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IN THE

SUPREME COURT OF APPEALS

OF VIRGINIA

AT WYTHEVILLE

JUNE TERM, 1928.

DESSIE H. ST.CLAIR, ET ALS

Vs.

EDGEWOOD WATER WORKS CO., ET ALS.

From the Court of Law and Chancery of the City of Roanoke.

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AT WYTHEVILLE

JUNE TERM, 1928.

DESSIE H. ST.CLAIR, Et als.

vs.

EDGEWOOD WATER WORKS CO., Et als.

Petition to behear and review.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioners, Dessie H. St.Clair, et als., would respectfully represent that on the 20th day of September, at Staunton, this Honorable Court, by Justice Preston W. Campbell, handed down its opinion in the above-styled cause, affirming the decree entered in this cause by the Court of Law and Chancery for the City of Roanoke,

and thereby refused to afford your Petitioners the relief in this cause prayed for.

Your Petitioners would respectfully represent that this Honorable Court should grant your petitioners a rehearing and review of this cause, and they do hereby pray that a rehearing and review be granted them and they do now assign the following reasons therefor:

(1) The court in its opinion finds, that J. D. Logan, Caldwell and Peck purchased the fifty acre tract of land, which was sub-divided by the Edgewood Land Company, in 1907.

This is an error. Thistract of land was sold by R.W. Kime, Trustee, in the foreclosure of a deed of trust, September 26, 1908, and purchased at this sale by M. M. Caldwell, Trustee, who joined with Kime, Trustee, in conveying the lands to the Edgewood Land Company, by deed dated November 27, 1908. (See par. (3) of Bill, p. 36 and "Agreed Stipulations" par. (3), p. 154, of the record).

Up to this date it nowhere appears in the record that either Logan, Caldwell, Peck or the Land Company had any interest in these lands. The date of the charter

of the Land Company is October 3, 1908 and the date of its grant is October 13, 1908. (See par. (1) of Bill, pp. 35 and 36 and "Agreed Stipulations", par. (1), p. 154 of record).

(2) The Court also finds in its opinion (and properly so) that the Land Company caused a map and plat of these lands to be recorded in the Clerk's Office of Roanoke County October 13, 1908.

The date of the recordation of the map and plat and the date of the charter and the date of its grant, all are between September 26th, the date of the purchase by Caldwell, Trustee, and November 27, the date of the conveyance of these lands by Kime, Trustee, and Caldwell, Trustee, to the Land Company.

The attention of the court is here called to the facts set out in (1) and (2) hereof, as being very material upon the evidence of A. H. St.Clair wherein he says that he bought his first lot in the spring of 1907 and that the well was bored to a depth of 175 feet in the fall of 1907, the year before Kime, Trustee, sold and conveyed these lands to the Land Company.

It is true that, "the recorded map did not indicate the location of the tank and well, nor was there any retention by the Company of the land upon which they are located", for the simple reason that at the time the map and plat were recorded the well had not been bored nor had the tank been erected, and it is submitted that upon an analysis of the evidence of A. H. St.Clair it will be found that he is mistaken as to just when he bought his first lot and when the well was bored and the tank erected.

(3) The defendant corporation is the successor in title to the Land Company, with possibly the same officers, and could have shown from its own records or the records of the Land Company, just when the well was bored to the depth of 175 feet and when the tank was erected. Upon its failure or refusal so to do, the presumption arises that these records would show a different and later date as to when the well was bored and the tank erected.

(4) The Court in its opinion says, "a most careful examination of the record discloses that each of the appellants purchased their lots with the absolute

knowledge of the existence of the well and the original tank", and that, "we think the law is well settled that when one purchases land upon which there is an obvious, visible and well defined burden, he does so after full consideration of the effect the burden would have upon his land," and cites Chapin vs. Lake 116 Va. 364, as authority therefor.

It is most respectfully submitted that there is a clear and well defined distinction between that case and the one at bar.

From the facts found in the former case, it appears that the portions of the streets obstructed had never been opened or used as a street, that the parties to the suit and those under whom they claimed had for a number of years used and occupied their lots without regard to the streets; had built fences across and in the streets for grazing and farming purposes, with little or no regard to the streets; that the obstructions on the streets were there when the appellee acquired his title, except an addition or improvement in a cement wall on Virginia Avenue; that the obstructions placed

upon the streets by the appellant were for the most part, if not entirely, placed there after the streets used by Lake, the appellee, had been closed or obstructed; that no objection had been made by either appellant or appellee to the closing up or obstruction of the streets; that both parties had acquiesced therein and that both parties had used said streets in a manner entirely inconsistent with their intended use.

