act went through a fierce legal attack, both in the Courts and public journals. It was said that workmen's compensation would foster a system of guardianship for freemen, and dole out to them *pensions* as wards of the State. That it would deprive freemen of the opportunity to enforce their rights in Courts, and deny them the proud boast of the common law, the right of trial by jury. The Ives case (201 N. Y. 271) was declared unconstitutional (about 1911). But the pendulum has swung the other way. This character of legislation has swept

the country. Is firmly established in nearly every State and Territory, and the legal controversy now in the state of flux growing out of it, is not the validity of the law or its wisdom but the extent to which the judgment thereunder in one State, is entitled to full faith and credit in a *sister State*, and the extent of its enforcibility, *as a judgment*, in foreign countries.

Constitutionality of these Acts is fully annotated in Anno. Cases 1912 B. 174; 1915 A. 247; 1916 B. 1286; 1918 B. 611, etc.

Laws requiring corporations to furnish testimonial letters to retiring or discharged employees, certifying the length of their service, and nature and cause of their leaving, etc., upheld in Prudential Ins. Co. vs. Check, 259 U. S. 530.

Child labor and minimum wage laws are other subjects of social legislation and whether in the domain of Federal or State legislation, is a question to be resolved by the statesmen of the country. Social regulatory measures of a satisfactory nature are bound to follow on these lines.

The Harrison Drug Law and white slave laws (Mann Act) are even more extreme examples of the socialization of the law.

Society has been the gainer by such legislation. The next step in the march of events has been the many and various forms of beneficial retirement provisions. Of course, from a very early period, we have had, both in this country and in England, the old line pension system for soldiers and sailors. The present law is but the adaptation of that general idea to modern *public life*.

"Old Age Dependence," by Lee Wellington Squire (1912) (Peabody Library No. 331,25.s773), gives the early history of police pensions or retirement funds, and sets forth some of the false principles from which some of these funds are recruited, as having no proper relation to the subject matter, and others as having a direct evil tendency, such as percentage of money from liquor licenses; billiard tables and pool rooms; peddlers' and hucksters' licenses, dances and entertainments; gratuities received by police for discharge of duty; fines on members for neglect of duty; witness fees where allowed policemen."

See also "Public Service Retirement Systems," Monthly Labor Report, Vol. 25, No. 2, August, 1927 (published by U. S. Gov't Printing Office, Washington, D. C.), containing comprehensive account of Municipal Employment System of Philadelphia organized in 1915.

European System for Relief of Unemployed. Dr. Fritz Rogner in December, 1927, issue of International Labor Review.

Unemployed Industrial Insurance said to be effective in 19 countries covering 45,000,000 workers, with Austria, England and Germany on actuarial basis, with payment of benefits for a limited period.

Also a Public Service Retirement System in Austria, under the laws of 1914, 21 and 24, and in Germany, Belgium and Czechoslovakia.

The most conveniently arranged and practical book, however, is "Principles Governing Retirement of Public Employees," by Lewis Meriam (1918) (Pratt Library No. T.65807), cited in argument by City Solicitor.

On pages 38-9 the author says:

"Government in its own interest, must guarantee to its employees reasonable permanence of tenure, and that to eliminate the losses from superannuation and disability, which follow from permanence of tenure, it must establish an adequate retirement system.

"An adequate retirement system may be defined as one that fulfills the requirements of that branch of the public service to which it applies and is at the same time fair to the employees as a class and to the individual employees, satisfactory to a public appreciation of the social value of such a system, and financially sound."

Meriam Principles Government Retirement Public Employees, pp. 38-9 (Pratt Library No. T.65807.)

See also article "Old Age Pensions," American Bar Journal, February, 1924.

We still have our Bay View and county almshouses. Also our annual charity drive for a million dollars for the Community Fund to be yearly absorbed by the more prosperous persons of Baltimore! The modern thought is a move in the direction of the elimination of these institutions, and the reduction of the necessary demands for the Community Fund.

The Arizona Act of 1915 struck crudely, but directly, at the objective, to wit: abolishing the almshouse. The Act was declared unconstitutional, not because of the *principle* of *old age pension*, but because of its indefinite and impracticable character, *as a piece of legislation*, which provided for the *sale of* the almshouses, and the use of the money toward a fund for pensioning of old age, without making any provision for certain other persons, not embraced in the pension class, but who would reach the old age class and, when destitute, require the use of the almshouses.

This brings us to the starting point that there is nothing vicious in the principle underlying a comprehensive system for the retirement of municipal or public employees, but is economically sound and socially beneficient.

There is a series of learned articles written by different authors on "*Ethics in Public Service*," Vol. 104, Am. Academy of Political Science (other articles on ethics of various professions, trades, etc. "Judicial," "legal," "medical," "public librarians," "advertising," etc.). The particular one having direct bearing here, is by W. C. Beyer, Assistant Director Municipal Research, Philadelphia. It presupposes necessity for merit system vs. spoils system, organization of public employees for the establishment of a good morale, the payment of a living wage; *the benefit of a reasonable degree of freedom from economic want*. Hence the public wisdom of a system of deferred payments, or "pension," or "retirement system," etc.

