C
100 Md. 579, 60 A. 627

Court of Appeals of Maryland.
NICOLAI
v.
MAYOR, ETC., OF **CITY** OF **BALTIMORE**.
March 22, 1905.

Appeal from Court of Common Pleas; Henry Stockbridge, Judge.

Action by C.R. Nicolai against the mayor and city council of Baltimore. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

West Headnotes

Adverse Possession 20 ⚿42
20k42 Most Cited Cases
Where proceedings to foreclose a mechanic's lien on a bridge and its abutments did not purport to convey the land on which the abutments rested, neither such decree, nor mere ownership of the bridge and abutments by a purchase thereunder, constituted evidence of the beginning of adverse possession of such land.

Adverse Possession 20 ⚿60(2)
20k60(2) Most Cited Cases
Where a railroad constructed the abutments to a bridge under a license from the landowner, and not under a claim of title, it could not acquire the land, on which the abutments rested, by adverse possession, in the absence of evidence of ouster.

Bridges 64 ⚿25
64k25 Most Cited Cases
Where a bridge and the abutments were sold in proceedings to foreclose a mechanic's lien thereon, a trustee's deed conveying the same to the purchaser alone, and not to her, her heirs and assigns, describing it as "bridge and masonry," did not convey the land on which the abutments rested.

Ejectment 142 ⚿6
142k6 Most Cited Cases
Where the owners of land granted a license merely to use the land on which to erect the abutments of a bridge, the erection of the abutments did not convert such license into a corporeal right to the land, so that a purchaser of the bridge, in proceedings to foreclose a mechanic's lien thereon, could maintain ejectment to recover such land, under Code Pub.Gen.Laws, art. 75, §§ 69-82, authorizing the maintenance of ejectment "to recover land.".

Argued before McSHERRY, C.J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

S.S. Field, for appellant.
Edgar Allan Poe, for appellee.

PEARCE, J.
This is an action of ejectment of an unusual character. The declaration contains three counts, in the first of which the plaintiff seeks to recover "the bridge and masonry at Merryman's lane, located adjacent to the line of the Maryland & Pennsylvania Railroad Company, in the city of Baltimore." In the second count the plaintiff claims "all that lot of ground belonging to the plaintiff, lying in the city of Baltimore, and described as follows: The land covered by the abutments of the bridge over the Maryland & Pennsylvania Railroad Company at Merryman's lane, and the abutments resting thereon." In the third count the claim is for "all that lot of ground belonging to the plaintiff, lying in the city of Baltimore, and described as follows: The land covered by the western abutment of the bridge over the Maryland & Pennsylvania Railroad at Merryman's lane, and the abutment resting thereon." Issue was joined on the customary plea, denying the commission of the wrongs alleged.

The plaintiff offered in evidence the proceedings in an equity cause in the circuit court for