Consequently that as between the parties to that suit the portions of said streets so used by both parties must be treated as an abandonment of them.

In the case at bar the facts are positively to the contrary. The streets involved had been opened to travel as streets. T. D. St.Clair and Mitchell had been assured that the obstructions were there only temporarily. That none of petitioners had ever closed or obstructed the use of the streets, and if there were any acquiescence by the petitioners it was fraudulently procured by the assurance of the Land Company, thru its agent, A. H. St.Clair, that these obstructions would be removed; that the well had been plugged up till in

1919 when it was depened to 264 feet and put in use; that when the Land Company made its conveyance to purchasers, especially to the petitioners, it did not reserve unto itself the right to maintain these obstructions, but conveyed its fee to the center line of the streets.

It is most respectfully submitted that Chapin vs. Lake, Supra, cannot be held as controlling in the case at bar. The facts are so entirely dissimilar.

But the Court in its opinion says, "that petitioners and their alienors purchased their lots with their eyes open; that the obstructions starred them in the face, and therefore they cannot complain, citing Chapin vs. Lake, Supra.

Suppose that is true, yet is it not equally true that the Land Company conveyed to the center line of the streets, with reference to its map and plat dedicating the streets to the use of the lot owners?

If this is true, and it cannot be otherwise, does it not logically and legally follow that the Statute of Limitations can be invoked by petitioners against the loss of their fee and the loss of their right of easement?

Laches. A Court of equity will not aid them in the assertion of their rights, because it appears that they have been guilty of gross negligence in seeking to enforce them, thereby holding that a court of equity would have granted the relief if they had not been guilty of gross negligence.

Wherein have they been guilty of gross negligence? Assurance had been given them that these obstructions were temporary, and just as soon as a movement was made upon the part of the defendant and the Land Company, showing contrary, the petitioners resorted to a court of equity for the removal of the obstructions and for the preservation of their easement in the streets. Should petitioners be punished for having relief upon the assurance of the Land Company, and be charged with laches when they had the right to rely upon the Statute of Limitations in the protection of their rights? Should not a court of equity grant the relief prayed for in such circumstances?

"Laches is the neglect to do something which a party ought to do, and mere lapse of time, unaccompanied by some circumstances affording evidence of a presumption that the right had been abandoned, is not considered 'laches'. And claims are considered 'stale' only where gross laches is shown with unexplained acquiescence in the operation of an adverse right."

Bell vs. Wood 94 Va. 683.

Kenneday Coal Corp. Vs. Buckhorn Coal Co. 142 Va. 37.

In the case at bar, can the Court say, or should the Court say, that petitioners have been guilty of "gross laches" in bringing their suit, when it appears that when some of petitioners purchased their lots they were assured by the agent of the Land Company, that the obstructions were there only temporarially, and when Logan and Caldwell assured them that the obstructions would be removed? If there was any "acquiescence" surely the same is thereby "explained",

and so "explained" as to justify a court of equity in protecting petitioners in their right of easement, a peculiar subject of equity jurisdiction.

No court of equity should lend its protection to one who by his acts and declarations has lulled another into supposed security, and thereby perpetrate a fraud upon him. Would that not be the result in this case?

To further illustrate. Suppose as a matter of fact petitioners did see these obstructions when they purchased, and paid less because they were there, with the assurance that they were there only temporarially, and the conditions remained the same until the defendant began to erect the new tank in 1925, could petitioners lose their right to ask for the removal of the obstructions before the defendant and its predicessor in title had been in hostile and adverse possession of the premises for twenty years, and then only after first having brought home to petitioners that they were so in possession and so claiming? Defendant never attempted to bring home to petitioners that it was claiming the right to maintain these ob-

structions until it began the erection of the new tank in 1925, when they immediately brought this suit.

Therefore, the prayer of your petitioners is, that this Honorable Court will rehear and review this case, and that the relief heretofore prayed for may be granted and afforded them; and they will ever pray, etc.

Respectfully submitted,
Dessie H. St.Clair,
C. C. Mitchell
J. N. Spencer
Louise Spencer
J. L. Wills
Bertha Wills
M. Wells
Jos. Spencer
Chas.Beheler
Bart Stewart
T. D. St.Clair
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