So much, then, for the general trend of public, judicial and legislative thought throughout the country, at the time the legislation in question was passed (1924).

(1) As to the proper understanding of the *descriptive* terms invoked. Political science journals, legal literature, text writers on social law, official and scientific government publications, political economy treaties, are teeming with discussions of the relative merits or demerits of particular "Public Service Retirement Systems." The very term itself has become socialized; like Mt. Hope *Retreat*, or other "Rest Homes." Patients are no longer "Insane," they are "*mentally disturbed*;" they are not now "locked up," they are "*detained for observation*." The bars are just as thick as they used to be, but the descriptive terms, *less harsh*.

Though freely using the appropriate and accepted term of "*Retirement System*," the legislature was taking no chance on the Court's "Social" Education, so, in addition thereto, it used the term "*General System* of Pensions." *A general* system, includes all subdivisions of the class.

Complainant contends that pension is necessarily personal. Not so. It may, or it may not be personal, depending upon the class to which it belongs at any given time. Pensions may be for life, or for years; full pension or partial pension, absolute, or conditional, compulsory or elective, dependent wholly on State or City for creation of the fund, or wholly on contributing members, or both. Authority to enact a *general* pension system, left the grantee power to select its own *variety*, or any combination of various varieties. Otherwise the system would not *be general*, but *special*.

(2) The word Pension, what does it now, or did it ever mean?

The French word *pon-sion* is of the same origin — indicating a place of lodging — Inn, etc., or boarding house, where one can be cared for.

Standard Dictionary:

Pension. "A periodical allowance to an individual — *or to those who represent him*, on account of past services— or some meritorious work done by him —especially such an allowance made by the government."

Pensions. 19 R. C. L., page 726, Section 33, says: "The establishment of a pension system for municipal officers and employees, whereby, after serving a certain number of years or upon disablement from injuries received in the course of their duties, they are retired from active service and paid a certain proportion of their salaries for the remainder of their lives is not an unconstitutional disposition of public moneys for private use when applied to officers and employees who have entered or continued in the service after the system went into effect. The pension in such a case is not a gratuity, but a part of the stipulated compensation. A judiciously administered pension fund is doubtless a potent agency in securing and retaining the services of the most faithful and efficient class of men connected with those arms of the municipal service in which every property owner and resident of the city

is most vitally interested. Reasons in support of this proposition need not be stated in detail. *They are such as readily suggest themselves to every reflecting mind.*"

Dr. Samuel Johnson in the first edition of his celebrated dictionary (Peabody Library No. L5.51) defines *Pension as* (1) "*an allowance made to one without any equivalent. In England it is generally understood to mean pay given to a State hireling for treason to his country.*" (2) "*A charity bestowed on the education of young subjects.*"

"*Pensioner.*" "*A slave of State hired by a stipend to obey his master.*"

The earliest use of the word quoted by Dr. Johnson is the lines of Pope: * * * "*a friend to men in power without pensions.*"

A payment of *rent* is, however, its much earlier meaning (one entirely overlooked by Dr. Johnson): "a small temporary *pension* for a vast freehold." *Borrow*, vol. 111. s. 15.

It was natural that Dr. Johnson should have experienced some embarrassment in view of these definitions, in his dictionary then current, when, in 1762, he yielded to the seduction of accepting an annual pension from George III of 300 pounds.

Boswell tells us that Dr. Johnson first consulted Sir Joshua Reynolds as to the propriety of his accepting the pension, and as to what would be expected of him on acceptance, but on assurance from Lord Bute that it was "*because of what he had done in the past, and not what was expected of him in the future,*" he yielded, and hence became a pensioner of the Crown.

The more modern Century Dictionary defines "*Pension*" as: (a) "a stated payment to a person *in consideration of the past services* of himself or some kinsman *or ancestor;*

(b) "Periodical payment made to a person *retired from service* on account of age or other disability;

(c) "A yearly sum granted by a government *to retired public officers;* to soldiers or sailors who have served a certain number of years, or have been wounded; to families of soldiers or sailors *killed or disabled*, or to meritorious authors, artists or others."

"'Tis no matter if I do halt:
I have the wars for my colour,
And my *pension* shall seem the more reasonable."
Shakes., 2 Henry IV, 1, 2.

