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Smith Vs. Corporation of Washington

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Decided On : 1857

Appeal No. : 61 U.S. 135

Appellant : Smith

Respondent : Corporation of Washington

Judgement :

Smith v. Corporation of Washington - 61 U.S. 135 (1857)
U.S. Supreme Court Smith v. Corporation of Washington, 61 U.S. 20 How. 135 135 (1857)

Smith v. Corporation of Washington

61 U.S. (20 How.) 135

ERROR FROM THE CIRCUIT COURT 0F THE UNITED

STATES FOR THE COUNTY OF WASHINGTON

SYLLABUS

The power granted by Congress to the Corporation of the City of Washington "to open and keep in repair streets, avenues, lanes, alleys &c.; agreeably to the plan

of the city" includes the power to alter the grade or change the level of the land on which the streets by the plan of the city are laid out.

If, in the exercise of this power, an individual proprietor suffers inconvenience or is put to expense, the corporation are not liable in damages.

This was an action on the case brought in the circuit court by Ann C. Smith against the Corporation of Washington to recover damages alleged to have been suffered by the plaintiff by reason of the alteration of the grade of K Street, in the City of Washington, upon which street the plaintiff's dwelling house and messuage were situated.

Upon the trial in the court below, after much evidence had been given, the defendants' counsel asked the court to give the following instruction, which was given by the court, and plaintiff's counsel excepted.

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"If, from the whole evidence aforesaid, the jury shall find that the defendants, *bona fide* and to promote the public convenience and to complete and extend the grading of the streets of said city, caused the north side of K Street to be cut down, graded, and completed, and thereby caused the damage in said declaration complained of, and that in the execution of said work the said corporation made their said excavation in the street, and at a distance of six or seven feet from the front line of the plaintiff's said premises, then the damages so as aforesaid alleged by the plaintiff, if the jury shall believe the same was occasioned by the acts aforesaid of the defendants and not otherwise, is *damnum absque injuria,* and the plaintiff is not entitled to recover in this action, which instruction the court gave as prayed, whereupon the plaintiff, by her counsel, excepts to said ruling of the court and prays the court to sign and seal this, his bill of exceptions, and to cause the same to be enrolled, which is done, this 22d day of May, 1856."

And on the trial of said cause, and before the same was submitted to the jury, the counsel for the said plaintiff requested the said court to give the jury the following

instructions, to-wit:

"1. That if they find from evidence that the grade of K Street north, in front of said plaintiff's premises mentioned in said declaration, was established and made, and said street graveled, at or about the year 1832, and the said sidewalk graded and flagged at or about the same time, by the direction and authority of said corporation at the time of opening said street, and in pursuance of the Acts of October 23, 1830, August 11, 1831, and 18th of May, 1832 -- that then the said corporation had no power or authority to regrade said street in a manner to occasion expense to the plaintiff or injure the use or value of her property without making compensation therefor, and that the defendants are liable for the damages which the said regrading occasioned plaintiff. [Refused.]"

"2. That if they believe that the plaintiff or her grantors was induced to build said house in consequence of the said Act of October 23, 1830, and the grading of said street in front thereof under it, that then in that case the changing of said grade to her injury, without making compensation, was an act of bad faith towards her for which the defendants are liable. [Refused.]"

"That if they find that the said street in front of plaintiff's house was graded under and in pursuance of the Act of March 3, 1851, by said defendants, that then the regarding under the Act of September 12, 1851, was unauthorized if the plaintiff sustained injury thereby, for which no compensation was made, and that then and in that case, the defendants are liable to her for the injury which she sustained thereby. [Refused.] "

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"That if they find that the said defendants caused the pavement in front of said plaintiff's house to be taken up, and said sidewalk to be regraded and the pavement relaid, that then the taking up the same, and regrading and relaying the same, under the Acts of August 21, 1851, and 12th of September, 1851, without making compensation for the damages the said plaintiff might sustain thereby, was unauthorized and unlawful, and that said defendants are liable to the plaintiff for

the damages sustained thereby. [Refused.]"

