FOR EDUCATIONAL USE ONLY

106 Md. 69, 66 A. 679

Court of Appeals of Maryland.
CANTON CO. OF BALTIMORE
v.
MAYOR, ETC., OF CITY OF BALTIMORE.
April 4, 1907.

Appeal from Superior Court of Baltimore City; George M. Sharp, Judge.
Action by the mayor and city council of the city of Baltimore against the Canton Company of Baltimore. From a judgment in favor of plaintiffs, defendant appeals. Reversed, without new trial.

West Headnotes

KeyCite Notes

Q*?119 Dedication
0*1191 Nature and Requisites
O»119k40 Evidence
<c=>119k44 k. Weight and Sufficiency. Most Cited Cases

Evidence that deeds, containing no reference to a park dedicated to the public, described lots conveyed by reference to an unrecorded plat, purported copies of which showed a tract reserved as a public square near the lots, none of the copies of the plat introduced in evidence being identified as the one to which the reference was made, or as having been in the possession of the grantor, was insufficient to show an offer to dedicate to the public the tract reserved as a park.

KeyCite Notes ^

c=>20 Adverse Possession
<s»2QI Nature and Requisites
€^20I(E) Duration and Continuity of Possession
Qs?20k39 Time Requisite for Acquisition of Rights
O»20k40 k. In General. Most Cited Cases

Where the dedication of a park is claimed, the fact that the original owner gave a mortgage on its property, excepting that portion theretofore laid out as a public park and dedicated to public use, does not interfere with the owner's claim by adverse possession, where it occupied for over 30 years after the date of the mortgage, and there was no evidence of acceptance of the dedication on the part of the public.

KeyCite Notes

€=20 Adverse Possession
o?20I Nature and Requisites
O»20I(F) Hostile Character of Possession
O»20k59 Possession Consistent with That of Another, and Possession Becoming Adverse After Amicable Entry
O»20k64 k. By Donor or Donee, or Bailor or Bailee. **Most Cited Cases**

Where the owner of land offers to dedicate it to the public as a park, but continues in possession

excluding the public for a period of over 20 years, he acquires good prescriptive title to the tract.

KeyCite Notes

0*142 Ejectment
€=1421 Right of Action and Defenses
fr»142k8 Title to Support Action
<c=142k9 In General
c=142k9(5) k. Easements or Licenses. Most Cited Cases

An action of ejectment by a city will not lie for land in which it claims an easement for park purposes, but does not claim the legal title.

***680** Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Edgar H. Gans and Arthur George Brown, for appellant.
Joseph S. Goldsmith and Albert C. Ritchie, for appellee.

SCHMUCKER, J.
The appeal in this case is from a judgment in ejectment rendered by the superior court of Baltimore City in favor of that city against the Canton Company. The land described in the declaration is a lot or square of ground in Baltimore City forming a part of what is known as the "Canton Company's" land, and bounded by Canton avenue, Lancaster, Patuxent, and Canton streets. The judgment is not for the property described in the declaration, but is "for an easement in the property described in the declaration, with exclusive right to the possession of the same for use as a public park." The city does not claim title to the square under any conveyance. It sues for the protection of an alleged incorporeal right or easement of the public to use the square as a park, upon the theory that there had been a dedication of it by the Canton Company to public use for that purpose.
Two bills of exception appear in the record; one to rulings on the admissibility of evidence, and the other to the court's action on the prayers. The two cardinal questions presented by the appeal are: First, whether there was an unrevoked dedication of or offer to dedicate the square to public use as a park at the time the city undertook to accept it; and, secondly, whether the present action of ejectment will lie at the suit of the city to secure to the public the enjoyment of the square as a park. We have come to the conclusion that the case must be reversed upon both of these propositions, and, as important public interests are involved in the issue, and the question of dedication was fully and ably discussed upon the briefs and in the argument before us, we will express our views upon both propositions in the order in which we have stated them.