Viewed therefore, either from the standpoint of the public thought at the time of the passage of the legislation, or from the definition itself, of the terms used, either expression ("Pension" or "Retirement System"), would, by its very terminology, *include* dependents or representatives, unless otherwise *excluded.*

It would seem to me therefore that the argument is without force, that the ordinance is void as to Sec. 9, referring to accidental death benefits, as being broader than the enabling Act. On the contrary I think the provisions in Section 9 of the ordinance, well within the power granted by the Legislature to the municipality, and entirely embraced within the scope of the title, as well as within the *Act itself.*

Reference was made in argument to the Firemen's Pension Law, Act of 1880, Ch. 409 and 1884, Ch. 312. The title of the Act contains no reference to any death benefits, or payments to widows or dependents, yet the body of the Act *does* make provision for them —Act for Relief of Disabled and Superannuated Firemen. Nearly half a century has passed since that enactment, and more than $1,500,000 has been paid in pensions under it, to firemen and widows of firemen.

Soon followed in 1886, the Police Pension Law for Baltimore City. Over $3,500,000 has been paid out in pensions under this Act. About $500,000 has been paid out, since 1926, under the present ordinance (Employees' Retirement System), of which over $100,000 was on account of *death* benefits.

It seems to me legal infirmity, of a serious character and definite and certain in nature, would have to be established in the legislation in question, before any Court would feel warranted in striking it down. I find no such infirmity and no such legal justification.

Other Similar Legislation.

Legislation of like general character, with similar title provisions, in States with constitutional requirements as rigid as our own, may be referred to

in passing: The Boston system, Laws 1922, Ch. 521.

"An Act Providing Retirement Allowances Based on Annuity and Pension Contributions for Employees of the City of Boston." (The system includes death benefits).

Rhode Island: Act 1923, Ch. 489, "Act to Provide for the Retirement of Employees of the City of Providence." (Language deemed broad enough to include death benefits).

New Jersey. Act of 1921, Ch. 109: "Establishment of an Employees Retirement System for the Employees of New Jersey." (Included death benefits).

New York. Act 1920, Ch. 427: "Retirement System for Officers and Employees" (included death benefits). Constitutional provisions there, similar to ours (as to subject embraced in Act shall be reflected in title). Sec. 16, Const. N. Y.

With these various statutes, presumably within the knowledge of the Maryland Legislature when it adopted similar provisions, in providing for the same sort of relief recognized by our Legislature, is it not a cogent argument that they fully realized that death benefits are included within any general system of relief, and any "general pension system?"

My conclusions, therefore, are, as to the first proposition:

That the Court has jurisdiction to review the evidence, to the end that it may be ascertained (a) whether the action complained of is fraudulent; (b) arbitrary; (c) without warrant of law.

Finding none of these elements present, the Court should not and can not substitute its conclusions (should they be different), from the findings of the Board of Trustees to whom alone is committed this *administrative duty.*

II. (a) That the ordinance No. 553, Feb., 1926, as to Sec. 9, providing for death benefits, is not broader than the terms of the enabling Act of 1924, Ch. 411, and is not therefore void for that reason.

(b) That the title of the Act sufficiently describes the subject matter, and that the term "General System of Pensions and Retirements, etc.," is broad enough to include accidental death benefits.

(c) That the bill should be dismissed with costs.

transfer from the Safe Deposit and Trust Company, and therefore, it is not property of which Bridget Curran died seized and possessed, but it is property which had been conveyed to and was held by said trustee for eight years before Bridget Curran died. The trustee had absolute power of disposition for the control and management of said estate, and without any supervision or control of Bridget Curran, the grantor. On the other hand, if the estate of tenants by the entireties was created by the deed of trust, subject to the enjoyment of the life estate by Bridget Curran, then it was vested during the lifetime of Bridget Curran, only to be divested by her withdrawal of the corpus in annual installments, and there was nothing transferred to take effect in possession after her death. The collateral inheritance tax is upon a transfer of an estate which passes from the decedent. It seems to this Court that the tax applies only to an interest that passes as part of an estate, which condition does not exist under the facts of this case.

But the character and nature of the interest is the greatest obstacle to the recovery of the tax as here claimed, because it is an unascertainable interest for taxation during the life of the husband and wife. Just as it is an unascertainable interest and not subject to fi. fa., or attachment on a judgment against either one while the other one is living. And during the lifetime of both, neither the husband nor the wife can convey by deed his or her interest, nor can it be mortgaged by either one acting alone, because there is no share or portion of the estate in either owner, but the husband and wife take the entire estate as one person, and they take but one estate.

It follows that as one of two tenants by the entirety does not have any estate independent of the other, and that such a transfer is to them as an entity composed of both, and not of one nor of the other, the law which says that all estates (Art. 81, Sec. 124) not passing to a named class are subject to this tax does not contemplate the interest represented by Barbara Curran as one of the component parts of a tenancy by the entirety, and the daughter-in-law and collateral to Bridget Curran.

These estates of tenancy by the entirety, have been known in the law of the State of Maryland as long as it has been a State, and if it was ever intended to make such an interest as is herein set forth subject to a collateral inheritance tax the Legislature has not so declared, as has been done in some other jurisdictions. For these reasons the verdict will be entered for the defendant.

