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Arned L. Hinshaw

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The supreme court agreed that there could not be confinement for *failing to pay* the damages,⁵⁴ but then pointed out that this was imprisonment for *failing to comply* with the conditions of suspension, a criminal offense.⁵⁵

With the broad discretion allowed him by the supreme court, both in his decision as to whether suspension should be allowed, and in his determination of proper conditions for suspension, the trial judge has a valuable corrective device at his disposal. Care should be exercised in granting suspension, however, only in cases where there is reasonable likelihood that the defendant will reform; otherwise the release of the defendant merely offers him another opportunity to endanger society.

MORTON L. UNION

Dedication—Prerequisites of Private Rights Arising Therefrom

In the case of a sale of lots by reference to a map or plat upon which streets, alleys, parks, or other areas are indicated apparently for public use, two distinct rights may arise in such areas. They are: (1) a public right in the general public to have the areas kept open, and (2) a private right in the individual purchasers of lots to enforce the obligation.¹ The North Carolina Supreme Court refers to each right as a dedication, although the latter is more properly termed an easement.² Prerequisites for the arising of the two rights are different.³ The in-

⁵⁴ This rule has been established in *Myers v. Barnhardt*, 202 N. C. 49, 161 S. E. 715 (1931); *State v. Whitt*, 117 N. C. 804, 23 S. E. 452 (1895); *State v. Warren*, 92 N. C. 825 (1885).

⁵⁵ *State v. Simmington*, 235 N. C. 612, 614, 70 S. E. 2d 842, 844 (1952). The court ruled that if the condition had been that the defendant post a bond to insure payment of damages, the condition would have been satisfied when the bond was posted. Thereafter, the defendant could not be forced to pay the bond by criminal action since that would be tantamount to imprisonment for debt. The only remedy would be a civil action to collect on the bond. See *Myers v. Barnhardt*, 202 N. C. 49, 161 S. E. 715 (1931).

¹ The existence of the two rights is recognized in the following cases: *Barnes v. Cheek*, 84 Ga. App. 653, 67 S. E. 2d 145 (1951); *Kelsoe v. Mayor and Town Council of Oglethorpe*, 120 Ga. 951, 48 S. E. 366 (1904); *Smith v. City of Hollister*, 238 S. W. 2d 457 (Mo. App. 1951); *Rowe v. City of Durham*, 235 N. C. 158, 69 S. E. 2d 171 (1952); *Lee v. Walker*, 234 N. C. 687, 68 S. E. 2d 664 (1951); *Broocks v. Muirhead*, 223 N. C. 227, 25 S. E. 2d 889 (1943); *Gault v. Town of Waccamaw*, 200 N. C. 593, 158 S. E. 104 (1931); *Irwin v. City of Charlotte*, 193 N. C. 109, 136 S. E. 368 (1927); *Wittson v. Dowling*, 179 N. C. 542, 103 S. E. 18 (1920); *Hughes v. Clark*, 134 N. C. 457, 46 S. E. 956 (1904).

² "There is no such thing as the dedication of property to private use." *A. F. Hutchinson Land Co. v. Whitehead Bros. Co.*, 127 Misc. 558, 217 N. Y. S. 413, 417 (Sup. Ct. 1926), *aff'd* 218 App. Div. 682, 219 N. Y. S. 413 (3d Dep't 1926). See also 16 AM. JUR., DEDICATION § 2.

³ To effect a common law dedication to *public* uses, there must exist: (1) intention of the donor to dedicate, and (2) acceptance by the public. *People v. Sayig*, 101 Cal. App. 2d 890, 226 P. 2d 702 (1951); *Atlantic Ry. v. Sweatman*, 81 Ga. App. 269, 58 S. E. 2d 553 (1950); *Egner v. Livingston County Board of Education*, 313 Ky. 168, 230 S. W. 2d 448 (1950); *Chene v. City of Detroit*, 262

quiry here will be confined to the prerequisites giving rise to the private right.

The general rule is that "where streets and roads are marked on a plat and lots are bought and sold with reference to the map or plat, all who buy with reference to the general scheme disclosed by the plat or map acquire a right to all the public ways designated thereon and may enforce the dedication."⁴

The rule is based on the doctrine of equitable estoppel. The theory is that the grantor, in making a sale of land⁵ by reference to a plat on which are marked public ways, *induces* purchasers to believe that the ways will be kept open for their benefit, and it would be unjust for the grantor to thereafter deny the right to privileges implied from his own conduct.⁶ While the requirements of the rule seem to be set out clearly as, (1) a sale with reference to a map or plat, (2) on which are marked

Mich. 253, 247 N. W. 172 (1933); *Smith v. City of Hollister*, 238 S. W. 2d 457 (Mo. App. 1951); *Dowd v. City of Cincinnati*, 152 Ohio St. 152, 87 N. E. 2d 243 (1949).

