1859

Brief of T.M. Cooley, Cook and Waldron v. Hillsdale, 1859

Thomas M. Cooley

JULY TERM, 1859.

SUPREME COURT:

State of Michigan.

JOHN P. COOK and HENRY WALDRON,

vs.

THE VILLAGE OF HILLSDALE.

BRIEF OF T. M. COOLEY,

For Complainants.

ADRIAN,
PRINTED BY S. P. & A. JERMAIN.

1859.

SUPREME COURT.

JULY TERM, 1859, AT LANSING.

JOHN P. COOK AND HENRY WALDRON, APPELLEES,

vs.

THE PRESIDENT AND TRUSTEES OF THE VILLAGE OF HILLSDALE,

NELSON SHATTUCK AND CHARLES W. PETERSON, APPELLANTS.

APPEAL FROM HILLSDALE CIRCUIT IN CHANCERY.

John P. Cook and Henry Waldron are owners of a mill lot in the Village of Hillsdale, upon which is situated a grist mill, operated in part by steam, and in part by water power. The lot embraces a single acre only, through which runs the mill race; and is as small as can be conveniently used for their purposes.

The quarter section line between the north and south halves of the section, runs through this lot. The mill was built upon it in 1838, previous to which time, John P. Cook, Chauncey W. Ferris, Salem T. King, Hiram Greenman, William E. Boardman, Joel McCollum, and Lonson G. Budlong, were tenants in common of the land south of this quarter line; and Cook, Ferris, McCollum and Rockwell Manning, of that north of the line. Cook and Ferris built the mill, taking deeds from the other owners of the mill premises, the most of which were procured the year the mill was built. Cook and Ferris continued to own and operate the mill until April 22, 1851, when Ferris sold to Waldron, and Cook and Waldron have ever since owned the mill, and carried on the milling business in it.

July 11, 1839, the original plat of the Village of Hillsdale was laid out, all the owners of the land on the north of said quarter section line joining in it. It was acknowledged, but the acknowledging officer attached no seal to his certificate. It was afterwards recorded, and we make no question that it has since been recognized by all the proprietors, by deeds given by them referring to the record. On this plat (a copy of which is attached to the case) a street called "Bacon Street," is marked, which defendants claim passes through the mill acre. It is upon the quarter section line so far as it goes. The side lines are not carried across, but only to, the mill lot on the map, and the words "Ferris & Cook's mill site," are written in the line of the street upon the premises. The description attached to this plat gives no *termini* of Bacon street, nor is there anything in it, as we claim, that fairly includes this land within the village plat. The lands intended to be included are particularly described, and the mill premises are marked upon the map simply to show the connection of the plat with the surrounding territory.

June 19, 1843, the proprietors of the land south of the quarter section line laid out the South Addition to Hillsdale. This plat, as to acknowledgment, record and recognition, is in the same position as the other. The mill premises are shown on this map also, but a line is drawn around them, and they are designated as "mill site." Only one line of Bacon street is marked out, but in the description attached to the map it is said "Bacon street is on the quarter line of said section, and is four rods in width—two rods on each side of the line." This, as we understand, is claimed by defendants as recognising, and dedicating to the public, a street along the whole quarter line, and, of course, through these premises. A number of lots are also bounded on Bacon street.

Bacon street was opened and used by the public immediately after the first platting, from Broad street west, and from Short street east. From Broad street to the mill lot there is a rapid descent. At the foot of this is the race, running north. Cook street starts from Bacon at Broad, passes on the north side of the mill to Short street, which leads into Bacon east of the mill. Bacon street extended across the mill lot would leave the mill in the little triangle between it, and Cook and Short streets.

From the first building of the mill, the proprietors have used the whole mill acre for their purposes—some of the the time occupying that portion claimed as street with wood, and sometimes with hog pens. For several years past, finding the public disposed to drive into the race to water their teams, and that the water was thereby rendered unfit to use in their boilers, the proprietors have been accustomed to fence across the west side of the race for a portion of the year. The public have never used a way across here, and probably a single team never passed over the *locus in quo*.

In or about February, 1858, the village authorities directed Bacon street to be opened through the mill lot, claiming it as dedicated by the said maps, and by acts of the proprietors *in pais*. Shattuck, the Village Marshal, was agent of the Village for this purpose, and Peterson took a contract for constructing a bridge over the race. On proceeding to act, they were restrained by temporary injunction, which was made perpetual on the final hearing. Defendants appealed.

There is no evidence that the public ever claimed a way over these premises prior to this action of the Village authorities, and the evidence in the case is so brief, and so entirely harmonious, that the Court can have little difficulty about the *facts*, however it may be with the law as applicable to them.

The only question to be considered then, is whether a public way has ever, by the act of Ferris & Cook, or of Cook & Waldron, been constituted over the mill premises now occupied by the complainants.

It is claimed by defendants that such way has been constituted:

1st. By Ferris & Cook uniting in the original plat of the Village of Hillsdale, and in the plat of the South Addition thereto; and, if these are insufficient of the purpose, then

2d. By their acts *in pais*.

As to the claim under the plats, we have to say, that, though not acknowledged in accordance with the statute, we shall make no question here but that they should, after having been recognized by the deeds of those signing them, have the same effect as though properly acknowledged. But they do not carry Bacon street through these premises.