CIRCUIT COURT OF BALTIMORE CITY.

Filed November 13, 1928.

Reversed—157 Md. 576.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 37, JAMES V. ANDERSON AND WILLIAM HOWARD ERSKINE, OFFICERS AND MEMBERS, AND MICHAEL CHAPMAN, A MEMBER OF SAID LOCAL UNION NO. 37, AND INDIVIDUALLY AS RESIDENTS, CITIZENS AND TAXPAYERS OF THE CITY OF BALTIMORE, PLAINTIFFS,

VS.

MILTON J. RUARK, ENGINEER OF SEWERS OF THE CITY OF BALTIMORE, THE MAYOR AND CITY COUNCIL OF BALTIMORE, A MUNICIPAL CORPORATION, THE RYAN CONSTRUCTION COMPANY, A BODY CORPORATE, PIO MAROCCA, WILLIAM H. THOMPSON, FRANK ANGELLOZZI, N. MARTELL, JOHN MATRICCIANI, PETER D. ADAMS AND ROSSE MARINO, TRADING AS ADAMS & MARINO, AND DOMINICK CATALANO AND FRANK PECORA, TRADING AS CATALANO & PECORA, DEFENDANTS.

Isaac Lobe Straus solicitor for complainants.

Harley & Wheltle & Webster, George Ross Veazey and *Edwin W. Wells* solicitors for defendant contractors.

Simon E. Sobeloff, Deputy City Solicitor, for Mayor and City Council of Baltimore.

1. Injunction—To enforce limitation of hours of labor on municipal works under Act 1910, Ch. 94—Jurisdiction of equity—Adequate remedy at law—Effect of provision levying fine for violation of statute—Restraining commission of crime.

2. Equity—Reserve power to restrain violation of statute prescribing fine for violation.

3. Constitutional law — Constitutionality of Act 1910, Ch. 94—Limiting hours of labor on municipal works.

4. Statutes—Act 1910, Ch. 94, construed and held constitutional.

5. Municipal corporations—Restraints and limitations upon exercise of power—Policy of courts.

6. Courts—Duty to apply law without regard to soundness or wisdom of its policy.

O'DUNNE, J.—

This is a bill to restrain by injunction, the city and contractors engaged by it, in the construction of its municipal works (public sewers), from employing and permitting to be employed in such public works, laborers who labor thereon more than eight hours a day, because of the legislative prohibition contained in the Act of 1910, Chapter 94. It is contended:

(1) That the Act is unconstitutional. (In the first contention, the City does not join).

(2) That equity is without jurisdiction solely because Sec. 4 of said Act provided a fine up to $50 for its violation by the city or others: that therefore there is a remedy at law and equity does not enjoin commission of crime.

As to proposition No. 1, I hold that the Act is not unconstitutional, for reasons given hereafter.

Second, that while it is true, generally speaking, when academically and technically considered, that ordinarily, equity should not be invoked as a substitute for criminal procedure, on the theory that in such case an adequate remedy is provided at law, however, the mere insertion of a fine in a statute passed to effectuate a large public purpose, indicative of a definitely declared public policy, should not in all cases be permitted, on narrow technical grounds, to thwart the legislative mandate to a designated municipality, acting as a State agency, in the discharge of functions of State sovereignty.

The reserve power of equitable tribunals is broad enough to determine when a proper case arises for the exercise of that reserve power of government vested in such tribunals of the people functioning in the interest of the general public. This is such a case. The injunction should issue and demurrer should be overruled.

My more detailed reasons are as follows:

As to the constitutionality of the Act of 1910, Chap. 94. *The Kansas 8-Hour Law*, of which ours is perhaps almost a verbatim copy was upheld in Atkins vs. Kansas, 191 U. S. 207:

"It is equally true—indeed the public interests imperatively demand—that Legislative enactments should be recognized and enforced by Courts as embodying the will of the people, unless they are plainly and palpably beyond all question and in violation of fundamental law of the constitution.

"It cannot be affirmed of the Statute of Kansas that it is plainly inconsistent with that instrument; indeed its *constitutionality is beyond all question*" (Italics mine), pp. 223-4.

But it is contended that Atkins vs. Kansas has been overruled by the later case in 1926, of Connally vs. Gen'l Construction Co., 269 U. S. 385:

This case involved the construction of Oklahoma Act strikingly like ours in terms. It provided for eight-hour day for all *employed by State* (and by contractors working for State), but the question involved was the *standard* for measuring the criminal provision, or that part of it in question, which read:

"That not less than the current rate of per diem wages in the locality where the work is performed shall be paid the laborers, &c., so employed by the States, &c., and provided criminal penalties for infraction."

Bill to restrain enforcement of this law.

Facts arose as to wages on bridge near town of Cleveland, Oklahoma.