The dedication of land to any public use is essentially a matter of intention. Certain dealings with property by its owner have been held to afford conclusive evidence of his purpose to make the dedication, but it is essential to establish the intention in every case. The principle of dedication rests largely upon the doctrine of estoppel in pais, and, while there are general rules applicable to certain lines of conduct on the part of the owner of the land, each individual case must, after all, be decided upon its own facts and circumstances. Baltimore v. Frick, 82 Md. 83, 33 Atl. 435. All of the facts in each case tending to show the intentions of the owner must receive due consideration, for, as was said in **McCormlck v. Baltimore.** 45 Md. 524:"The evidence of such intention is furnished in various ways, but, as dedication will be presumed where the facts and circumstances of the case clearly warrant it, so that presumption may be rebutted and altogether prevented from arising by circumstances incompatible with the supposition that any dedication was intended." It is now universally held that an intention to dedicate land lying in the beds of streets to public use will be presumed, where its owner makes a plat of the land on which the streets are laid down, and then conveys it in lots described as bounding on the streets or by reference to their numbers on the plat, from which it appears that they do in fact bound on the street. In such cases there is, in the absence of language showing that no dedication was intended, an implied covenant that the purchaser shall have the use of the streets on which his lots bound, from which a dedication of the streets to public use is held to arise. White v. Flannigan, 1 Md, 540, 54 Am, Dec. 668; Moale v. Baltimore, 5 Md. **321,**

61 Am. Dec. 276; Hawley's Case, 33 Md. 280; McCormick's Case, 45 Md. 523; Tinge's Case, 51 Md. 600; Pitts' Case, 73 Md. 326, 21 Atl. 52; **Baltimore v. Frick, 82 Md. 83, 33** Atl. 435. But the dedication of such streets to public use resulting from their conveyance in the manner mentioned does not become final and irrevocable until there has been an acceptance of it on the part of the public authorities. **Baltimore v. Broumel,** 86 Md,**153, 37 Atl.** 648; Valentine y,**Hagerstown,** 86. Md. **486, 38 Atl. 931:** New Windsor v. Stocksdale, 95 Md. 212, 52 Atl, 596, In the last-mentioned case, we said that the acceptance of a dedication "may be evidenced in one of three ways, viz., by deed or other record, by acts in pais, such as opening, grading, or keeping the road in repair, or by long continued user on the part of the public."

While the authorities are agreed that streets or highways may be thus dedicated ***681** by their owners to public use, they do not agree as to the physical limits of the dedication. Some authorities hold that the streets mentioned in the deed or laid out on the plat are embraced in the dedication to the full extent that they are owned by the grantor. Other cases, among which are the decisions of this court, confine the dedication to a limited and restricted area. In **Hawley v. Baltimore,** 33 Md. 270, which may be regarded as the leading case upon that subject, it is said: "The law is now too well settled to admit of any doubt that, if the owner of a piece of land lays it out in lots and streets and sells lots calling to bind on such streets, he thereby dedicates the streets so laid out to public use. The rule is founded on the doctrine of implied covenants, and the dedication will be held to be coextensive with the right of way acquired as an easement by the purchaser. It is upon the implied covenant in the grant to him that the dedication to public use rests, and such dedication must necessarily be measured by the limits of the right he has acquired by virtue of his grant. In the case before us, the right of way or easement in Mosher street acquired by the purchasers of the lots mentioned in the proof is the precise limit of the dedication by Hiss. Over what portion of Mosher street, then, did their right of way exist? We think they acquired by their several purchasers the right of way only from Madison avenue to McCulloh street, as it is between those streets that their lots lie and bind on Mosher. The doctrine of implied covenants will not be held to create a right of way over all of the lands of a vendor which may lie, however remote, in the bed of a street. The lands must be contiguous to the lot sold, and there must be some point of limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bind on a street not yet opened by the public authorities is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed, and no further." In Hawley's Case the owner of the lot sold exhibited to the purchaser at the time of the sale a plat of his land, on which the streets were laid down, but the plat was not called for in the deed of the lot to the purchaser. In Baltimore y. **Frlck, 82** Md. 85, 33 Atl. 435, we cited and followed Hawley's Case as to the extent of the dedication of a street by the grant of a lot bounding thereon, and still more accurately defined the limits of the dedication by saying: "The contention that the street which limits the extent of the dedication must be an open public street is not supported by the cases heretofore decided by this court. In Hawley's Case, supra, the land over which the right of way is given it is said must not be remote, but contiguous to the lot sold; but if the contention of the city that in all cases we must presume a dedication of a right of way over the grantor's land, until the next or nearest open street is reached, be correct, such right of way would in many cases extend over land not only not contiguous to but very remote from the lot sold." It may therefore be said that under the decisions of this court the sale of a lot of land calling to bind on an unopened street works a dedication to public use of that street, if it is of the land of the grantor, only until it reaches the next open or unopened street.