"That under the act of Congress authorizing said defendants to open streets, when they have once graded and opened the same, that they have no lawful authority, without the consent of the propertyholders injured thereby, and without making compensation for the damages sustained, to regrade so as to injure the value or the use of real estate when the said regrading is made, and that if they find said defendants have so regraded, they are liable to said plaintiff for all damages she has sustained by such regrading. [Refused.]"

"That if the jury find that the said street had been previously graded by the said corporation, that no changes by the action of the elements thereon, or by natural causes resulting from said grade, can authorize such regrading, and that if the said defendants regraded said streets on account of such changes, they are liable to said plaintiff for all damages which she sustained thereby. [Refused.]"

"That if the jury find that said street was graded and graveled in August, 1851, by said corporation, that without a change of circumstances, and the occurrence of a new and further necessity for a change in said grade, that then the regrade under the Act of 12th of September, 1851, was unauthorized and unlawful, and the defendants are liable for such damages as the plaintiff may have sustained by said last-mentioned regrading. [Refused.]"

"That if the jury find that the defects in the street were such as were occasioned solely by a neglect in not preserving it in the condition in which it was left when first graded under the laws of 1830, 1831, and 1832, that then the defendants were not authorized to regrade said street under either of said acts of 1851, and that their doing so was illegal and renders them liable for all damage growing out of such regrading resulting therefrom. [Refused by a divided court.]"

"That if the jury find that said street could have been restored to its condition, as established under the grading originally made, without cutting down said street and regrading it, that said defendants were bound so to restore it without regrading, and that such regrading was unauthorized and illegal, and renders

the defendants liable for all damages sustained by the plaintiff resulting therefrom. [Refused.]"

"That if the jury believe that said defendants, in regrading said street in 1851, cut down said street lower than was necessary to restore the former grade, and render the said street equally passable, that such excess of cutting down was unauthorized and illegal, and the said defendants are liable to said plaintiff for all injury sustained by such excess of cutting down. [Refused.]"

"That if the jury find that in said regrading in 1851, the defendants cut down said K Street in front of said plaintiff's premises so much as to render it necessary to regrade and cut down Twelfth Street, and thereby render that portion of it north of said K Street steeper and more difficult of passage than it formerly was; that such fact raises a presumption that said regrading, to the extent it took place, was unnecessary and improper, and unless such presumption is repelled by proof, that the said regrading was unauthorized, and renders the defendants liable to the plaintiff to the extent of the damages which she has sustained thereby. [Refused.]"

"That if the jury find that the fall between the north and south sides of K Street in front of plaintiff's premises, by the first grading or first regrading, was not greater than that in one or more of the grades in the City of Washington made or suffered by the defendants in opening and grading said streets, that such fact will raise the presumption that said regrading was not a work of necessity, and was therefore illegal and unauthorized, and renders them liable to all such damages as the plaintiff sustained by such regrading. [Refused.]"

"That if the jury find that the north side of said K Street in front of plaintiff's house was cut down so low as to turn the water from Thirteenth Street from its natural course from north to south, from the high grounds at the north of said K Street to the low grounds on I Street, at the south, and make it run east to Twelfth Street, that such fact is presumptive evidence that said street was cut down more on said north side than was necessary or proper, and that, unless disproved, it is

conclusive against the defendants that they cut down there more than was necessary, and that they are liable to the plaintiff for all damage she has sustained thereby. [Refused.]"

"That if the jury believe that said K Street, or any part thereof, where it crosses Twelfth Street, was left higher than said K Street, and impassable for teams, or materially obstructed from the regrading in 1851 to the fall of 1854, or to other time, that such fact is presumptive evidence that said regrading was not necessary for the purposes, passing, and travel, on said K

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Street, but that it was lowered below said Twelfth Street at that point for some other purpose, and that unless disproved, it renders said defendants liable to said plaintiff for all damage she may have sustained by so regrading. [Refused.]"