(1) Held "Current Rate" is an uncertain standard. Does it mean current minimum or current maximum?

The Court goes on:

(2) As to locality? "Who can say

with any degree of accuracy what areas constitute the *locality* where a given piece of work is being done. Two men moving in any direction from the place of operation would not be at all likely to agree upon the point where they had passed the boundary which separates the locality of that work from the next locality" (page 394).

On page 391:

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to the application violates the first essential of due process of law" (citing cases).

Here, it was held void, but the *eight-hour* provision was not involved in the case.

Three answers may be made to the contention that the Connally case, in 269 U. S., overrules the Atkins case, in 191 U. S.

(1) The United States Supreme Court is not given to overruling cases by implication, without any reference to the solemn pronouncement of that Court, as previously made.

(2) The eight-hour feature of the law was the provision under consideration in the Atkins case, in 191 U. S., whereas an entirely different provision in the Oklahoma statute was the subject of attack in the Connally case, in 269 U. S. The Court held that attempt to enforce criminal penalties, based on so vague and uncertain standard as "*current rate of wages*" in the "*locality*" where the work was performed, and that locality being *Oklahoma*, was *too vague* for ascertainment. Oklahoma is a vast territory. It is nearly seven times larger than all of Maryland—as large as Maryland, Delaware, Virginia and the District of Columbia, with Vermont thrown in. "Locality" under such conditions would be impossible of ascertainment.

Whereas the Maryland statute in question (Act 1910, Chap. 94), is applicable only to Baltimore City, and the current rate of wages in that limited and definitely fixed locality of the city limits, is easily susceptible of accurate ascertainment.

(3) The Act of 1910, Chap. 94, has gone to our Court of Appeals in two cases: Sweeten vs. State, 122 Md. 634 (decided in 1912), and the case of Elkan vs. State, 122 Md. 642, argued same day, with opinion filed in the Sweeten case, but specifically adopted in the Elkan case, and the constitutionality of this Act was not only upheld by *our* Court of Appeals, but the Elkan case was appealed to the United States Supreme Court, and affirmed in 1915, in 269 U. S. 643, on authority of the Atkins case, in 191 U. S.

In Lockner vs. N. Y., 198 U. S., at 55, the Atkins vs. Kansas case, in 191 U. S., was again affirmed. It seems to me, therefore, it cannot be contended that the Connally case, in 269 U. S., overrules the Atkins case, in 191 U. S.

In Heim vs. McCall, 239 U. S., at 192 and 193, it is said:

"It belongs to the State, as guardian of its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities."

See Ellis vs. U. S., 206 U. S. 246.

Eight hours a day (Act 1910, Chap. 94), is the limitation of time set by the Legislature for work performed in Baltimore municipal public works. It is the *definitely expressed mandate of the State Legislature.*

That this mandate has been utterly disregarded by the municipality would seem quite apparent from the indictments in the Sweeten case, in 122 Md., and the Elkan case, immediately following in the same volume. The conviction was there affirmed by our Court of Appeals. The constitutionality of the Act in turn was again affirmed by the United States Supreme Court on appeal in that very case.

That the practice of continued violation by our municipality of this expressed will of the Legislature is also apparent from the demurrer to the bill, admitting for purposes of demurrer, the allegation of the bill. From the oral argument, I understand the fact will not be denied as a fact in any answer.

Therefore, it would seem the indictments of some 30 counts referred to in the Sweeten case and in the Elkan case, in 122 Md., have not deterred the municipality from openly and continuously disregarding the Legislature's mandate. We may not be concerned in this

proceeding with the effect of *example* in official disregard of law by municipal corporation. This may be a moral issue. We limit our consideration of the question to the economic effect on the taxpayers who are interested in the most efficient expenditure of the public monies. They justly have a jealous regard for any loss of taxpayers' money, occasioned by deterioration due to defective construction by tired and careless labor, overtaxed by long hours, in the performance of public improvements both under ground and on the surface.

Is this loss to taxpayers unappreciable in amount? An examination of the loans submitted to, and approved by, the people of Baltimore since 1910 (when the eight-hour restriction as to physical endurance for those laboring in construction of public municipal works in Baltimore was passed), discloses that, tabulated roughly, they amount to nearly $200,000,000, of which over $40,000,000 is for sewerage construction, a form of work especially affecting public health. In these figures I include $10,000,000 sewer loan *available* in 1910, though passed before that date.

In the November 6, 1928, election there were $16,000,000 more loans for public improvement in Baltimore (a portion of which is for replacement of the 1920 loan to better the rate of interest therein authorized, and to that extent may be considered as included in the general figures.)

