C
121 Md. 366, 88 A. 342

Court of Appeals of Maryland.
MAYOR AND **CITY COUNCIL** OF **BALTIMORE**
v.
YOST.
YOST
v.
MAYOR AND **CITY COUNCIL** OF **BALTIMORE**.
June 26, 1913.

Appeal and Cross-Appeal from Baltimore City Court; Walter I. Dawkins, Judge.

Condemnation proceedings by the Mayor and City Council of Baltimore for the opening and widening of Bonner Road. From a judgment awarding damages to John S. L. Yost, an infant, both parties appeal. Affirmed.

West Headnotes

Dedication 119 ⚿15
119k15 Most Cited Cases
Intention of a landowner to dedicate land for use as a highway is essential, and, unless such intention is clearly shown, no dedication exists.

Appeal and Error 30 ⚿1031(4)
30k1031(4) Most Cited Cases
Where exceptions were taken to the court's refusal to permit a witness to testify as to his method of reaching the value of land sought to be condemned, but the record, without reciting the witness' testimony, stated that he subsequently testified as to his means of arriving at the value of the property, the ruling would be presumed harmless on appeal.

Eminent Domain 148 ⚿201
148k201 Most Cited Cases
In proceedings to condemn land for a street, evidence that, prior to the opening thereof, the whole tract was assessed for taxes, but after it was opened the assessment was removed from the bed of the road, but increased as to the remainder of the land, held irrelevant.

Eminent Domain 148 ⚿238(4)
148k238(4) Most Cited Cases
Where an appeal from an award to an infant in condemnation proceedings was taken by him, and the petition showed that he was the real party in interest and was proceeding by his mother as next friend, an amendment of the body of the petition for appeal so as to make it read that the mother was acting entirely as next friend of the infant and not in her own right was not objectionable as adding a new party in violation of Code Pub.Civ.Laws, art. 75, § 41.

Eminent Domain 148 ⚿238(4)
148k238(4) Most Cited Cases
An order allowing an amendment, of a petition for an appeal from an award of damages in condemnation proceedings in the exercise of the trial court's discretion is not reviewable.

Evidence 157 ⚿524
157k524 Most Cited Cases
In proceedings to condemn land to widen a street, the court properly permitted a question asked of a real estate agent offered as an expert, calling for his opinion as to the value of the land.

Trial 388 ⚿96
388k96 Most Cited Cases
A motion to strike evidence inadmissible only in part, is properly overruled, where it does not point out the particular evidence objected to.

***343** The following are the third, fourth, fifth, seventh, eighth, and fourteenth prayers of the city referred to in the opinion:

"No. 3. The court instructs the jury that, in making up their award of damages (the only matter for their inquiry is), the jury is to determine

the value of the appellant's interest in the property to be taken for the proposed condemning and opening of Bonner Road, and in determining the amount of said damages they are not at liberty to indulge in vague speculations or conjecture but shall allow only such damages as they shall find, from the evidence, is the fair market value of the appellant's interest in said property to be taken, at the present time, in its present condition, at a fair and not at a forced sale." Granted.

"No. 4. The city prays the court to instruct the jury that, in estimating the damages to be awarded to the property owner, they can only award him the fair market value of his interest in the property of which the part to be taken for the proposed improvement is part, less the fair market value of his interest in so much thereof as will remain after the opening of Bonner Road." Granted.

"No. 5. The court instructs the jury that, if they shall find that the amount of damages awarded to the appellant for his interest in the property to be taken for the condemning and opening of Bonner Road is more than the fair market value of said interest in said property at the present time, in its present condition, then the jury have the right, and it is their duty, to reduce said award to an amount equal to a fair market value of the appellant's interest in said property at the present time, in its present condition, at a fair and not at a forced sale." Granted.

"No. 7. The court instructs the jury that, if they shall find from the evidence that the property of the appellant abutting on Bonner Road, mentioned in the evidence, after the same is condemned and opened, will be benefited by said condemning and opening as a public road or highway, then they are to assess such benefits against said property as it is, in their opinion, from the evidence fairly and reasonably apparent that said property of such abutting owner will receive from the proposed improvement, ***344** other than the general benefit to the community at large." Granted.