Baltimore county between Charles H. Nicolai & Co. and the Baltimore & Swan Lake Railroad Company to enforce a mechanic's lien which Nicolai & Co. had filed against the bridge and masonry mentioned in the declaration, under section 22 of article 63 of the Code of Public General Laws of Maryland. This proceeding resulted in a decree for the sale of "said bridge and masonry mentioned in the proceedings," and the appointment of W.F. Mitchell and Bernard Carter as trustees to make the sale. This decree covered also other bridges embraced in the lien filed, and the trustees' advertisement of sale covered all these. The bridge in question here was described simply as "the bridge and masonry at Merryman's lane," and the other bridges were described in like terms, neither the decree nor the advertisement making any reference to the land on which the bridges were erected, but the advertisement stated that the bridges and masonry could be easily removed and the material used for building purposes. All the bridges included in the decree were sold to the present plaintiff, the sale was duly ratified, and the trustees conveyed the property sold to the plaintiff, describing the bridge now in question as "the bridge and masonry at Merryman's lane, located along the line of the Baltimore & Swan Lake Railway in Baltimore county," but it is now within the limits of Baltimore City. The plaintiff proved that the masonry consisted of two abutments on which the bridge rested, each abutment being of stone, 40 feet in height and the same in length, the bridge span being about 100 feet over the Maryland & Pennsylvania R.R., and over Stony run, next to the eastern abutment. She also offered evidence tending to prove that Merryman's lane crossed Stony run about 15 feet north of this bridge before the erection of these abutments in 1873, and that neither of them stands upon any part of what was Merryman's lane before their erection, and that the bridge was put in place in 1880. James H. Smith then testified that the western abutment stands upon land that belonged to David Carroll at the time the abutment was erected, and that the eastern abutment stands upon what was a part of Merryman's lane, which at that point was the boundary of Carroll's land, and that there was no written agreement between Carroll and the Swan Lake Railway Company for the erection of the western abutment. She also offered to prove a verbal agreement between the parties named, under which the western abutment was erected on Carroll's land in consideration of the erection by the company of a wall on the east side of the railroad track, thereby changing the course of Stony run, ***628** which formerly ran on the west side of the railroad, but this offer was rejected by the court upon the defendant's objection, and the first exception was taken to this ruling. The plaintiff then put in evidence chapter 314, p. 559, of 1868, and chapter 272, p. 398, of 1874, of the Laws of Maryland, the first being the act incorporating the Baltimore & Swan Lake Railway Company, and the latter being an amendment of the former, and then proved that the bridge and abutments were worth about $4,000, and that she had never received anything for them from any source, and then closed her case, upon which the court granted a prayer offered by the defendant taking the case from the jury, and directing the verdict for the defendant, to which ruling the second exception was taken. The court held that, under the decree to enforce the mechanic's lien, the trustees were only authorized to sell, and only sold and conveyed, the bridge and abutments, and not the ground upon which these stood, and that the bridge and abutments could not be recovered in ejectment. The plaintiff, however, contends that, under the description "bridge and masonry," the ground upon which the abutments rested passed under the trustees' deed, without being expressly mentioned, in support of which he cites: 4 Enc. of Law (2d Ed.) 919, and 941; 5 Cyc. 1052, 1066; Daniels v. Athens, 55 Ga. 609; Bardwell v. Jamaica, 15 Vt. 438; Hawkins v. Wilson, 1 W.Va. 117; and Tolland v. Willington, 26 Conn. 583.

We have carefully examined these authorities, and it does not appear that any of them were actions of ejectment. All of these, and others to like effect, are cases in which were involved only the duty of maintaining the approaches to the bridge, or the liability for injuries received in accidents occurring thereon. In some of them expressions are used which seem to give color to the contention made, but which, when carefully considered, cannot be regarded as so intended. Thus, in Daniels v. Athens, 55 Ga., supra, the court held that contiguous embankment necessary to make access to a bridge, so as to pass teams and wagons over it, is a part of the bridge, and title to the bridge covers such embankment. But this was an action for damages from injuries received from negligent maintenance of the embankment, in which possession and control only was involved, and not legal title, and we must assume that the court designed the language used to refer only to such qualified title as may be predicated of rightful possession, and not to legal title in the sense required in actions of ejectment. If designed, however, to be understood in the latter sense, the language is obiter dictum. So, also, in Hawkins v. Wilson, supra, it was said, "The description in a summons of unlawful detainer of premises, as a certain house and appurtenances, imports land within the meaning of chapter 134 of the Code of 1860, to the extent of the land on which the house stands, and the garden attached, but no further;" but the court proceeded to observe that "the question of title was not involved, but only possession."