If the municipality is continuing the expenditure of the taxpayers' money in any amount nearly approximating $200,000,000 appropriated since 1910—and has millions and millions now available, and being used, in municipal public works, and is constructing those works in which the taxpayers are *so vitally* interested, and in which the people of this city are concerned, *without regard to whether they are burdened taxpayers or not*, and doing so with a contemptuous disregard of the clear mandate of the Legislature that such public works shall be done in a certain way, and according to certain *specifications*, has not any taxpayer the right to insist that the specification shall be faithfully complied with, without substitution either of inferior material, or inferior workmanship? If the Legislature believes, and definitely and mandatorily *expresses* its belief, that the grade and character of labor expended in its public works of *this municipality*, shall not be by persons taxed to greater exertion than eight hours a day on its behalf, has not any taxpayer as much right to demand that his burden of taxes shall not be increased by any *skimping* in the *grade* of labor used, as he would have to ask that the city be enjoined from expenditure of the public money in *inferior materials*, below definite standards clearly enumerated in the specifications? In considering the durability of the construction of public works, certainly the *grade of labor* used is as important an item entering into the *value* of construction, as is the quantum and quality of the materials.

If the Legislature directed the construction of the Light Street bridge, and specified it must be of *concrete*, could not a taxpayer enjoin an attempted construction of it out of wood?

Does his substantial financial interest therein *vanish*, and his rights as a taxpayer go glimmering because in some section, somewhere in the legislative enactment, provision is also made for a fine assessable against anyone who substitutes false material, either in quantity or quality, from those provided for in the definite specifications? And is not labor as much of a material in this sense as any other entering into its construction?

Wherefore, it seems to me the argument that the great reserve power of the equity tribunals of the people are shorn of all their strength and vigor because a minor, unimportant and demonstrated to be wholly *ineffectual*, provision for a fine is found provided for in Section 4 of Chapter 94 of the Act of 1910, is without force. It would put a premium on narrow technicality by which *substance* would be made subservient to *form*. If I may paraphrase a line from the great dramatist, shall we fly heedlessly over the beauties of law, and see nothing but petty technicalities couched in the corner? Such was the reproach of the common law. This very attitude of the early tribunals gave birth to equity. It was born out of a revolt of the broad principles of justice, against the narrow concepts of technical legal minds whose vision converged in a limited horizon, utterly oblivious to the grandeur of

the legal panorama. This stricture, self imposed, by the common law tribunals, caused equity to rise, not "Phoenix like from its ashes," because they still glow with all their ancient vigor, though yet bound up in much of their early and narrow technicality.

In Baltimore vs. Gill, 41 Md. 375, at page 395, our Court said:

"In this State the Courts have always maintained with jealous vigilance the restraints and limitations imposed by law upon the exercise of power by municipal and other corporations; and have not hesitated to exercise their rightful jurisdiction for the purpose of restraining them within the limits of their lawful authority, and of protecting the citizen from the consequences of their unauthorized or illegal acts.

"If the right to maintain such a bill as this be denied, citizens and property holders residing or holding property within the limits of a municipal corporation, would be without adequate remedy to prevent the injury and damage which might result to them from the unauthorized or illegal acts of the municipal government, and its officers and agents."

Much has been said on both sides about the case of Kelly, Piet & Co. vs. Baltimore, 53 Md. 134.

It was held on the facts to be a controversy between rival tradesmen for the printing business of the city. Relief was denied on that ground. The Court rose majestically to the inherent possibilities of its jurisdiction when it said, at page 139:

"In exceptional cases, where great principles, or large public interests are involved, citizens or corporations may sue in behalf of themselves and their fellow-citizens to arrest some projected violation of constitutional law, or abuse of corporate authority."

Pumphrey vs. Baltimore, 47 Md. 145, was a mandamus proceeding by a private citizen to compel the city to take charge of a bridge at Gwynn's Falls according to an Act of the Legislature and mandamus was *granted*. On page 154 the Court said:

"In Baltimore vs. Gill, 31 Md. 375, an injunction was granted against appellants, upon principles somewhat analogous to those which govern the present case."

I infer the mandamus would also have issued in Graham vs. Gaither, 140 Md. 330, except for the very peculiar situation presented by the answer filed, and because of the discretionary alternative vested in the Police Commissioner as to procedure, but more particularly because of the fact that the ball games sought to be prevented by mandamus were at the time of the hearing matters of history, mandamus must be issued as prayed, if it is to issue at all, and it could not, therefore, issue in that case. The game was over!

I do not, therefore, regard this decision as adverse to complainants' contention here. Quite the contrary.

Supremacy of Declared State Policy as Expressed in Legislative Mandate.

The judicial branch of government is not required to find affirmative evidence satisfactory to its mind, of the soundness, wisdom or experience of a State public policy finding expression in the statutory mandates of the Legislature, nor is it permitted to veto such expression unless plainly repugnant to the fundamental law of the land. Arguments are readily available, however, to support the legislative policy, if support were required.