Although the law relating to the dedication to public use of streets has been settled by numerous decisions of this court, we have seldom been called upon to consider the nature and extent of the dedication of a park to such use when it is so designated on a plat of the grantor's land, and reference is made to the plat in deeds conveying portions of the land. Most of the text-books and many cases assert broadly that the rules and principles controlling the dedication of streets to public use by the use of or reference to plats in the manner mentioned by us apply with equal force to the dedication of parks and other public places designated on such plats. 2 Dillon on Mun. Corps. § 644; 13 Cyc. p. 448; 9 Am. & Eng. Encyc. of Law, p. 25. Other cases plainly distinguish between the principles applicable to the dedication of "streets affording easements directly profitable and necessary to the use of lots" and parks which are intended for public recreation and enjoyment, and are only indirectly beneficial to the lots. Baker v. Johnston, 21 Mich,...3.1.9; Coolidge v. **Dexter, 129 Mass. 167;** Light v. Goddard, 11 Allen (Mass.) 5, where it is said, by Bigelow, C. J.: "An attempt is made in the present case to extend this rule of interpretation much further than is warranted by any of the adjudicated

cases. The plaintiff claims under a deed which describes the lots conveyed as laid down on a plan to which reference is made. Upon inspection of this plan, it appears that these lots are carved out of a large tract of land, the whole of which is divided into numerous lots or parcels, and is fully laid down on said plan. It also appears that certain other land, which at the time of the grant in question also belonged to the grantors, and which is not immediately adjacent to the lots conveyed, but is separated therefrom by a contemplated street which forms one of the boundary lines of the lots conveyed, is designated on the plan as 'Ornamental Grounds' and as 'Play Ground.'The contention of the plaintiff is that such designation on the plan referred to in the deed of lands lying in the vicinity of, but not adjacent thereto, the land granted, amounts to a covenant that those grounds shall forever continue to be appropriated and used for the uses and purposes so designated.""We are by no means prepared to adopt as a sound rule of exposition the general proposition on ***682** which the argument for the plaintiff rests. We do not think that a mere reference to a plan in the descriptive part of a deed carries with it by necessary implication an agreement or stipulation that the condition of land, not adjacent to, but lying in the vicinity of, that granted, as shown on the plan, or the use to which it is represented on the plan to be appropriated, shall forever continue the same so far as it may be indirectly beneficial to the land included in the deed, and was within the power or control of the grantor at the time of the grant."

We will now consider the facts of the case before us in the light of principles to which we have referred. The Canton Company is a well-known owner of a large tract of land in the eastern section of Baltimore, which it acquired about____years ago, and from which it has from time to time sold lots. These lots were described in the deeds conveying them as bounding upon various streets, and in many of the deeds made between the years 1846 and 1882 the lots conveyed were further described as being "Nos.____,___, and____on the Canton Company's plat." A number of the lots thus conveyed were situated upon the streets facing the square in question, but in none of the deeds for any of the lots was any public park mentioned or referred to, or was there even any allusion to this square. From the references in these deeds to the Canton Company's plat, of its property, but there is no evidence in the case that the company ever recorded its plat, or in any form made an issue or publication of it to the community at large, or made any representations in reference to it, other than those contained in the deeds, appearing in the record. Portions of several different plats were offered in evidence by the city, and were admitted over the objection of the Canton Company, and the court's action in that respect forms the subject or bills of exception.

These plats agree in the location upon them of the respective streets. Two of them, which are alleged to be copies of Canton Company plats of about the years 1845 and 1853, respectively, and one, which is alleged to be a copy of part of Poppleton's plat of Baltimore as enlarged in 1851, so as to include Canton, also show the alleged park designated as a public square. We here insert, for purposes of illustration, a copy of a sufficient portion of the plat of 1845 to show the location thereon of the alleged park and the blocks of ground immediately surrounding it:

[Click to View]

