H
106 Md. 69, 67 A. 274, 11 L.R.A.N.S. 129

Court of Appeals of Maryland.
CANTON CO. OF BALTIMORE
v.
MAYOR, ETC., OF BALTIMORE.
June 26, 1907.

On motion for reargument. Application refused.

For former opinion, see 66 Atl. 679.

West Headnotes

Appeal and Error 30 ⚿671(3)
30k671(3) Most Cited Cases
On appeal the Court of Appeals may not consider testimony stricken out by the trial judge, where neither the evidence nor a statement of its substance appears in the record, and there has been no application for a writ of diminution to supply it.

Easements 141 ⚿32
141k32 Most Cited Cases
Though mere nonuser of an easement, even for more than 20 years, will not afford conclusive evidence of abandonment, such nonuser for a prescriptive period, united with an adverse use of the servient estate, inconsistent with the existence of the easement, will extinguish it.

***274** SCHMUCKER, J.
Since the handing down of the opinion in this case the appellee, Baltimore City, has made a motion for a reargument, and has filed a carefully prepared brief in support of the motion. The reasons advanced by the brief for a reargument may be conveniently grouped under three heads, which are: (1) That some important matters which transpired at the trial below, tending to prove a dedication of the square of ground in question to public use as a park by acts in pais or admissions, were not shown by the record; (2) that we did not correctly apprehend or give due weight to the evidence which appeared in the record tending to prove the dedication by implied covenants arising from deeds made by the Canton Company to sundry purchasers of lots from it; (3) that we erred in the conclusions of law at which we arrived.

We held in our opinion already filed that, under the plain decisions of this court from which we saw no reason to depart, the city was not entitled to maintain the present action of ejectment, because it had no legal title to the land in controversy. Because of the importance of the case, and the thoroughness with which it had been discussed, we also expressed our views upon the legal sufficiency of the evidence to establish a dedication of the lot and the effect of the ripened adverse possession of the lot by the Canton Company long before any attempt at an acceptance of the alleged dedication had been made on the part of the public. After a careful consideration of the brief on the motion we see no reason to change our views on the want of right in the city to maintain the suit; but in view of the labor and care bestowed by counsel upon the brief we will examine its leading propositions upon the other features of the case.

This appeal, like all others, must be determined by us upon the contents of the record. We are not at liberty to consider the alleged testimony of Bernard N. Baker touching acts in pais of the Canton Company tending to prove a dedication, said by the brief to have been introduced by the city at the trial below and stricken out by the trial judge on motion of the Canton Company, because neither that evidence nor any statement of its substance appears in the record, nor was there any application for a writ of diminution to supply it. The same observation applies to the other statements in the brief of what occurred or was said at the trial below which is not shown by the record. In deciding only the case put before us by the record, we furnish a precedent for such cases only as are sufficiently similar in facts to the one

before us to justify a like application to them of the principles upon which we base our conclusions.

Turning our attention to the suggestion in the city's brief on the motion, that we were misled as to the true character and effect of the plats offered in evidence by it as tending, when taken together with certain deeds, to establish the alleged dedication of the square ***275** to public use, we will briefly review the contents of the record in that respect. Sundry deeds appear in record from the Canton Company of portions of its land which recite that the lots thereby conveyed are lots laid down on the Canton Company's plat. Copies of three plats were put in evidence by the city subject to exception on which the lands of the company are laid out in lots, and the square in question is shown as a public square. The deeds themselves make no mention of or reference to the square, nor do they contain a description of or identify the plat to which they refer, nor does the record contain any direct testimony connecting the plats or any of them with the deeds. The record shows a notice from the city to the Canton Company to produce at the trial below the plat known as "Sales Plat No. 1" of the company published about 1845, and said in the notice to have been referred to in numerous conveyances of the company after that date, and also the sales plat of the company published in 1853, and said in the notice to have been referred to in numerous conveyances of the company after that date. It does not appear by the record that any plats were produced by the Canton Company in response to that notice. Following the notice there appears in the record an agreement of counsel that the city might produce and use on its behalf, subject to all exception and objection that might be interposed to the use of the original as evidence, a blue print of the plat known as "Sales Plat No. 1," made about 1845, and also a copy of the plat of the Canton Company's property prepared in 1853 by William Dawson, Jr. This agreement contains no admission at all that either of these plats was the one referred to in the deeds, relied on for the alleged dedication, nor are those deeds mentioned or in any manner referred to in the agreement. The trial judge asked the counsel whether it was admitted that the deeds referred to either of the two plats, and the counsel for the Canton Company replied: "We do not admit that they do, and we do not think that they do," and, after further colloquy, reiterated their refusal to admit that either of the plats was the one referred to by the deeds, although they admitted that they were Canton Company plats. The copies, mentioned in the agreement, of the two plats, were introduced by the city, subject to the exception above stated, but no evidence was offered to show that the company had published either of the plats, or recorded them in the public records, or exhibited them to the purchasers of the lots or to other persons. When the copy of the plat of 1853 was put in evidence, there appeared pasted upon its back what was designated as a "Plan of the city of Baltimore, as enlarged and laid out by T. H. Poppleton under the direction of commissioners appointed by the General Assembly *** corrected to November, 1851, a survey of its environs and Canton." On this plat the square appeared as it did upon the other two. The city admitted that this plat was a separate one from that on which it was pasted, and that the two had not been issued together by the Canton Company. No further evidence appears touching this last-mentioned plat. The Canton Company subsequently moved to strike out the deeds and all of the plats from the evidence, but the court refused to grant the motion. This evidence does not, in our opinion, measure up to the standard set by us in Harbor Co. v. Smith, 85 Md. 542, 37 Atl. 27, of the character of evidence required to establish, as must be done beyond reasonable doubt, the intention of an owner of property to dedicate it to public use. In that case we said: "The rule that the strongest, clearest, and most convincing proof of intention will be required to establish a dedication has been

announced again and again by this court."