Reduction of hours of labor must not be viewed solely from the economic effect either on production, or on profits to the producer, or on wages to the employed. These are undoubtedly within the domain of consideration by political economists, but they do not occupy the *entire* field, they form but *one zone*. There are other, and even more important, zones.

The economic zone is briefly surveyed in a report submitted by the Secretary of the National War Labor Board, published July 20th, 1918 (Peabody Library, No. 331, 81 U. 58 N. W. M.), with the conclusion that the volume of production is *increased* by the reduction of hours of labor to eight.

Secretary of Commerce, Redfield, is quoted as follows: "The cry for shorter hours of labor * * * is a normal protest against the *fatigue* that *destroys*."

From the same report, I quote from the last paragraph:

"The way to crime and chaos lies plainly in the exploitation of our men and our women as if they were coal and oil. In our free America there is

to be industrial and social freedom, and out of the foment of unrest there has already begun to come a true sense of human values, a better adjustment of law to those values, a keener conscience as to the treatment of those values, and a conservation that will not stop with saving of water or wood, but will make its greatest and most fruitful task, the conserving of our people themselves" (p. 104).

Again from the same source, page 102:

"While shortening the hours of labor does not decrease output, nor materially increase the cost of production, long hours, on the other hand, reduce efficiency and result in inferior output. Over-fatigue results in spoiled work; and it is generally found that the output in the last hours shows a steady and marked decline."

Former Secretary of War, George W. Alger, says:

"The notion that preparedness is a military thing * * * is a delusion. Sweat shop, child labor, industrial anarchy held in check by martial law, the exploitation of the worker * * * all these and a hundred others, are true problems of preparedness which are today ignored."

The legislative mind of the Federal system has committed the central government to the eight-hour movement. If the Maryland Legislature, somewhat in advance of much of the Federal legislation, adopted this as State policy (at least for the public works of its chief municipality), what right has the judicial branch, irrespective of which school of political economists an individual judge may think the more sound, to ignore its mandates when officially called upon to see that obedience thereto is yielded by its municipal agencies of government?

Is not leisure one of the many requisites for good citizenship? Is not the State dependent on good citizenship? Has it not a right to demand a quantum of leisure for those at least who are engaged in the construction of its public works? Has it not a right to exact that its employees in such work shall not be too exhausted to *use* some of that leisure in a manner that makes for better citizenship? As I pass on the public highways of municipal life, and look at its public works in the making, and gaze down into the municipal trenches in which the conduits for public sanitation are laid, I am struck with the foreign appearance of large gangs of laborers. Is not a familiarity with the English language and an understanding of the American institutions of importance? It is primarily necessary for *admission* to citizenship, and *essentially* necessary thereafter for *good* citizenship. Today we are solemnly commemorating the signing of the Armistice. Will anyone say the legislative leisure thus created making possible cessation of all business activity and affording opportunity for the contemplation of the glories of liberty (for the preservation of which all forms of government are supposedly ordained), fails to make its profound impression upon the present and prospective citizenship of both State and Nation?

Mr. Charles Sumner Bird, one of the largest paper manufacturers in the world, when discussing the effects of long hours on industrial workers, says:

"They are as dangerous to the welfare of the nation as was slavery of the black race. The men employed for such long hours are taxed beyond their strength, and the physical exhaustion, day after day, week after week, soon results in *lower standards of life*. No time or energy left for development of healthy home life, essential to the welfare of the nation" (Reference to where obtained was lost).

Outside the zone restricted exclusively to economics (measured in money), is the zone of health. Medicine recognized that exertion producing exhaustion causes a poison in the system, and when *acute*, creates a specific poison, or the "*toxin of fatigue*." If fatigue toxin were injected in animals in sufficient quantities, it would cause death. To overcome this toxin, *rest* is requisite. Otherwise we increase the municipal liability for accidents due to careless and indifferent work, and the payment of these judgments comes out of the pockets of the taxpayers. It is no sufficient or complete answer to say that under certain decisions, municipalities, as a form of sovereignty, while engaged in *public* sanitation, are exempt from such civil liability. If so, it is but *an additional* reason why the Legislature may provide safeguards to diminish the likelihood of their occur-

rence, because of its non-liability in some such cases to the injured.

From Bulletin of the Committee of One Hundred on National Health, Washington, D. C., 1909, page 47, I take the following:

"A typical succession of events is, first fatigue, then colds, then tuberculosis and then death. Prevention to be effective, must begin at the beginning."

Is not this a succinct statement of the argument underlying the policy which the Legislature has seen fit to promulgate governing the construction of its public works?

No man has a vested right to be employed in the construction of public works. The Legislature may determine under what conditions, and subject to what restrictions, he may be so employed. One of these is that he shall not be employed more than *eight hours* in the construction of the *public works* in the *municipality of Baltimore.*

In the briefs filed by counsel before the Supreme Court in the case of Bunting vs. Oregon in 1915 will be found a summary of the various arguments for short hours.

