IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

RECORD NO. 1447

RICHMOND-ASHLAND RAILWAY COMPANY

v.

COMMONWEALTH OF VIRGINIA EX REL. CITY OF RICHMOND

JAMES E. CANNON,
City Attorney.

CLYDE W. SAUNDERS & SONS, INC., PRINTERS, RICHMOND, VA.

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STATEMENT

It is said at the foot of page 2 of the petition in this cause that the City of Richmond has never acquired an easement over the right-of-way of the Richmond-Ashland Railway Company at Lombardy Street, by either deed or condemnation and that if it has any right to the use of such crossing, it is either a permissive use or an easement acquired by common law dedication. The city disputes this assertion and directs the court's attention to the following statement of facts:

By deed dated February 16, 1910 (106) the Richmond and Chesapeake Bay Railway Company, predecessor in right and title to the Richmond-Ashland Railway Company,

hereinafter referred to as the company, conveyed to the public two thirty-foot strips of land for highway purposes, lying on either edge of the one hundred foot roadway then known as Brook Turnpike, retaining as a right-of-way for railway purposes, a strip forty feet wide in the center. Said deed contains the following language (111):

> "* * * and said parties hereby recognize the right of said Richmond and Chesapeake Bay Railway Company to fence said right-of-way with wire or other suitable material, provided said fence does not interfere with existing crossings or crossings which may be hereafter lawfully established."

It appears from the uncontradicted testimony of F. Will and J. B. Wittkamp (46-47), that the Lombardy Street crossing was an existing crossing at the time of the execution of the said deed and consequently, was preserved and dedicated as a crossing by the terms of the deed itself.

In addition to this, reference is made to section 24 of the city's charter which has been in force since 1870, which reads in part as follows:

> "Whenever any piece, parcel or strip of land shall have been opened to and used by the public as any street, alley, lane or part thereof for the period of five years, the same shall thereby become a street, alley, lane or part thereof for all purposes and the city shall have the same authority and jurisdiction over and right and interest therein as they have by law over the streets, alleys and lanes laid out by it."

In the fourth paragraph of the company's answer (35), the averment is made that within a few years past, at great

expense to itself, the company changed the grade of its tracks and laid a cement roadway across the same at Lombardy Street in order to accommodate the City of Richmond. W. F. LaPrade, an engineer in the city's Department of Public Works, testified (49), that the work referred to in this paragraph of the company's answer was done in 1921 and hence, it is apparent that at least since that time Lombardy Street has become a public street for all purposes within the purview of said section 24 of the city's charter.

With this exception, the city accepts as correct the statement of facts contained on pages two and three of the petition.

ARGUMENT

As part of this brief, the city adopts the "statement of facts and reasons" to be found on pages 126 to 139 inclusive of the record. At page 132, we find the following:

> "The Commission does not hold that police power in the instant case is not expressly conferred upon the city of Richmond, but it does hold that such police power resides in the City of Richmond as is essential to the accomplishment of the objects involved in its creation as a municipal corporation under the Constitution and laws of Virginia, and that the exercise in the instant case even though the police power exercised be only general, is reasonable and proper and imposed upon the company the legal obligation which it is the purpose of this proceeding to enforce."

It is the contention of the city not merely that the facts show that the requirements of the city ordinance under which this proceeding was instituted are reasonable, but

that the courts cannot inquire into this question of reasonableness because the particular police power has been expressly conferred upon the city by the General Assembly.

In sction 19 of the city's charter is to be found the general welfare clause authorizing the council of the city to enact suitable ordinances to secure and promote the general welfare of the inhabitants of the city by them deemed proper for the safety, peace, good order, convenience and morals of the community and in section 19g is to be found the authority to close or extend, widen or narrow, lay out and graduate, pave and otherwise improve streets and public alleys in the city and have them properly lighted and kept in good order. Also, in section 19i is to be found the following authority vested in the council:

> "To authorize the laying down of railway tracks in the streets of the city and the running of cars thereon, under such conditions and regulations as they may prescribe, and also from time to time to prescribe additional conditions and requirements as to the construction, reconstruction, repair and maintenance of the tracks and roadbed and cars and the running of cars on such tracks,"

and finally, in section 19j is to be found a provision specifically authorizing the council to designate the route and grade of any railroad to be laid in the city.

In volume 2 of McQuillin on Municipal Corporations, 2nd Ed. Section 760, the law is stated to be:

> "Where passed by virtue of express power, not inconsistent with the Federal Constitution or treaties or laws of the United States, or the Constitution and general laws of the State (unless as to the latter

exceptions have been duly authorized), and such power has been substantially followed and exercised in a reasonable manner, the ordinance will be sustained regardless of the opinion of the court respecting its reasonableness. In brief, if passed by virtue of express power, an ordinance cannot be set aside by a court for mere unreasonableness, since questions as to the wisdom and expediency of a regulation rest alone with the State law making power. And this is true although such ordinance would have been regarded as unreasonable if it had been passed under a grant of power general in its nature or the implied or incidental powers of the municipality. * * *

"The doctrine may be stated that the power of the court to declare an ordinance unreasonable and therefore void, is practically restricted to cases wherein neither the charter nor applicable statute has dealt with the subject matter of the ordinance specifically, and consequently to cases in which the ordinance was passed under the supposed implied or incidental powers of the corporation merely. But whether the municipality had power to enact an ordinance, or whether the ordinance is valid and constitutional, is for the courts."