Image 1 (5.36" X 4.84") Available for Offline Print

***683** J. Howard Sutton, a surveyor and civil engineer, testified for the defendant that he had been connected as employé and partner with the firm of Simon J. Martenet & Co. since the year 1878; that Simon J. Martenet had been the surveyor of the Canton Company from prior to 1870 down to his death, in 1893, and the firm had continued to be its surveyors since that time; that, about 1870 to 1872, Mr. Martenet had prepared for the company an elaborate atlas of all of its property, upon which were located all conveyances theretofore made by the company and all of the property still owned by it at that time; that it had been the continuous custom of the company ever since then to enter upon the atlas at intervals of about three months all deeds, leases, or changes that might have occurred in that interval, and also to add to the map any purchases of additional land made by the company; and that the atlas had always been kept at the company's office and used by it in connection with all transfers, sales, leases or other transactions appertaining to its real estate. The atlas was put in evidence and identified by the witness. Upon the section of the atlas covering the portion of the company's land embracing the square in question, the location of the streets and the square is the same as upon the plat of which a copy appears in this opinion, but the square is entirely blank, like the other vacant lots appearing on the map, and has no suggestion upon it either in letters or decoration indicating that it is or was intended to be a public park. Furthermore, it is marked on two

of its sides with red lines, which are uniformly used on the atlas to designate the portions of the entire property still owned in fee simple by the company.
In addition to the deeds mentioned, the Canton Company, in December, 1873, executed a mortgage of its entire property to George S. Brown and others, to secure an issue of bonds made by it, excepting therefrom, in addition to the streets laid down on the plat of its property, a public park, in the following language: "Saving and excepting from this conveyance that portion of the said property of said company which has heretofore been by it laid out as a public park and dedicated to public use as such and which park is likewise marked and located on the said plat of said company's property." It appears from the record that this mortgage was released on April 23, 1887. There is no evidence in the case that the alleged park ever was used as such by the public, or by any person, except that on several occasions church or school picnics were held in it for which in each instance special permission was procured from the company. On the contrary, the uncontradicted evidence shows that since 1856 the square had been fenced in and used or rented out by the company, and the public have been strictly excluded from it. It has been assessed to the Canton Company for city and state taxes ever since 1876, the present assessment being $34,604, and the city has regularly demanded, and the Canton Company has paid, the taxes on the assessment. On April 11, 1906, an ordinance was introduced in the city council of Baltimore accepting, on the part of the city, the dedication of the alleged park, but, before the ordinance was passed, the Canton Company executed and put on record a sealed instrument, declaring that it had never dedicated or offered to dedicate the park to public use, and asserting, if there ever had been any dedication, it had been revoked, annulled, and withdrawn by the published maps of the company, and further declaring by the instrument itself a revocation, annulment, and withdrawal of any dedication or offer to dedicate the park which may have been theretofore made by the company.

The state of facts thus sworn by the record does not in our opinion furnish legally sufficient evidence of a dedication by the Canton Company of the square to public use as a park. The deeds offered in evidence do not any of them on their face profess to convey to the grantees any title to, interest in, or use of the square; nor is it described or referred to or mentioned in any of them; nor do any of the lots conveyed by the deeds touch or bound on the square itself. A deed of a lot described as bounding on a street will dedicate the street, if of the lands of the grantor, to the next cross-street; but it will not, in the absence of apt expressions for that purpose, give to the grantee any interest in land lying on the opposite side of the street. In Howard v. Rogers, 4 Har. & J. 278, John Eager Howard conveyed to Rogers a lot of ground, part of Lunn's lot, bounding on the south side of German street, and in describing the lot used this language: "Which street bounds on the south the square intended for public uses, and thence east, binding on said street and fronting the square, to the place of beginning." On a bill filed in chancery by Rogers to restrain Howard from applying the square to private uses, it was held that the deed conveyed to the grantee "no right, interest, or privilege in the square.'"There is not anything mentioned in the granting part of the deed but a lot of ground on the said Lunn's lot. These words 'beginning,' etc., are a description of the lot, and designate the location of it, and show in a plain manner where it lies. The words, 'which street bounds on the south the square intended for public uses,' were inserted to render the description more certain, and identify more plainly the said lot. These words convey no right, interest, or privilege in the square. The words 'binding on the said street, and fronting the said square, to the beginning,' are also words of description, and are susceptible of the same answer. *** It was the plain intention of the parties, to be collected from the words of the deed, that the lot therein described should ***684** pass, and all Col. Howard's right and interest therein, and nothing else."