"No. 8. The court instructs the jury that the measure of damages of the property here being condemned is the fair market value thereof as it stands now between a purchaser willing but not anxious to buy and a seller ready but not compelled to sell." Granted.

"No. 14. The court instructs the jury that by the true construction of the several deeds from Nellie Bonner Yost to Mrs. Moog, Mr. Miller, et al., Trustees, Gladys D. Yost, John T. Ford, and Mabel B. Yost, respectively, offered in evidence, the grantees therein and their assigns are entitled to the use of the bed of Bonner road, as mentioned and called for in said deeds, for the use and benefit of the lots fronting thereon, respectively; and the appellant in this case can therefore only recover such damages for the land lying in the bed of Bonner road, mentioned in said deeds, as the jury may find the said John S. L. Yost will sustain by the condemnation of said bed of Bonner Road as a public highway, taking into consideration the fact that he holds the bed of said road subject to said right of way." Granted.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

Benjamin H. McKindless, of Baltimore, for Mayor and City Council of Baltimore. Clifton S. Brown, of Baltimore, for John S. L. Yost, infant.

PATTISON, J.
This is an appeal and cross-appeal from an inquisition of a jury in the Baltimore city court allowing damages and assessing benefits to John S. L. Yost, an infant, in condemning, opening, and widening Bonner Road, located within the limits of Baltimore city.

The first exception is to the action of the court in permitting an amendment to the petition by which an appeal was taken from the award of the commissioners for opening streets.

[1] The caption of said petition when filed was, "John S. L. Yost, by Nellie B. Yost, Next Friend, v. Mayor and City Council of Baltimore," and the name of the petitioner, as therein stated, was "Nellie B. Yost." To the petition was attached an affidavit to the truth of the matters and things therein alleged, made by Nellie B. Yost, "as Next Friend." A motion was made by the plaintiff in open court "to amend the petition in the body thereof by interlineation, by adding before the name of Nellie B. Yost the words 'John S. L. Yost, Infant, by,' and after the name of Nellie B. Yost the words 'Next Friend,' so that it will read, 'John S. L. Yost, Infant, by Nellie B. Yost, Next Friend."' A motion had previously been made by the mayor and city council of Baltimore to dismiss the petition. The latter motion, however, was overruled and the amendment asked for permitted to be made.

It is contended by the defendant, the Mayor and City Council of Baltimore, that, as shown by the petition aforesaid, the appeal was not taken in the name of the infant by his mother, Nellie B. Yost, as next friend, but by her individually, and that by the amendment an entire new party plaintiff was introduced or made, in violation of section 41 of article 75 of the Code of 1912. We cannot agree with the defendant in this contention. It should be borne in mind that it was to the infant, John S. L. Yost, the owner of the property affected by the opening and widening of said road, and not to the mother, Nellie B. Yost, that damages were allowed and benefits assessed. She was in no way interested in or affected by the award appealed from except as mother of the infant plaintiff, and she could not in her own right appeal from said award, as to such appeal she could only act as the next friend of the infant. It is true we find that the petition is signed by her and that her name appears therein as petitioner, but we also find attached to said petition the affidavit made by her "as next friend"; and in the caption of the petition the plaintiff or petitioner is named as "John S. L. Yost, by Nellie B. Yost, Next Friend." To us it is sufficiently shown by the petition, when considered as a whole, in connection with the proceedings of the commissioners and the purpose for which it was filed, that the appeal was taken in the name of the infant by the mother as next friend. The effect of the amendment was not to make an entire new plaintiff, as contended by the defendant, but to make all parts of the petition conform to the fact shown by it that the appeal was taken in the name of John S. L. Yost, Infant, by Nellie B. Yost, Next Friend.

[2] The court acted within its power in permitting the amendment to be made, and therefore it is not the subject of exception nor of review by this court. Thillman v. Neal, 88 Md. 525, 42 Atl. 242.