In 43 Corpus Juris, under the heading of Municipal Corporations, Section 316, a similar expression is to be found:

"As a general rule, if the Legislature has expressly conferred upon a municipal corporation power to do a certain act, the courts cannot question, except upon constitutional grounds, the right of the municipality to exercise the power; as for instance, on the

ground that it might have been regarded as unreasonable if it had been done under the implied or general power of the municipality."

In the recent case of *Scruggs* v. *Wheeler*, 4 S. W., 2nd Series, pp. 616-619, this doctrine is tersely and forcefully expressed in the following language:

"The rule is generally announced that where the legislature in terms gives a municipality power to pass ordinances of a specific and defined character, they cannot be successfully attacked, except upon constitutional grounds, as being unreasonable, though they may be so impeached if passed under merely incidental or general power."

This Court is in full accord with this general principle, as may be seen by reference to the case of *Danville* v. *Hatcher*, 101 Va. 523, in which was assailed as unreasonable, an ordinance to regulate saloons, pased under a specific grant of authority by the General Assembly.

At the foot of page 530, the court had this to say:

"The language in which the grant of power is couched in this case, is unmistakable and too plain to permit of elucidation. It leaves it absolutely within the control of the council to determine whether they will wholly suppress or grant the privilege, subject to such restrictions as they may see fit to impose.

"Within the sphere of their delegated powers, municipal corporations have as absolute control as the General Assembly would have if it had never delegated such powers and exercised them by its own enactments, and the courts can no more interfere with the

> acts of the one than the other. To permit such interference would be to deny the existence of a discretionary power, and transfer its exercise from one coordinate branch of the government to another."

At page 533, in commenting upon a quotation from 1st Dillon on Municipal Corporations, Sec. 328, the court said:

> "But these principles have no application where the Legislature, as in the present case, has invested the City Council with all its police powers over the subject. Under such conditions no case has been found which warrants an interference by the courts with the discretion of the Council, exercised in good faith for the general welfare of the inhabitants of the city."

On page 534, the court quoted with approval from the case of *Beers* v. *Dalles City*, 16 Ore. 334, to the following effect:

> "When a City Council is vested with full power over a subject and the mode of the exercise of such power is not limited by the charter, it may exercise it in any manner most convenient."

It is only sufficient to read sections 19g and 19j of the City Charter to see that the council is vested with specific authority to require the railway company to do the things set out in the ordinance of July 7, 1932, and this phase of the controversy will not be further discussed.

Counsel for the company, at the foot of page 16 of the petition, state that the identical question involved in the case at bar was passed upon by your Honors in the case of *Lynchburg Traction Co.* v. *Lynchburg*, 142 Va. 255.

We sharply differ with this statement. The *Lynchburg* case does not involve any question of the crossing of a public highway by the traction company. In that case the traction company dedicated to the County of Campbell as one of the public highways of the county, what was known as Rivermont Avenue, but according to the deed of dedication, such public use as a highway was "to be subject to the use of the said company for the purpose of constructing therein railroads whether to be run by steam, electricity, horses or any other motive power." Of course when the city of Lynchburg enlarged its boundaries so as to include Rivermont Avenue, it succeeded only to whatever rights the County of Campbell may have had. Your Honors merely held that the city of Lynchburg had no power to compel the traction company to pave Rivermont Avenue on both sides of and between its tracks, stating that this requirement of paving might have been exacted as the price paid for a privilege, but inasmuch as no privilege of the sort had been granted to the traction company, the city of Lynchburg could not exact the price. At the foot of page 266 in the opinion, this was said:

> "Of course when the city limits were extended the railway company became subject to the police power of the city and it could regulate the speed of its cars, the keeping of the tracks safe and in good condition (as distinguished from the maintenance of the railway itself), the giving of signals, the stopping of cars at convenient points, the keeping of watchmen or gates at specified points, requiring cars to be provided with fenders or other matters pertaining to police regulations, but this gave it no right to require street improvements or repairs not caused by any unlawful, negligent or improper act of the company."

In the instant case, when Lombardy Street became a street, crossing the right-of-way of the company, whether by common law dedication or by other dedication, expressed or implied, it became in the language of the city charter a street "for all purposes" and the city was given the same authority and jurisdiction over and right and interest therein as it has by law over streets laid out by it, and the city is merely undertaking to exercise its police power over Lombardy Street to the same extent that it has the right to exercise the same in respect to railway crossings of other streets, there being no reservation, condition or exception reserved to the company in respect to it.

The company claims that it has been denied the equal protection of the laws in violation of the 14th Amendment to the United States Constitution, for the reason that the city is not undertaking to exact of other street railway companies the same requirements that it is undertaking to exact of the company. This contention made so little impression upon the Corporation Commission that it was not even referred to in the lucid and convincing opinion handed down by that body. It seems to us a sufficient reply to say that to apply the equal protection clause of the Federal Constitution to a case of this sort would be to throttle all progress and improvement and preclude the city council from ever commencing any proceeding tending to promote the welfare of the community.

A typewritten copy of this brief has been delivered to Messrs. Kirsh and Bazile, counsel for the company, on this 27th day of December, 1933.

Respectfully submitted,

JAMES E. CANNON,
City Attorney.