In the present case there is not only no evidence of any conveyance by any one for the land upon which either abutment stands, but the plaintiff's witness proved that there was no written agreement between Carroll and the railway company with reference to the land upon which the western abutment was built, and there is an entire absence of any evidence as to any authority from any source for the erection of the eastern abutment, which stands upon what was a part of Merryman's lane. There was therefore no more, at most, than a parol license for the erection of these abutments, creating an incorporeal hereditament, for which ejectment cannot be maintained. The cases so holding are numerous. In Moore v. Brown, 139 N.Y. 127, 34 N.E. 772, the discoverer of a garnet mine upon state lands filed a claim under a statute which entitled him, as discoverer, to work such mine, and provided that he, his heirs and assigns, should have the sole benefit of all products therefrom, upon payment of a certain royalty to the state, and that the commissioners of the land office should execute a contract accordingly, which they did. Moore was the assignee of the discoverer, and brought ejectment. The court held that the statute and resolution of the land commissioners neither conveyed a legal title to the premises described, nor anything equivalent thereto, but was a mere license, and no interest in the land, and therefore ejectment would not lie; and cited Doe v. Wood, 2 Barn. & Ald. 724, where plaintiff claimed in ejectment under a formal indenture granting the right to search for, dig, work, and mine minerals in the grantor's lands described in the indenture, but this was held to operate as a license only. In the latter case Chief Justice Abbott said: "It was contended that words importing an intention in the grantor to divest himself of the possession for a time, and vest it in another, operate in law as a lease, and that words showing such intent appear in different parts of this deed, such as 'the land hereby granted,' 'the ground and premises hereby granted,' and 'the land or ground hereby granted,' which occur in some of the clauses and covenants of the deed, and, among others, in the clause of re-entry, upon which special reliance was placed. *** But we think these words are not sufficient to vary the construction that must be given to the words of the granting part of this deed, and are not sufficient to extend the grant by converting the thing granted from incorporeal to corporeal, which would carry the rights of the grantee much

further than the grant of a license or authority extends." So in Petroleum Co. v. Bliven Co., 72 Pa. 173, which was an action on the case under ***629** an agreement to lease the exclusive right of boring for oil upon certain described lands, the court, through Judge Sharswood, held: First, that the grant was of a mere incorporeal hereditament; second, that case was the proper remedy; and, third, that ejectment certainly could not have been maintained. And the same principle was declared in Caldwell v. Fulton, 7 Casey, 480; in Clement v. Youngman, 40 Pa. 344, where it was said that, where one grants a mere incorporeal hereditament, "it can never be intended the owner should be ejected from the soil"; in Richardson v. Louisville R. Co., 169 U.S. 128, 18 Sup.Ct. 268, 42 L.Ed. 687; and in Crocker v. Fothergill, 2 Barn. & Ald. 661, where Justice Holroyd said, "Although an ejectment will not lie for a liberty and privilege alone, which is a mere incorporeal hereditament, yet when an ejectment is brought for land, and liberties and privileges are appurtenant to the land, the latter may be recovered with the land, because you may recover in ejectment all incorporeal things included in the demise, though an ejectment will not lie for the incorporeal things alone." In Moore v. Brown the statute and resolution gave the right to the discoverer, his heirs and assigns, but the court did not allow these words to import a grant of land, nor can the same words used in the decree in this case be given that effect. Their presence in the decree was probably due to the use of a printed blank for general use; but however this may be, the trustees' conveyance was made to Charlotte R. Nicolai alone, and not to her, her heirs or assigns, as it would have been if they had deemed themselves authorized by the decree to convey the land on which the abutments stood.

If, in the proceedings to enforce this lien, it was designed to extend the lien to land, assuming this to have been possible under the mechanic's lien law, the necessary steps should have been taken for this purpose under sections 6 and 7 of that law providing for designation of the boundaries, though we are not to be understood as intimating this could have been done, since it was decided in Stebbins v. Culbreth, 86 Md. 658, 39 Atl. 321, where a mechanic's lien upon a steam heating apparatus or machine was under consideration, that only such a machine as had not lost its character as a movable chattel was within the purview of section 22 of article 63, which gives the mechanic's lien upon "machines, wharves and bridges."

We may observe here that sections 69 to 82 of article 75 of the Code, all of which relate to the action of ejectment, speak uniformly of land, and nothing else, as recoverable in ejectment, but there is no repugnancy or inconsistency between these provisions of our Code and those decisions here relied on by the plaintiff to establish that ejectment will lie for other things than land, such as an upper room in a building, a stall in a stable, a pew in a church, a coal mine, a crop of grass, or a pool of water. Without passing upon the particular cases thus mentioned the principle underlying them all, we apprehend, will be found to be that the grantee took under the grant some estate or interest in land; in many of them under deeds, or through undisputed or established adverse possession of the property claimed. Taking the case of Gilliam v. Bird, 30 N.C. 280, 49 Am.Dec. 379, cited by the appellant, as an illustration of all, we find that the grantor bargained and sold "all my right, title and claim to the building known as 'Hayward's Shop,' and all interest I may have had to the ground occupied by the house." Judge Battle said: "The defendant assumes that a house separate from the ground on which it stands is personal property, but this is not so. The ownership of land is not confined to the surface, but extends indefinitely upwards and downwards. An upper chamber of a house may be held separately from the soil on which it stands, and ejectment will lie to recover it." The principle