The brief on the motion suggests that, although there was no direct testimony tracing any of these plats to the possession of the Canton Company, such possession was sufficiently established by the contents of the letter of November 30, 1906, from the plaintiff's to the defendant's counsel inclosing the notice to produce the plats, taken together with the agreement of counsel for the use of copies of plats in lieu of the originals, and the admission of defendant's counsel that they were Canton Company's plats. Without reviewing in detail these several elements of proof, we are of opinion, after carefully examining them, that, even if it be admitted that they show the plats to have been at some time in the possession of the company, they do not show at what time, nor do they prove that the plats or any of them were distributed or issued to the public by the company, or in any manner employed by it in procuring or making the sales for which the deeds appear in the record, nor do they sufficiently connect the plats with the deeds. The views expressed in our opinion already filed, as to the true operation and effect of the reference to the square as laid down on a Canton Company plat contained in the mortgage from that company to George S. Brown and others in 1873 which was afterwards paid off and released, remain unchanged and need not be repeated. The brief calls attention to the fact, of which we were aware when our opinion was written, that in White v. Flannigan, 1 Md. 542, 54 Am. Dec. 668, the court, in commenting upon Howard v. Rogers, 4 Har. & John. (Md.) 278, said in effect that it appeared from the record in that case, although not from the printed report, that the dedication made by Col. Howard of the lot on German street was conditioned upon the removal of the State Capitol to Baltimore, and that if the condition had been complied with Howard could not have resisted a claim to have it so dedicated. Giving full force to the construction thus placed upon Howard v. Rogers, it would afford no ground ***276** for changing the views expressed by us of the insufficiency of the evidence in the present case to establish the dedication here claimed. Howard v. Rogers differs from the present case in that there was not only proof of the making and publication by Howard of a plat of his land showing the existence and location of the park, but the deed itself from Howard to Rogers stated on its face that the square, lying opposite the lot conveyed, was "intended for public uses." It further appears that in that case a deed for the lot, in which the expression "relative to the public square" was omitted, had been executed by Howard and tendered to Rogers, who refused to accept it, and insisted that those words be inserted in the deed for the purpose of giving his lot the privilege of fronting on the square. We have here no such proof of an intention to dedicate the square in question as was presented in that case.

Nor can we yield our assent to the very urgent contention made in the brief on the motion as to the effect of the adverse possession of the square by the Canton Company. The uncontradicted evidence in the record shows that since 1856 there has been no use by the public of the square as a park, without the express permission of the Canton Company first obtained for that purpose, and that during all of that time the company has maintained an uninterrupted adverse possession by actual inclosure of the square, so open and notorious that it could not have escaped the notice of any one living or passing in sight of it, and so hostile and exclusive as to have completely prevented the exercise of a right or easement in any other person to enter upon and use the square as a park. That state of affairs continued uninterruptedly for 40 years before any attempt on the part of the public authorities was made to accept the alleged dedication of the square as a park. Although it is conceded that mere nonuser of an easement even for more than 20 years will not afford conclusive evidence of its abandonment, such nonuser for a prescriptive

period, united with an adverse use of the servient estate inconsistent with the existence of the easement, will extinguish it. Washburn on Easements, §§ 551, 552; 14 Cyc. 1195; 10 A. & E. Encyc. of Law, 436; Woodruff v. Paddock, 130 N. Y. 618, 29 N. E. 1021; Matter of New York, etc., 73 N. Y. App. Div. 394, 77 N. Y. Supp. 31; Smyles v. Hastings, 22 N. Y. 224; Smith v. Langewald, 140 Mass. 205, 4 N. E. 571; Spackman v. Steidel, 88 Pa. 453; Horner v. Stilwell, 35 N. J. Law, 307; Bently v. Root, 19 R. I. 205, 32 Atl. 918; McKinney v. Lanning, 139 Ind. 170, 38 N. E. 601; Lathrop v. Elsner, 93 Mich. 599, 53 N. E. 791; Louisville v. Quinn, 94 Ky. 310, 22 S. W. 221. In Clendenin v. Md. Construction Co., 86 Md. 85, 37 Atl. 711, we said, in reference to the dedication to public use of streets and highways resulting from the implied covenant arising from the call for such streets as boundaries in deeds of lots lying thereon: "So long as the implied covenant between the grantor and grantee exists, the city can accept, unless there has been an abandonment or an estoppel of some kind; but as the dedication to the public springs from and is supported by the title conveyed to the grantee, and must depend upon the existence of that covenant, it must cease with it if there has been no acceptance during the time it was in the power of the city to accept." Again, we said in Story v. Ulman, 88 Md. 247, 41 Atl. 121: "But, when a dedication is presumed from an implied covenant in a deed which arises from a call for a street as a boundary line, this dedication will be defeated if the covenant is rescinded before the street is opened or used by the public." As we have frequently held that the right of the public in such cases is only coextensive with the easement acquired by the purchaser, and must be measured by its limits, it follows that, if that easement has been extinguished by nonuser, coupled with adverse possession, before there has been an acceptance by the public the dedication will be defeated. The principles, thus declared in reference to the dedication of streets to public use from implied covenants in conveyances to purchasers of lots bounding thereon, apply with at least equal force to the dedication of a square to public use as a park from the reference to a plat on which it is shown, in a conveyance by its owner of other lots appearing on the same plat.

The application for a reargument of the case must be refused.

Motion refused, with costs.

Md. 1907.
Canton Co. of Baltimore v. City of Baltimore
106 Md. 69, 67 A. 274, 11 L.R.A.N.S. 129

END OF DOCUMENT