"That if the jury find that the lowering the north side of K Street in front of said plaintiff's house, and the making a gutter there from Twelfth to Thirteenth Street would have obviated the objection of the flow of the water across the street, and gullying the same, without regrading to the extent which said street was regraded, that then said defendants are liable to said plaintiff for all damages sustained by lowering the north side of said street more than was necessary to protect against said flow and injury. [Refused.]"

"That the statute of Congress authorizing said corporation to open and grade streets in said city is not a continuing power, but, when once opened and graded, that such corporation is not authorized to regrade the same in a manner whereby private property is injured, and that if they do so, they are liable to those injured for all damages sustained thereby. [Refused.]"

The court having refused to give said instructions, the plaintiff's counsel excepted.

The defendants' counsel thereupon asked the said court to give the following instructions:

"And thereupon the said plaintiff's counsel, insisting before the jury that the said change of grade was not made by defendants *bona fide,* the defendants now pray the court further to instruct the jury that the defendants cannot be made responsible in damages in this action unless from the evidence the jury shall find that the said change was made wantonly, willfully, and maliciously; which instruction the court gave as prayed."

"Whereupon the plaintiff, by her counsel, excepted, and prays the court to sign and seal this her bill of exceptions, this 23d day of May, 1856."

And the said court thereupon gave said instructions, and the counsel for the plaintiff excepted.

And thereupon the said jury, under the said ruling of the court, found a verdict for the defendants.

Upon these various rulings and refusals, the case came up to this Court.

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MR. JUSTICE GRIER delivered the opinion of the Court.

The declaration in this case alleges in substance that the plaintiff is owner of a lot in the City of Washington, fronting on K Street; that this street was opened in front of her lot in the year 1831, and became a traveled street; that a wall had been erected in front of the lot to protect it; that shade trees had been planted in front it; that a sidewalk had been laid; "that defendants unlawfully, wrongfully, and injuriously," cut down the shade trees, took down the wall, removed the pavement, and dug down the street in front of the premises, thereby obstructing and injuring the ingress and egress to plaintiff's lot and the buildings thereon -- injuring their value, depriving her of the shade and ornament of the trees, and compelling her to pay large sums of money to enable her to use and occupy her house.

It must be observed that the gravamen of this case is not a trespass on the property of the plaintiff or the taking down a wall or removing shade trees thereon,

nor the erection of a nuisance on the public highway, nor a willful, malicious, or oppressive abuse of authority, in order to injure the plaintiff.

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But the declaration charges that these acts of defendants, in reducing the level of the street, removing trees, pavement &c.;, were done "unlawfully, wrongfully, and injuriously."

On the pleadings and evidence in the case, the only questions of law that did or could arise on it were:

1st. Whether the corporation, defendant, had power to change the grade of the street, or acted "unlawfully and wrongfully" in so doing; and,

2d. If the act was lawful, were the defendants bound to compensate the plaintiff for the injurious consequences to her property?

1. First, then, as to the authority of the corporation.

It is unnecessary in the consideration of this point to recur to the early history of the foundation of the City of Washington; suffice to say the land was originally conveyed to trustees, "to be laid out as a federal city, with such streets &c.;, as the President shall approve." It has been so laid out, and the streets dedicated to the public. As in all other cities and towns, the legal title to the public streets is vested in the sovereign, as trustee for the public, and consequently in this district they can be regulated only by Congress, directly or by such individuals or corporations as are authorized by Congress.

The act to incorporate the City of Washington, passed May 15, 1820, among other specific powers and duties enumerated in the seventh section, has the following: "To open and keep in repair streets, avenues, lanes, alleys &c.;, agreeably to the plan of the city."

It has been contended that this power, "to open and keep in repair," does not include the power to alter the grade or change the level of the land on which the

streets, by the plan of the city, are laid out.

But we think such a construction of this clause of the charter is entirely too narrow, and cannot be supported as consonant either with the letter or spirit of the statute. It is the evident intention and policy of this statute to commit to this corporation, as a municipal organ of government, whose members are chosen by the citizens, the care, supervision, and general regulation of the streets, as in other cities and boroughs.