In this case Nellie B. Yost acquired the lands on both sides of what is now Bonner Road, as well as the bed of said road, between Garrison avenue and Winfield avenue, by deed from Fielder C. Slingluff and Frank Slingluff, trustees, dated April 15, 1901. Upon this land she built a dwelling near Winfield avenue and opened a road or lane 20 feet in width over said lands leading to it from Garrison avenue and called it Bonner Road. Later she built a second house, adjoining the one in which she lived. This she sold in 1903 to Mrs. Wilhelmina Moog. In the deed to her the property is described as the lands on the south side of Bonner Road, and in it there is no reservation of Bonner Road from dedication. Later she sold and conveyed other lots south of Bonner Road and binding upon it, two in 1905 and one in 1906. Each of these deeds contained ***345** a clause reserving the road from dedication. In 1906 she conveyed to her daughter, Mabel B. Yost, a lot on the north side of Bonner Road. At the same time she conveyed unto her son John S. L. Yost, the remainder of said lands on the north side of said road, and later, in 1910, she executed a confirmatory deed to her son, the necessity for which arose from some error or irregularity in the

description contained in the first deed. The description of the land in the two deeds to her son included the entire bed of Bonner Road, except that which passed to her daughter under the deed above mentioned.

In 1911 the city determined to open and widen Bonner Road for public use, and condemnation proceedings were accordingly instituted. In these proceedings Bonner Road was regarded as having a width of 40 feet and was to be widened 10 feet, making it thereafter 50 feet in width. For the strip of land 10 feet in width extending a distance of 300 feet, to be used for widening said road, and designated in the proceedings as lot B, John S. L. Yost was awarded the sum of $500, and for the strip of land 20 feet wide, designated as lot E, lying immediately south of lot B, and regarded in the proceedings as the northern half of Bonner Road, he was awarded the sum of $1, and the remaining portion of his land was assessed, for benefits, the sum of $300. The rights of the plaintiff, if any he had, in the southern half of Bonner Road, as mentioned in the condemnation, do not seem to have been considered, or, if so, no damages were awarded to him therefor. Upon appeal to the Baltimore city court, John S. L. Yost was awarded by the jury for both lots (B and E) $1,351, and was assessed, for benefits, the sum of $300.

It is contended by the city that Bonner Road, of the width of 40 feet, was dedicated to public use by Nellie B. Yost by the aforesaid conveyance to Wilhelmina Moog, in which the lot of land so conveyed is described as *binding* on Bonner Road, and in which deed there is no clause reserving the road from dedication, and that by reason of such dedication the plaintiff is entitled only to nominal damages therefor. It is upon this deed that the defendant chiefly relies to establish the dedication of the road of the width of 40 feet to public use.

The plaintiff contends, however, that there is no implied covenant to be found in said conveyance by which Bonner Road was to be dedicated to public use, inasmuch as there was no map or plat upon which the said road was located or designated in existence at the time of said conveyance, and that without such map or plat the language found in the deed describing the lot conveyed as binding on Bonner Road could not have the effect sought to be given to it by the defendant. The record does not disclose that there was such a map or plat.

This court has said in the case of White v. Flannigain, 1 Md. 540, 54 Am. Dec. 668, and in a number of subsequent cases: “That where a party sells property lying within the limits of a city, and in the conveyance bounds such property by streets designated as such, *in the conveyance*, or on a map made by the city, or by the owner of the property, such sale implies, necessarily, a covenant that the purchaser shall have the use of such streets.” Moale v. Mayor, etc., 5 Md. 321, 61 Am. Dec. 276; Clendenin v. Md. Cons. Co., 86 Md. 83, 37 Atl. 709; Hawley v. Mayor and City Council of Baltimore, 33 Md. 280, and others.

The plaintiff, in support of his contention, has referred us to the cases of Mayor and City Council v. Frick, 82 Md. 83, 33 Atl. 435, Canton Co. v. Mayor and City Council, 106 Md. 69, 66 Atl. 679, 67 Atl. 274, 11 L. R. A. (N. S.) 129, and Mayor and City Council v. Northern Central Ry. Co., 88 Md. 427, 41 Atl. 911. In the first of these cases the court said: “The settled rule appears to be, if the lot is described as fronting or binding on a street which is designated on a public map or private plat, such description and calling for an unopened street raises an implied covenant that such right of way exists.” And in the last of these cases this court, through Judge Pearce, said one of the essential elements or conditions of such a dedication is “a street designated on a (map or) plat made or adopted by the party himself as passing over his lands.”