A review of judicial decisions dealing with the hours of labor may also be found collected in Bulletin No. 46, N. Y. State Department of Labor, March, 1911.

But, in the language of a deceased Southern Maryland jurist of the Court of Appeals: "It will serve no useful purpose to further multiply authority."

The day after submission of this cause, Mr. Straus, counsel for complainant, furnished me (with copies to adverse counsel) the following most interesting extract:

"In J. E. Thorold Rogers' classic History of English Labor—'Six Centuries of Work and Wages'—referring to the superior quality of workmanship under the Old English Statute of Labourers, during the fifteenth and sixteenth centuries, prescribing eight hours as the working day, it is said at pages 542-543:

" 'Employers were very likely to discover that the labourer's resistance to an excessively long day was not entirely personal, and that *the work might suffer from the workmen's weariness or exhaustion.* Now the *quality of the work* in the old times of which I have written is unquestionable. It stands *to this day* a proof of *how excellent ancient masonry was.* The building from the construction of which I have inferred so much as to work and wages, is still standing as it was left four centuries ago. *I am persuaded that such perfect masonry would have been incompatible with a long hours' day.* You may still see brickwork of the next century, which I venture on asserting no modern work would parallel; and within five minutes' walk of it Roman brickwork, probably sixteen centuries old, which is as solid and substantial as when it was first erected. The artisan who is demanding at this time an eight hours' day in the building trades is simply striving to recover what his ancestor worked by four or five centuries ago. *It is only to be hoped that he will emulate the integrity and thoroughness* of the work which his ancestor performed.' "

The fact remains, however, that in the time of Elizabeth *twelve hours* was prescribed as the working day, of which two and one-half hours were devoted to rest periods, for meals, etc., and it provided a fine for "a penny an hour" on the laborer for being absent from his work.

The publication of this "Six Centuries of Labor" was made by Rogers from the House of Commons in London in 1886, and may be found at the Peabody (No. 331.42 R 727).

A much larger publication is "Life and Labor in London," in five volumes, appearing in present form in 1903, by Charles Booth and a staff of five assisting in his research work. It is handled in a scientific manner which would do credit to any American institute attempting to make a modern *survey* of existing conditions. It treats all trades and all professions. From Chapter VII of Vol. 5, at page 199, I cull this extract:

"The willing and the idle, the overworked and the underworked, jostle in the same crowd, live in the same street and move in the same civic life; all alike in their own ways, exert their measure of usefulness, and all alike beget children. It is thus inevitable that the whole community should suffer from the deterioration of any section; from this there is no escape. In

the social state, no man or woman, however lonely, stands apart, and later generations, if not we ourselves, will suffer from the effects of every form of present degradation.

"The form of degradation that follows from *excessive hours* takes different shapes. It may even be compatible with regular work, good wages and abundant food, for too long hours tend to create a mechanical and absorbed mind indifferent alike to home and to the wider interests of life. Such degradation is perhaps undetected and is the more subtle because more self absorbed, than the *extreme* forms of the same evil. It may not involve as great economic or physical evils, but its moral effects are hardly less regretable and sinister."

The stress of trial work which leaves no leisure for consideration of "sub curia cases" many of which are worthy of most careful and prolonged consideration and the most industrious legal research, persuades me to a belief in the wisdom of some of these observations, and to a not unwilling acceptance of the proposition that exhaustion produces the *toxin of fatigue*, the presence of which is evident to me as I sit here all day in a niche on the fifth gallery of the Peabody Library on this sublime occasion dedicated to a solemn commemoration of the signing of the Armistice, and to a contemplation of the glories of patriotism and the grandure of liberty, of mind, of body and of soul.

I am conscious of the effects of toxin and fatigue that makes for "carelessness and indifference in workmanship." I am conscious of that "degradation" resulting from long hours producing a "mechanical and absorbed mind," "indifferent alike to home and the wider interest in life," a degradation "more subtle" because we have become "more self absorbed," and that the effects are not less regrettable, because they have become more "subtle." I am conscious of a gross neglect today of the "leisure" provided by the Legislature for what Emerson calls "the cultivation of the soul," and what the above authorities style "higher standards of living," the "development of a more healthy home life necessary to the safety of the nation." Not wholly unmindful of the duty to respond to this high call, the degradation of long hours is borne in on one, not merely as beautiful theory of political economists, but as one of the stern realities of life.

If legal vision has been thereby blinded, and perceptions of recognized principles have ceased to be acute, and the toxin of fatigue has left visible evidence of "indifference in workmanship," increasing thereby the burdens of litigants in the taxation of costs of appeal, it is abundant evidence of the evils of long hours of labor, and only further demonstrates that the output of the last of such hours can be expected to show "a steady and marked decline."

Therefore, let the demurrer be overruled, and let the injunction now issue, with leave to the defendants to move to dissolve the same upon giving five days' notice to the complainant of such motion.