To effect an easement under the rule here discussed there is no need for an acceptance. *Broocks v. Muirhead*, 223 N. C. 227, 25 S. E. 2d 889 (1943); *Home Real Estate Loan and Ins. Co. v. Town of Carolina Beach*, 216 N. C. 778, 7 S. E. 2d 13 (1939); *Wheeler v. Consolidated Construction Co.*, 170 N. C. 427, 87 S. E. 221 (1915); *Hughes v. Clark*, 134 N. C. 457, 46 S. E. 956 (1904).

It would seem, also, that an actual intent on the part of the grantor to make a dedication is not necessary to effect the private right when it is considered that the rule is applied, as will later appear, as an equitable estoppel. The elements of an equitable estoppel are conduct, acts, language, or silence amounting to a representation or a concealment of material facts, and the party claiming the estoppel must have so acted on it that he would be prejudiced if the first party be permitted to deny the facts to be as represented. *Boddie v. Bond*, 154 N. C. 359, 70 S. E. 824 (1911).

Thus it appears that an intent on behalf of the first party that the facts be as represented is not an element of equitable estoppel. In fact, it would be more accurate to say that in most cases of equitable estoppel, the party against whom it is held to operate did *not* intend the facts to be as represented by him.

⁴ *ELLIOTT, ROADS AND STREETS*, § 132, (4th ed. 1926); *Gaither v. Albermarle Hospital, Inc.*, 235 N. C. 431, 443, 70 S. E. 2d 680, 690 (1952); *Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach*, 216 N. C. 778, 786, 7 S. E. 2d 13, 19 (1939); *Stephens Co. v. Myers Park Homes Co.*, 181 N. C. 335, 340, 107 S. E. 233, 236 (1921); *Elizabeth City v. Commander*, 176 N. C. 26, 30, 96 S. E. 736 (1918); *Hughes v. Clark*, 134 N. C. 457, 462, 46 S. E. 956, 958 (1904); *Collins v. Asheville Land Co.*, 128 N. C. 563, 566, 39 S. E. 21, 22 (1901).

Although not quoting directly from *ELLIOTT, op. cit. supra*, other North Carolina cases have stated the rule in substantially the same way. See *Rowe v. City of Durham*, 235 N. C. 158, 69 S. E. 2d 171 (1952); *Lee v. Walker*, 234 N. C. 687, 68 S. E. 2d 664 (1951); *Russell v. Coggin*, 232 N. C. 674, 62 S. E. 2d 70 (1950); *Evans v. Horne*, 226 N. C. 581, 39 S. E. 2d 612 (1946); *Foster v. Atwater*, 226 N. C. 472, 38 S. E. 2d 316 (1946).

⁵ The sale of a single lot in reference to the plat is sufficient to invoke the rule. See *Wittson v. Dowling*, 179 N. C. 542, 545, 103 S. E. 18, 19 (1920).

⁶ *Gaither v. Albermarle Hospital, Inc.*, 235 N. C. 431, 70 S. E. 2d 680 (1952); *Broocks v. Muirhead*, 223 N. C. 227, 25 S. E. 2d 889 (1943); *Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach*, 216 N. C. 778, 7 S. E. 2d 13 (1940); *Irwin v. City of Charlotte*, 193 N. C. 109, 136 S. E. 368 (1926); *Stephens Co. v. Myers Park Homes Co.*, 181 N. C. 335, 107 S. E. 233 (1921); *Wittson v. Dowling*, 179 N. C. 542, 103 S. E. 18 (1920).

public ways;⁷ still, a proper appraisal of these requirements can only be made in the light of this reason behind the rule.

As to the first requirement, it seems indisputable that unless the grantor at some time, in some way, calls the map to the attention of the grantee, *nothing* on the map can be said to have been used as an inducement for the purchase. However, must the reference to the map be made in the instrument of conveyance, or is it sufficient that a reference to it be made in the negotiations? Some writers seem to think that the courts, in referring to a "sale" by reference to a map or plat, mean a sale followed by a conveyance which also makes reference to the plat;⁸ but North Carolina does not require a reference to the plat in the deed if there is reference to the plat in the negotiations for the sale.⁹ Nor is it necessary that the plat to which reference is made be recorded.¹⁰ However, if the reference to the map is not incorporated in the purchaser's deed, the grantee may lose his rights thereunder in the event his grantor later sells land embracing the dedicated areas to a third person who has no notice, either actual or constructive, of the unrecorded plat.¹¹

The second requirement of the rule concerns the plat itself; that is, what it must contain before purchasers are allowed an easement in areas shown thereon. The rule speaks of purchasers acquiring a right in public ways which are "marked" or "designated" on the map or plat. All of the North Carolina cases, prior to the recent one of *Gaither v. Albermarle Hospital, Inc.*,¹² have involved plats on which the areas in dispute are actually marked "court," "street," "alleyway," etc.¹³

⁷ The quotation from ELLIOTT, *op. cit. supra* note 4, § 132 is, of course, mainly concerned with public ways, but there is no reason to make any distinction, for the purposes of the rule, between cases where the benefit is obtained from using the areas as means of passing to other enjoyments and where the benefit is the enjoyment of the areas themselves.

