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124 Md. 620, 93 A. 144

Court of Appeals of Maryland.
MAYOR AND **CITY COUNCIL** OF **BALTIMORE** et al.
v.
CANTON CO. OF **BALTIMORE**.
No. 21.

Jan. 11, 1915.
Rehearing Denied March 2, 1915.

Appeal from Baltimore City Court; James P. Gorter, Judge.

"To be officially reported."

Condemnation proceedings by the Mayor and City Council of Baltimore and others against the Canton Company of Baltimore. From a judgment of the Baltimore city court on appeal from the commissioners for opening streets, awarding substantial damages to defendant, the City appeals. Affirmed.

West Headnotes

Dedication 119 ⚿29
119k29 Most Cited Cases
Where land dedicated as a street was continuously used by adjoining owners for others purposes for more than 67 years, there was no acceptance of the dedication.

Dedication 119 ⚿31
119k31 Most Cited Cases
The dedication of a street to public use by plats and deeds does not make it a public highway until there has been an acceptance of it by the authorities.

Dedication 119 ⚿35(3)
119k35(3) Most Cited Cases
Acceptance of the dedication of a street may be implied from repairs knowingly made or paid for by the proper authorities.

Dedication 119 ⚿37
119k37 Most Cited Cases
Acceptance of the dedication of a street may be implied from long user by the public.

Dedication 119 ⚿39
119k39 Most Cited Cases
A city held estopped, by the assessment and collection of taxes upon a strip dedicated as a street, from thereafter accepting the dedication.

Easements 141 ⚿30(1)
141k30(1) Most Cited Cases
Nonuser for the prescriptive period, united with an adverse use by the servient estate inconsistent with an easement, extinguishes the easement.

Trial 388 ⚿386(1)
388k386(1) Most Cited Cases
In condemnation proceedings tried to the court, where the facts are controverted, it is proper practice for the court to instruct itself as to the legal effect of certain facts.

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

Robert F. Leach, Jr., Asst. City Sol., S. S. Field, City Sol., and Benjamin H. McKindless, Asst. City Sol., all of Baltimore, for appellant. John G. Schilpp and R. E. Lee Marshall, both of Baltimore (Arthur George Brown, of Baltimore, on the brief), for appellee.

BRISCOE, J.
The questions in this case are presented on an appeal by the mayor and city council of Baltimore from an award and a judgment of inquisition rendered by the Baltimore city court in favor of the Canton Company of Baltimore, the appellee here, in the matter of the condemning and opening of Linwood avenue from Boston street to the waters of the Patapsco river, in Baltimore city.

The strip of land in controversy is about 60 feet wide by 300 feet long, and was condemned by the commissioners for opening streets under and by authority of Ordinance No. 284 of the mayor and city council of Baltimore, approved June 9, 1913, which provided for its taking and condemnation for use as a public street. The amount of damages awarded to the appellee, on appeal from the action of the commissioners for opening streets to the Baltimore city court, was increased from the nominal sum of $5 to the sum of $15,000, and from this award and judgment this appeal has been taken.

It is conceded, in the appellant's brief, that the amount of the award of damages made by the inquisition in the court below ***145** is correct and free from objection, if it be held, under the law and the facts of the case, that the appellee is entitled to more than nominal damages, as ascertained by the commissioners for opening streets.

The record is a voluminous one, and contains a large amount of testimony bearing upon the various questions raised in the court below. There are 29 bills of exceptions, embracing the rulings of the court in the course of the trial. The main and controlling questions presented on the record, are: First, whether the land in question was ever dedicated or offered for dedication as and for a public street; second, assuming there was a dedication of the street to the public, by the Munson deed in 1846, was there ever an acceptance of it by the municipality; and, third, whether the appellee is now, or ever was, the owner of the land in question.

[1] It may be conceded, under the facts of this case, that the land in controversy was dedicated as and for a public street by reason of the description contained in the map and deed from the Canton Company to Alfred Munson dated May 1, 1846, as contended for by the appellant, but this alone would not constitute it a public highway.

In the recent case of Whittington v. Commissioners of Crisfield, 121 Md. 392, 88 Atl. 232, this court said, following the rule established by a long line of decisions upon this subject, that a dedication of a public street to public use by the plats and deeds does not make the street a public highway. Such a deed does not become final and irrevocable until there has been an acceptance of it on the part of the public authorities. McCormick v. Baltimore, 45 Md. 524; Kennedy v. Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346; Valentine v. City of Hagerstown, 86 Md. 488, 38 Atl. 931.

The evidence fails in this case to disclose any such acceptance by the municipality, the appellant here, of the land in question, as the law requires, and the court below, we think was entirely right in finding, upon the facts, that the appellee was entitled to recover substantial damages for the condemnation of the land for public purposes.

The court's instruction, in connection with the granted prayers, we think, stated the law applicable to the case, as recognized by the authorities in this state. It is as follows:

> "The court declares the law that, notwithstanding the court finds there was a dedication of the property in controversy by the deed from the Canton Company to Munson in 1846 and the plat of 1845, still, if the court, sitting as a jury, shall find from the evidence that taxes were assessed upon and against the property in controversy, and were paid by the petitioner during the times mentioned in the evidence-viz., from 1876 to the present time-and shall further find that from the year 1874 to the year 1896 the premises in controversy were occupied by a tenant of the petitioner, in the manner testified to by the witness McCosker, and shall further find that from 1896 to 1901 the said premises were in the possession of the petitioner as owner thereof, and shall further find that from the year 1901 to the year 1912 the

said premises were occupied by a tenant of the petitioner, in the manner testified by the witness Rohde, and shall further find that in or about the year 1883 the premises were inclosed by a fence along Boston street having gates in it, and that said premises from the time of the erection of said fence to the present time have been occupied by tenants or agents of the petitioner, and the said gates have been until recently opened by the permission of the petitioner or its tenants or agents, respectively, or for the prosecution of its or their business, and that said occupation by the petitioner and its tenants has been open, notorious, exclusive, and adversary from 1874 to the commencement of the proceedings in this case against the defendant and every other person, and if the court, sitting as a jury, finds that the purposes of right and justice require, then the defendant is estopped from asserting any right to said property, and the petitioner is entitled to substantial damages."