Where sums of money have been specially voted by Congress for the improvement of the city, it is usual to order it to be expended under the supervision of the President. But no inference can be drawn from such legislation that Congress intended to retain the whole police and regulation of the streets to itself, so as to require a special act to alter the grade of a street, or that the President, in addition to his other duties, has imposed on him that of street commissioner of Washington.

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The city corporation has the trust confided to them, and the duty imposed upon them, not only of opening the streets of Washington, but of "keeping them in repair."

Streets cannot be opened and kept in repair, or made safe or convenient for public use without being made level, or as nearly so as the nature of the ground will permit. Hills must be cut down and hollows filled up, or, in other words, the road must be "graded" or "reduced to a certain degree of ascent or descent," which is the proper definition of the verb "to grade." If the duty imposed on the corporation requires this to be done, the power must be coextensive with the duty. If charged with neglect of their duty, as public officers bound to keep the streets in repair, it would not be a sufficient excuse to allege that the fences and obstructions are removed, and therefore the street is "opened," or that it has been kept in as good "repair" as it was found.

A court of quarter sessions would probably not receive a defense founded on such astute philological criticism of the terms of the statute. Nor could the allegation be admitted, that having once fixed a grade, which is now found improper and insufficient, the corporation has exhausted its power, and has no authority to change the level or grade, in order to keep the street in repair. As the duty is a continuing one, so is the power necessary to perform it.

2. Having performed this trust confided to them by the law according to the best of their judgment and discretion without exceeding the jurisdiction and authority vested in them as agents of the public, and on land dedicated to public use for the purposes of a highway, they have not acted "unlawfully or wrongfully," as charged in the declaration. They have not trespassed on the plaintiff's property nor erected a nuisance injurious to it, and are consequently not liable to damages where they have committed no wrong, but have fulfilled a duty imposed on them by law as agents of the public. The plaintiff may have suffered inconvenience and been put to expense in consequence of such action; yet, as the act of defendants is not "unlawful or wrongful," they are not bound to make any recompense. It is what the law styles *"damnum absque injuria."* Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience, at the expense of that of the public.

The law on this subject is well settled both in England and this country. The cases are too numerous for quotation; a reference to one or two more immediately applicable to the questions arising in this case will be sufficient.

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In *Callender v. Marsh,* 1 Pick. 417, the defendant, as surveyor of the highways, was charged with digging down a street in Boston so as to lay bare the foundations of plaintiff's house and endanger its falling. The authority under which he acted was given by a statute which required "that all highways, townways &c.;, should be *kept in repair and amended* from time to time, that the same may be

safe and convenient for travelers." "This very general and exclusive authority," said the court,

"would seem to include everything which may be needed towards making the ways perfect and complete, either by leveling them where they are uneven and difficult of ascent, or raising them where they should be sunken and miry."

It was held also that the law does not give a right to compensation for an indirect or consequential damage or expense, resulting from a right use of property belonging to the public.

In *Green v. Borough of Reading,* 9 Watts 282, the defendants, by virtue of their authority to "Improve and repair," graded the street in front of plaintiff's house five feet higher than it had been before, and it was held that the corporation was not liable to an action for any consequential injury to plaintiff's property by reason of such improvement or change of grade in the public street.

In the case of *O'Connor v. Pittsburg,* 18 Pa. 187, a church had been built according to the direction of the city regulator and by a grade established in 1829. Afterwards, in pursuance of an ordinance, the grade of the street was reduced seventeen feet; the church had to be taken down and rebuilt on a lower foundation, at a damage of $4,000. The authority given to the city was *"to improve, repair, and keep in order the streets,"* &c.;

The court said

"We had this case reargued, in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled not only in Pennsylvania but by every decision in the sister states except one."

We are of opinion, therefore, that the instructions given by the court below on these points were correct, and

Affirm their judgment.

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