The same rule applies to pieces of land marked on the plat or map as squares, courts, parks. *Conrad v. West End Hotel & Land Co.*, 126 N. C. 776, 36 S. E. 282 (1900). See *Foster v. Atwater*, 226 N. C. 472, 473, 38 S. E. 2d 316, 318 (1946); *Wittson v. Dowling*, 179 N. C. 542, 544, 103 S. E. 18, 19 (1920); *Sexton v. Elizabeth City*, 169 N. C. 385, 390, 86 S. E. 344, 346 (1915); *Green v. Miller* 161 N. C. 24, 30, 76 S. E. 505, 507 (1912); *Hughes v. Clark*, 134 N. C. 457, 460, 46 S. E. 956, 957 (1904).

⁸ See 3 TIFFANY, REAL PROPERTY § 800 (3rd ed. 1939); Note, 7 A. L. R. 2d 612 (1949).

⁹ *Green v. Miller*, 161 N. C. 24, 76 S. E. 505. See *Milliken v. Denny*, 135 N. C. 19, 22, 47 S. E. 132, 133 (1904) where the court said that "the references . . . either in the deed or in the negotiations estops the party" [italics added].

¹⁰ *Somerset v. Stanaland*, 202 N. C. 685, 163 S. E. 804 (1932); *Collins v. Asheville Land Co.*, 128 N. C. 563, 39 S. E. 21 (1901).

¹¹ *Green v. Miller*, 161, N. C. 24, 76 S. E. 505 (1912).

¹² 235 N. C. 431, 70 S. E. 2d 680 (1952).

¹³ *Evans v. Horne*, 226 N. C. 581, 39 S. E. 2d 612 (1946) ("Carolina Street"); *Broocks v. Muirhead*, 223 N. C. 227, 25 S. E. 2d 889 (1943) ("16-foot strip . . . designated '11 ft. alley'"); *Home Real Estate Loan and Ins. Co. v. Town of Carolina Beach*, 216 N. C. 778, 7 S. E. 2d 13 (1939) ("Lake Park Boulevard, . . . shown to be of the width of ninety-nine feet, including the strip of land in question"); *Wittson v. Dowling*, 179 N. C. 542, 103 S. E. 18 (1920) ("certain open spaces between the lots, marked 'alleyways,' and another open space 50 feet

In the *Gaither* case, the owner of lands along a navigable stream had the property surveyed and a plat thereof made and recorded. The plat indicated numerous lots, laid off and numbered, and a street running along the river with a strip of land, unnumbered and undivided, and never wider than six feet, lying between the river and the street. Lots were then sold by reference to the plat and lot numbers. It was held that the grantor dedicated to the purchasers of such lots access over the strip of land to the waters of the navigable stream.

It appears, then, that there was no designation whatever on the strip of land in question; that it was not a part of the public street by which it lay, nor was itself drawn in the form of a street or alley. But the conclusion of law in connection therewith was that the *failure* to indicate that the strip of land had been subdivided for sale amounted to a designation of it for use by the general public. Though not expressly saying so, the court seems to have determined the question to be: From a reading of the plat as a whole would a purchaser reasonably be led to believe that the areas in dispute were to be left open for use by the public? And for the question to be answered in the affirmative, it is not necessary, according to this decision, that there be an actual marking on the plat.

The court thus extends the application of a rule, already applied more strictly against the platlor in this state,¹⁴ to facts not heretofore

in width, . . . marked 'Meadow Street'"); *Wheeler v. Consolidated Construction Co.*, 170 N. C. 427, 87 S. E. 221 (1915) ("There can be no doubt, from an inspection of the map, that the street . . . is clearly defined as a street on said map."); *Green v. Miller*, 161 N. C. 24, 76 S. E. 505 (1912) (This issue was submitted to the jury and answered by them in the affirmative: "If this tract or any part of it was surveyed and platted into lots and street, did any of the streets so surveyed and platted correspond to what is now known as Pungo Street?"); *Collins v. Asheville Land Co.*, 128 N. C. 563, 39 S. E. 21 (1901) ("certain portions were platted and distinguished as streets, and others as lots."); *Conrad v. West End Hotel & Land Co.*, 126 N. C. 776, 36 S. E. 282 (1900) ("streets and public squares, known as Grace Court").