[2] The court below, it will be seen, properly instructed itself, sitting as a jury, in its rulings upon the prayers, what facts it was necessary to find in order to entitle the petitioner to recover in the case.

In Kennedy v. Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346, it is said this is quite in accord with the practice in this state in similar cases where the facts are controverted or in dispute. The court in such cases leaves the finding of the facts to the jury with appropriate instructions as to their legal effect, according as the jury may find them to be. And there is good reason why this rule should be applied in cases like the present; for, if the question of acceptance or adoption vel non should be left broadly to the finding of the jury, it would follow that the liability of a county or municipality would be left in uncertainty, depending upon the varying verdicts of different juries upon the same state of facts, instead of being, as it should be, settled and fixed by the law as declared by the courts.

[3] In Pope v. Clark, 122 Md. 9, 89 Atl. 389, it is said:

"Not only is *** an acceptance necessary, but it must be proved by the party who asserts the way to be a public way, and it may be proved, when express, by the records, or it may be implied from repairs made and ordered or knowingly paid for by the authority which has the legal power to adopt the street or highway, or from long user by the public." State v. Kent County, 83 Md. 377, 35 Atl. 62, 33 L. R. A. 291; Canton Co. v. Baltimore, 106 Md. 69, 66 Atl. 679, 67 Atl. 274, 11 L. R. A. (N. S.) 129; Story v. Ulman, 88 Md. 246, 41 Atl. 120.

[4] In the late case of Baugh v. Arnold, 123 Md. 7, 91 Atl. 152, it is said:

"The law as established in this state (Canton Company v. Baltimore City, 106 Md. 69 [66 Atl. 679, 67 Atl. 274, 11 L. R. A. (N. S.) 129]), and elsewhere is that the mere nonuser of an easement even for more than 29 years will not afford a conclusive evidence of abandonment, but 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."

***146** [5] The record in the case not only fails to disclose any evidence legally sufficient to show any acceptance by the city of the street, but the assumed easement has never been used as a street, from 1846, the date of the Munson deed, to the present time, covering a period of over 67 years.

The locus in quo was rented by the appellee in 1874 to one McCosker, at an annual rental of $200, and from that time to 1896, a period of 22 years, the premises were used and occupied by the tenant as a shipbuilding yard, and the rent paid therefor. The tenant McCosker in 1883 built a fence along the line between the property in question and the south side of Boston street, and

this fence was maintained by the appellee as the owner of the land from 1896, when McCosker moved away, until 1901, when the premises were again rented as a shipbuilding yard to one Rohde, and occupied as such by him until 1913.

It is stated in the appellee's brief, and supported by the proof, that from 1884, to the present day the property in controversy has been inclosed on all three sides by fences, from Boston street to the water front; and, in addition, the owners and occupants on both sides of the property have recognized and assented to the use and occupation of the strip in controversy for private business purposes, by themselves leasing a portion of their own properties in aid and furtherance of the prosecution of the business conducted in and about said strip by the tenants of the Canton Company. There has been no such user of the street by the public for the length of time required as would constitute it a public highway by prescription. On the contrary, there has been a complete nonuse of the easement either by the covenantee or any one else.

In Vogler v. Geiss, 51 Md. 407, this court said:

> "A cesser of the use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as an express release of the easement, without any reference to time." Barnett v. Dickinson, 93 Md. 267, 48 Atl. 838.

[6] But, apart from this, it appears from the records and plats of the appeal tax court that the city has assessed this property and collected taxes upon it since 1876, a period of more than 38 years. The locus in quo was included in the land belonging to the Canton Company, and assessed for taxation from 1876 to the reassessment of 1896, and in 1896 the premises were assessed to the Canton Company as a separate lot, and taxes paid thereon upon an assessed valuation of $14,117 until 1913. In 1913, at or about the same time that the commissioners for opening streets condemned the premises for $5, the appeal tax court reassessed the locus in quo, and notified the Canton Company of their purpose to increase the assessment from $14,117 to $25,308. There is also evidence tending to show that the city never at any time or in any manner attempted to exercise control over the property. The premises were never paved or repaired, nor were they lighted or patrolled.

Apart from any other consideration, we think, the city, under the facts and circumstances of this case, is estopped from now asserting any right to the property here in question, and from now accepting the assumed dedication. Whittington v. Com'rs of Crisfield, 121 Md. 388, 88 Atl. 232; Dillon, Municipal Corporations (4th Ed.) § 675.

There is no evidence to support the appellant's contention of want of title to the property in the appellee, and, as its title is sufficiently established by the evidence, we need not discuss this objection.

From the views we have expressed it follows there was no reversible error in the rulings of the court upon the prayers.

There were 28 exceptions taken by the city in the course of the trial to the rulings of the court, upon various motions and upon the admissibility of evidence. It is stated in the appellant's brief that the disposition of the questions raised by these exceptions will follow the ascertainment of a correct conclusion on the two main and controlling questions in the case, and that the city's case will be presented from that point of view rather than in detail with regard to each of the particular bills of exception.

We have examined these exceptions, and do not consider it necessary to comment upon them, particularly or in detail. We find no reversible error on these rulings, and what we have said on the main questions presented by the record is

sufficient to dispose of them.

The order and judgment of inquisition will be affirmed.

Rulings affirmed, with costs.

Md. 1915.
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