I

To give a town plat the effect to vest rights in the public, an intention so to do must clearly and distinctly appear on the plat itself. This intention must not be left to mere inference. The statute has required the utmost particularity in such cases, requiring actual boundaries, courses, extent, and object to be stated.

Comp. L. § 1133.

II.

So far, in this case, from either of these plats showing clearly on their face an intention to lay a street through this land, they clearly and unequivocally show a contrary intent.

1. The first gives no boundaries, courses or extent, which carry Bacon street across the land.

The lines on each side the street are not carried across it, and though lines are not drawn on the easterly and westerly sides of the mill site, any inference that could be drawn from this, in favor of a street over the premises, would extend to the whole mill acre.

The words "*Ferris & Cook's Mill Site*," are written on the map across the premises, exactly where the street would go if extended.—And this, as if to negative any presumption that a street would be permitted to cross. Looking only at the plat—and it is to this only that we are to look, in considering this branch of the case—one has as much reason to expect to find the mill, on going on the premises, situated in the middle of what is claimed as a street, as to find it on any other part of the mill acre.

A fair construction of the explanations attached to the plat would not, except as to lot 12, extend it south of Cook street. Such, we contend, was clearly its limit. All that is shown by the map beyond, is for the purpose simply of showing the connection of the plat with the surrounding lands. All the lands intended to be included, are marked into lots numbered consecutively, and a strong inference against an intention to include this land is thereby furnished.

2. The second plat recognizes Bacon street, but, like the first, gives

no courses, boundaries or extent, which carry it across this land.

Lot 98 is described as being in the corner of Broad and Bacon streets. So, in fact, it is, and is bounded on Bacon street for more than half its distance. But while the description says this lot has ten rods on Broad street, nothing is said of its lying the whole length on Bacon street, as would have been done were that the fact.

So lots east of the mill are bounded on Bacon street, and clearly recognize the street there.

But lest any inference should be drawn that it was intended to carry it over these premises, lines are drawn around them, clearly cutting them off from the street; and they are designated on the plat, as private property—as a "mill site."

3. But each of these plats, failing to describe this street by boundaries, courses and extent, fails to constitute it, *ipso facto*, under the statute, a street. Any inference that may be drawn from them, in favor of an intention to give a street here, is an inference that can only be taken into account in considering the question of dedication.

IV

But were here an actual dedication of the land to the public, in a manner that made it *instanter* a public way, we submit that under the law then in force, it long since ceased to be a public way, for any purpose whatever.

R. S. 1838, p. 127 §41.

The street here would have been a mere town way; the village was not incorporated, and the road could only be opened for use as a town road, and by the township authorities. We submit that this provision applies to all town ways, however constituted.

The question is not now whether private individuals may not have acquired rights of private way over the premises—this may and often does occur from the selling of lots with reference to a plan, without the public thereby acquiring any rights whatever. The issue here is one of *public* way, and defendants can claim nothing from any private rights, if any should happen to appear in the case.

See Willoughby vs Jenks, 20 Wend. 96.
Clements vs. West Troy, 16 Barb. 251.

Again; if the statute did not make the neglect of the public to open and use this way, terminate the public right, the long acquiescence of the public in the private occupancy, is evidence of abandonment of so

satisfactory a nature as ought to be held conclusive.

Beardslee, vs. French, 7, Conn. 125.

V.

But has there ever been any actual dedication? Under the evidence in the case, any discussion of this question seems like taking up unnecessarily the time of the Court. A few elementary principles, it seems to us, will dispose of the whole question.

A dedication of a way, is a voluntary giving of the land for the purposes of the way.

Gould vs. Glass, 19 Barb. 179

The intention to dedicate must distinctly and unequivocally appear.

State vs Nudd, 23, N. H. 337.
Curtis vs. Keesler, 14 Barb. 511.
People vs. Beaubien, 2 Doug. Mich. 256.

The dedication is not complete until accepted by the public.

People vs. Jones, 6 Mich.
Kelly's case, 8 Grat. 632.
People vs. Beaubien, *ut supra.*
Oswego vs. Oswego Canal Co. 2 Seld. 257.

Until then it is a mere *offer* to the public; and it may be revoked at any time before the public have accepted the offer. There is no sound principle upon which it can be held, that an offer once made and not then accepted, is open forever.

In determining the question of dedication, all the acts of the proprietors having reference thereto, are to be considered together, and an inference of intent to dedicate, may be rebutted by acts evidencing a contrary intent.

Barraclough vs. Johnson, 8 Ad. & E. 99.
Trustees of British Museum vs. Finnis, 5 C. & P. 460.

Applying these principles to this case, it will appear:

1st. That there was never any *intent* to dedicate, but, on the contrary, a continued appropriation of the land to private uses, and, to all appearance, an intent to continue such private use permanently.

2. That the dedication, if offered to the public, was not accepted for upwards of 19 years, long before which time the proprietors had evidenced the withdrawal of the offer by using the land in a manner inconsistent with any presumption that they considered the offer any longer open.

3. That to negative any supposition that such offer, if ever made, was still open, they excluded the public wholly from the premises for a considerable portion of the year; and at all times so occupied the grounds as to give notice that they recognized no public rights where they are now claimed.

We submit, therefore, that so far from a dedication being proved, we have clearly and distinctly proved that none was ever made.

T. M. COOLEY,
Of Counsel for Appellees.