applicable in the case of a mine is well stated in 10 Enc. of Law (2d Ed.) 477, thus: "Where the grant by its terms does not purpose to demise the lands or the minerals therein, but operates only as a license to dig and mine throughout the lands, ejectment will not lie unless he has actually opened and worked the mine, for until then the right is incorporeal." In the case before us here, the erection of the abutments is not equivalent to the opening and working of the mine, and does not convert the incorporeal right into a corporeal right, as the opening of the mine does under the English cases. When that is done, there arises a right to remove and dispose of that part of the soil so mined, but the mere use of the surface of the land in erection of the abutments creates no right in or title to any part of the soil. So, in the case of a crop of grass, it is said ejectment will lie because a grant of herbage implies a particular interest in the soil to mature the herbage, though the soil does not pass under the grant. And as to the pool of water cited by the appellant from Yelverton, 143, reference to that case shows that, "if land under the water does not belong to the plaintiff, ejectment will not lie." In Partridge v. Independent Church of Baltimore, 39 Md. 631, a lot in a cemetery was purchased in 1821, and held under a certificate which stated that said lot "is hereby granted and conveyed by said Church to Eaton R. Partridge, his heirs and assigns forever." In 1871 the cemetery was sold under a decree of court, having ceased to be suitable for burial purposes, and the remains interred in the lot mentioned were removed by the family, but the vault was not removed, and was reserved from sale by the trustees, with the right to the family to remove it; but they declined to do this, and demanded all out of the proceeds of sale-a sum sufficient to construct***630** a similar vault elsewhere. This petition was dismissed, and, in affirming that order, the court said: "The lot holder purchased a license-nothing more irrevocable as long as the place continued a burial ground, but giving no title to the soil. Whether it was an incorporeal hereditament descendible, or passed on his death to his personal representatives, it is unnecessary to decide, though while the license continued he could, perhaps, bring trespass or case for any invasion or disturbance of it, whether by the grantors or by strangers. *** All monuments and erections, capable of being removed, placed on the burial lot under a license like the present, would be regarded as the personal property of the lot holder, and he would have the right to remove the same upon the lot ceasing to be used for burial purposes." This case is entirely in line with the cases already cited from other jurisdictions, so far as the nature and effect of a mere license is concerned, though special provision is made by section 92 of article 16 for the sale under decree in equity of burial grounds which have ceased to be used for burial purposes, and for the distribution of the proceeds of sale among the parties interested.

We cannot find any legally sufficient evidence of adverse possession by the plaintiff of the land here in question. The original entry by the railway company for the construction of the abutments was under a mere license, and not under claim of title. The proceedings under the mechanic's lien law, in the form in which they were conducted, could per se originate no claim of title to the land; and mere ownership of the bridge and abutments by purchase under that decree neither created any title to the land, nor constituted any evidence of the beginning of adverse possession. The record discloses no act of the plaintiff inconsistent with her holding under the original license, nor indicative of any purpose on her part to claim by adverse possession. In Gamble v. Horr, 40 Mich. 562, cited by the plaintiff, the act relied on was actual inclosure and occupation of the premises, and this is the principle applied in Hiss v. McCabe, 45 Md. 83, where Murray, being then in the actual occupation of a house, rebuilt one of the walls, and in doing so extended it nine inches

beyond his line, and continued to occupy the dwelling without interruption for more than 20 years thereafter, and his occupation of the nine inches was held to give title by adverse possession.

If this plaintiff had inclosed this land and abutments, or had erected dwellings upon them, or had torn down the abutments and erected houses upon the land formerly occupied by them, and had occupied such houses by tenants or in person, a different case would be presented. But we can perceive no act done by her indicating her purpose to claim title to the land. It follows from what we have said that we find no error either in the ruling upon the evidence, or in granting the defendant's prayer.

Judgment affirmed, with costs to the appellee above and below.

Md. 1905.
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