In the above-mentioned cases there were maps and plats, and the court in what it said in those cases had reference to the facts which were at such times before it. And in those cases we do not understand the court to have said that without a map or plat an implied covenant to dedicate a road or street to public use could not arise from a grant of land described as binding on such road or street, if at the time said road or street was actually opened or laid out, with a clearly defined width and capable of definite location and description.

[3] In such cases, however, the location of the road and such other facts as might be necessary in each particular case to arrive at the intention of the grantor in relation to the land or extent of land that was intended by him to be dedicated should be clearly proven, for the intention of the owner to dedicate his land to such use is absolutely essential, and unless such intention is clearly shown no dedication exists. Pitts v. Baltimore, 73 Md. 332, 21 Atl. 52; Glenn v. Baltimore, 67 Md. 390, 10 Atl. 70; McCormick et al. v. Baltimore, 45 Md. 524; Tinges v. Baltimore, 51 Md. 609; Bloede v. Mayor, etc., 115 Md. 594, 81 Atl. 67; Baltimore v. Northern Central Ry. Co., supra, and others.

In the deed to Mrs. Moog the land conveyed is simply described as binding on Bonner Road. The road is not further described or ***346** referred to, and the only evidence as to its width is that of Mrs. Yost, who testified that it was opened and laid down by her of the width of 20 feet. It may be that the road has since been widened to the extent of 40 feet for the use of those living upon the road; but, if so, there is nothing, so far as disclosed by the record, showing that such widening was a dedication to public use, for the evidence discloses that before, at the time of, and long subsequent to the conveyance to Mrs. Moog this road was closed by fences, gates, and ropes placed at Winfield and Garrison avenues, and whatever travel there was upon the road by the general public was against the strong protest of Mrs. Yost, acting for herself so long as she was the owner of the land and for her son after he became the owner of it. She states in her testimony that she put up fences across Bonner Road at Garrison and Winfield avenues and they were knocked down; she replaced them and they in turn were destroyed; at other times she put up gates, locked them, and gave keys to those living on the road, entitled to its use, and these gates too were destroyed; she also used ropes to prevent public travel upon this road. These efforts to prevent the public use of this road continued so late as 1911, the year in which these proceedings were instituted. She also during this period of time warned all persons, other than those residing on the road, from using the road, and where she could she stopped them.

It was said in the oral argument by counsel for the city that he understood it to be a concessum that the width of the road was 40 feet. But in the brief of the plaintiff we find this language: “We cannot conceive how it can be argued that it was then 40 feet wide, in the absence of any testimony to that effect, especially as Nellie B. Yost testified: ‘We built a road 20 feet wide from Garrison avenue to get in.’ How can it be assumed that the Bonner Road called for in the Moog deed was not this 20-foot road, and, if so, this would be the road which was dedicated, and the northern half of the present Bonner Road, now 40 feet wide, would still be not dedicated, and it was only for the northern half that any damages were asked.” Therefore we must consider the case as we find it presented to us by the record.

The only evidence as to the width of Bonner Road is that of Mrs. Yost, and she says that it was laid out by her 20 feet wide. If the road has since been widened, there is no evidence that it had been done at the time of the conveyance to Mrs. Moog. It has not been shown that at the time of such

conveyance the road was more than 20 feet in width, and the burden was upon the defendant to prove this fact. If the road at such time was but 20 feet wide, the 20 feet of land now spoken of as the northern half of said road was not then in the bed of the road and could not have been dedicated under the grant to Mrs. Moog, and, as we have already said, there is no evidence showing that it has otherwise been dedicated.

There is no dedication of the above-mentioned strip of land 20 feet in width, whatever conclusion might be reached as to the remaining 20 feet of the road, which we are not called upon in this case to decide. And having reached this conclusion there is no need of our passing upon any of the exceptions of the city except those touching the question of damages and benefits.

The only granted prayer of petitioner affecting the question of damages is the fourth, which states the measure of damages as to the 10-foot strip of land to be used in widening Bonner Road. By it the court was asked to instruct the jury: "That in awarding damages to the petitioner they must take into consideration the value of his property before Bonner Road has been widened 10 feet, and the value of said property after it has been widened 10 feet, and the measure of damages is the difference between what they find the aforesaid value to be." In connection with this prayer the court granted the third, fourth, fifth, seventh, eighth, and fourteenth prayers of the city, which the reporter is asked to insert in the statement of the case.