The only manner, therefore, in which any interest or privilege in the square can be claimed by the grantees under the deeds appearing in the present record is upon the theory of an implied covenant, for its use as a park, arising from the references contained in them to the plat. Before the Canton Company could be deprived of the beneficial use of the valuable property in controversy upon any such theory, the fact would have to be established by the clearest and most convincing evidence that the plat referred to in the deeds had that square designated upon it as a public park. The city attempted to prove that fact by the production tempted to prove that fact by the production and putting in evidence of copies of portions of the three different plats upon which the square was so designated; but it failed to produce any direct testimony tracing these plats to the possession of the Canton Company, or identifying any of them as the one referred to in the deeds. In **Harbor Co. v.** Smith, 85 Md. 542, 37 Atl. 27, where this court refused to uphold an alleged dedication of a square of ground to public use as a park, 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 originals of the three plats were not produced; the defendant agreeing that the copies might be used subject to the objection to the admissibility of the originals. The copies offered in evidence had the following memoranda indorsed on them: On the first was the memorandum made in 1904 by Martenet & Co.: "Copy of a part of plan of a part of Canton Company's ground indorsed 'copy of printed map in possession of Title Guaranty & Trust Company.' The original is not dated, but we believe same to have been published about 1845." The next copy has indorsed upon it: "Copy of part of the plan of the Harbor of Baltimore in connection with the Canton Company's lands compiled by William Dawson, Jr., 1853." The memorandum appearing on the third copy, saying that it was from Poppleton's enlarged plat of Baltimore, has already been substantially stated. The fact that the description of the lots conveyed by the deeds answers to the location and dimensions of the lots of corresponding numbers on the plat of 1845 might have been admissible, if followed up by other evidence of identity, as tending to show that it was the plat referred to in the deeds; but no such other evidence appears in the record. It is further to be observed that, although the memorandum on that plat said that it was a copy of a copy in the possession of the title company, none of the officers or employes of that company were put upon the stand to show the source from which it came. Even if the record had contained such evidence as the law requires to show a tender by the Canton Company of a dedication of the square to the public for a park, the uninterrupted, open, and adverse possession by inclosures of the square by that company from 1856 down to the institution of this suit would have formed an effectual bar to its maintenance. Even if we assume that the company, by the execution of deeds referring to a plat of its lands on which the square was designated as a public park, made an implied covenant with the purchasers to allow its use as a park from which an intent to make a dedication to public use was to be inferred, it remained in possession of the land as vendor. Under these circumstances, by repudiating the right of the public to use the square as a park, and excluding them from it by fencing it in and openly asserting the ownership of and title to the land and paying the taxes thereon, as the evidence shows the company did in this case, its possession became adverse, and at the expiration of 20 years ripened into a good prescriptive title. 1 Cyc. 1040; Waltemeyer v, **Baughman, 63 Md. 200.** Nor was the defense of adverse possession defeated by the execution of the mortgage to George S. Brown and others in 1873, first, because the adverse possession continued for more than 30 years after that date, and, secondly, because the covenants express and implied of that instrument ceased to be operative after its release, and there was prior to that time no acceptance on the part of the public of any dedication, which could have been inferred from the statements contained in the mortgage. As, for the several reasons mentioned, the record shows a good defense to the suit, we deem it unnecessary to pass upon the effect of the instrument in the nature of a disclaimer and revocation placed upon record in 1906 by the Canton Company. Turning now to the second issue presented by the appeal, the present action is not maintainable because an ejectment will not lie in this state for an incorporeal right or easement in land such as that claimed in the present case. The counsel for the appellee have cited upon their brief some decisions and text-writers holding that, where lands have been dedicated to public use, the municipality may maintain an ejectment therefor; but this court has uniformly held that the action will not lie, at the suit of one who has no legal title to the land, to recover a right of way or other easement. 1 Poe Pleading & Practice, § 261, and cases there cited. The law upon this proposition has been fully stated by us in the recent case of Nicolai v. Baltimore, 100 Md. 579, 60 Atl. 627, and no good purpose would be served by repeating here what we have there said.

The court below should, in our opinion, have taken the case from himself as a jury, by granting the defendant's first, second, and third prayers, and for his failure to do so the judgment must be reversed. Inasmuch as we have held that the present action cannot lie, we will not remand the case. ***685** For the same reason we abstain from passing in detail upon the other thirteen prayers, nine of which were offered by the plaintiff, and four by the defendant.
Judgment reversed, with costs, without a new trial.
Md. 1907.
Canton Co. of Baltimore v. City of Baltimore
106 Md. 69, 66 A. 679

END OF DOCUMENT

(C) 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.