¹⁴ As already noted, North Carolina allows the rule to operate where reference is made only in the negotiations for the sale, and does not require that the plat be recorded. In addition, in this jurisdiction, the easement may be enforced by all purchasers under the plat, and it extends to all public ways thereon, even though remotely located from the lot of the party seeking enforcement. *Gaither v. Albermarle Hospital, Inc.*, 235 N. C. 431, 70 S. E. 2d 680 (1952); *Broocks v. Muirhead*, 223 N. C. 227, 25 S. E. 2d 889 (1943); *Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach*, 216 N. C. 778, 7 S. E. 2d 13 (1939); *Hughes v. Clark*, 134 N. C. 457, 46 S. E. 956 (1904); *Collins v. Asheville Land Co.*, 128 N. C. 563, 39 S. E. 21 (1901); *Conrad v. West End Hotel & Land Co.*, 126 N. C. 776, 36 S. E. 282 (1900).

Some other jurisdictions limit the extent of such easements to the streets and alleys shown on the plat as are reasonably beneficial to the purchaser, and a deprivation of which would reduce the value of his lot. *Bradley v. Frazier Park Playgrounds, Inc.*, 242 P. 2d 958 (Cal. 1952); *Danielson v. Sykes*, 157 Cal. 686, 109 P. 87 (1910); *Gerald Park Improvement Assn. v. Bini*, 138 Conn. 232, 83 A. 2d 195 (1951); *Lake Garda Co. v. D'Arche*, 135 Conn. 449, 66 A. 2d 120 (1949); *Douglas v. Belknap Springs Land Co.*, 76 N. H. 254, 81 Atl. 1086 (1911); *Byington v. Bass*, 11 Tenn. App. 569 (1930); *Lindsay v. James*, 188 Va. 646, 51 S. E. 326 (1949).

determined to be within its scope.¹⁵ In doing so, are the principles of the rule violated? It would seem not. Rather, it would seem to be in keeping with the principles of the rule to estop a grantor from denying the use of land, which, because it is unmarked on a plat, taken in conjunction with its peculiar location, would appear to all to have been left in an open state for the benefit of nearby lot owners. The element of inducement is present and the consequent results in such a case are the same as in the case where the land is marked affirmatively on the plat. Further, it is believed that the holding in this case is confined to the particular facts with which it is concerned, and the decision is not authority for saying that all areas shown on a map as not divided or not numbered will have an easement imposed upon them. Much stress was laid on the point that this was a very narrow strip of land, lying between two public ways, a highway and a navigable stream, and was the only means of access to the latter.¹⁶

However, on authority of this case, the door is open for courts to be very liberal in finding inducement by a plattor to support a holding that an easement exists in his lands in favor of purchasers of lots in a subdivision. Such practice could lead to abuse in particular instances if not applied with caution. It is submitted that a court should always be cautious in holding an adverse interest to exist in lands of an owner when the case involves a balancing of *private* rights only.

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Still other jurisdictions hold that the easement is limited to the adjoining streets and such other streets as are necessary to give the purchaser access to a public highway. *Mullan v. Hochman*, 157 Md. 213, 145 Atl. 554 (1929); *Howley v. Baltimore*, 33 Md. 270 (1870); *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666 (1903); *Pearson v. Allen*, 151 Mass. 79, 23 N. E. 731 (1890).

¹⁵ In *Town of Lumberton v. Branch*, 180 N. C. 249, 104 S. E. 460 (1920), our court refused to find a public dedication of a street where the area in dispute was not designated as a street on the plat though there was part of a line which might have been a street boundary, but which was incomplete because of the frayed edges of the paper.

No instances from other jurisdictions have been found where a private easement was allowed when there was no specific delineation on the plat. The following are cases holding a public dedication to have been made even though the space in question contained no marking indicating that it was for public uses: *Davis v. Epstein*, 77 Ark. 221, 92 S. W. 19 (1905) (finding that grantee intended to dedicate lake shore where no intervening space was shown on the plat between the lake and a street parallel to it); *City and County of San Francisco v. Burr*, 4 Cal. 634, 36 P. 771 (1894) (disputed area not named as street, but its boundaries "clearly indicate that they were intended to represent the lines of a street."); *Coe College v. City of Cedar Rapids*, 87 N. W. 444 (Iowa, 1901) (holding that failure to name as a street a strip marked off like other streets on a plat did not negative the intention to dedicate").

In these cases, however, an intent to dedicate was shown by the accompanying circumstances; thus, they are of little help in determining the propriety of allowing a private easement in areas left blank since here the intent of the grantor is not controlling. See note 3, *supra*.

¹⁶ See *Gaither v. Albermarle Hospital, Inc.*, 235 N. C. 431, 70 S. E. 2d 680 (1952).