The law of this case as to the damages to be allowed and the benefits to be assessed as presented by the petitioner's fourth prayer and the city's granted prayers as stated above is in our opinion as favorable to the city as could be asked for by it.

[4] After the witness Coale, a real estate agent, had testified as an expert to the value of the strip of land 20 feet wide, forming the northern half of Bonner Road, subject to the rights of the grantees of Mrs. Yost to use the same, he was asked the value of the 10-foot strip which was to be used in widening the said road. The question was objected to by the city, and, the objection being overruled, the twenty-fifth exception was taken, which is the first exception to the testimony touching upon the question of damages or benefits. The twenty-sixth exception is upon the ruling of the court in permitting the witness Bond, also a real estate agent, to be asked the value of the 20-foot strip of land. If to these questions the witnesses gave their estimates of the value of the lands mentioned, it was open to the city upon cross-examination to inquire of them how and in what manner they arrived at such valuations, and to ascertain whether the methods by which they arrived at such valuation were the prover methods to be employed in such cases, and also to inquire as to the facts considered by them in arriving at such estimates of value.

[5] The objections are to the questions and not to the answers, and we can discover no reversible errors of the court in permitting ***347** the questions to be asked, nor do we find any reversible error in the ruling of the court upon the twenty-seventh exception. In the twenty-eighth exception the court was asked to strike out all testimony of the witness Bond "in reference to the value of the road or any land forming the bed or a portion of the bed of Bonner Road." This the court refused to do, and we find no error in its ruling thereon. There was at least some evidence that was properly admitted, that was by this motion asked to be stricken out. Jessup v. State, 117 Md. 122, 83 Atl. 140.

[6] The twenty-ninth exception is to the ruling of the court in striking out the testimony of Clarence W. Biddle, assistant clerk to the appeal tax court, who testified that prior to the opening of Bonner Road the whole tract was assessed for taxes; and that after it was opened the assessment was

removed from the bed of the road but increased as to the remainder of the land. On cross-examination he admitted that the beds of private streets or roads were no longer taxed or assessed, and therefore there was no distinction between this road and other private roads in respect to assessments. Upon the motion of the petitioner this evidence was stricken out. Bernard was subsequently put upon the stand, and the offer was made to show by him the reason that Bonner Road was not assessed (that is, the land forming the bed of the road), but he was not permitted to testify in relation thereto. This forms the thirtieth exception. In these rulings we think the court committed no error. We cannot see the force and effect of this testimony, if admitted, upon the issues here presented, especially in view of the fact that we hold there was no dedication of the strip of land concerning which the inquiry was made.

[7] The thirty-first, thirty-second, and thirty-third exceptions are to the rulings of the court in not permitting certain questions to be asked the city's witness Bernard as to his method of reaching the value of the land sought to be condemned. The record discloses, without stating what was said by the witness, that he thereafter testified as to the value of the property to be taken by the city, the benefits to the remaining portions of the property of the petitioner, and as to his "means of arriving at the value of the same." We are therefore unable to say that the city is injured by these rulings, for it may be that he was therefore permitted, in stating the means or methods by which he arrived at such valuation, to give in evidence that which was excluded by the rulings complained of, and therefore we cannot say that such errors, if errors at all, were reversible errors. What we have said as to the thirty-first, thirty-second, and thirty-third exceptions also applies to the thirty-fourth and thirty-fifth exceptions.

In the cross-appeal of the petitioner there are but two exceptions, one to the admission of testimony and the other to the ruling of the court upon the prayers. We will, however, not discuss or pass upon the rulings of the court presented by these exceptions, for it is apparent to us from an examination of the whole case that the rulings complained of have worked no injury to the petitioner, and, should it be held that the court has erred in either or both of these rulings, there is no reversible error. W. U. Tel. Co. v. Lehman, 105 Md. 452, 66 Atl. 266. The judgment appealed from will be affirmed.

Judgment affirmed, with costs to the appellee in each appeal.

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