1890

Dedication to Public Uses

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The doctrine of dedication is of comparatively modern origin and is an outgrowth of the common law. The principles which govern the law are peculiar to the subject itself. Under these principles rights are parted with and titles acquired by means unusual and peculiar.

Ordinarily, in order to transfer the title to real property, some conveyance or written instrument is required. A dedication may be made without writing, by act in pais, as well as by deed. The owner does not part with his absolute or title in the land. He is not deprived of his land but estopped from asserting his right of exclusive possession and enjoyment. All rights of property not inconsistent with the public use remain in the original owner, and in case the public use of the land is abandoned it revests in him.

It has been said that the principle upon which the estoppel rests is, that it would be dishonest, immoral or indecent, and in some instances even sacriligious,

to reclaim at pleasure property which has been solemnly devoted to the use of the public or in furtherance of some charitable or pious object. The law, therefore, will not permit any one thus to break his own plighted faith, to disappoint honest expectations thus excited and upon which reliance has been placed. The principle is one of sound morals and of most obvious equity, and is in the strictest sense a part of the law of the land. It is known in all courts and may be enforced as well in law as in equity.

Public parks, bridges, squares and highways were recognized and protected by the Civil Law but the Covil Law contained no principle strictly analogous to didication under the common law. In Rome the individual held the land subject to the ultimate ownership of the state, dominium eminens, and whenever the public safety or convenience demanded, the occupant might be divested of his estate by an exercise of this reserved right of dominion. The public took actual ownership of the land instead of an easement as under the common law.

In regard to the origin of the doctrine Gibson, C.J., in the case of Gowen vs. Philadelphia Exchange Co. (5 W. & S., 141), decided in 1842 says: "The first trace of

the doctrine of dedication is found in Rex vs. Hudson (5 Stra. 909) decided in 1732; and the next in Lade vs. Shepherd (id. 1004) decided three years afterward. It was then suffered to sleep till 1790 when it was awakened by Rugby Charity vs. Merryweather (11 East. 375), and for the last thirty years it has been of all others the subject most frequently agitated in regard to grants of highways and most prolific of decisions, without having its principles very definitely settled."

Since the case above referred to was decided the doctrine has been recognized as an undoubted principle and has become an important branch of the law.

Dedication applies only to public never to private uses.

A dedication as defined by Mr. Angell in his work on Highways is an appropriation of lands to some public use, made by the owner of the fee and accepted for such use by or on behalf of the public. If a dedication is made in pursuance of some statutory regulation it is necessary simply to comply with the requirements of the statute, and carry out its provisions in the manner prescribed. The difference, in effect, between a dedication at common law and one under the statute is, that the

former operates as an estoppel in pais while the latter operates by way of grant, as a transfer of an interest in lands. The statutes usually provide that, like all grants, it must be acknowledged and recorded; and if these requirements are complied with it is no more effectual to pass the title or interest specified than a deed which has not be acknowledged. But if a statutory dedication fail on account of non-compliance with statutory provisions it may operate as a common law dedication if it is accepted and appropriated by the public.

In dedicating land to public uses at common law no particular formalities are necessary. Any acts which clearly indicate an intention to didicate are sufficient: such as throwing open the land to public use, dividing land and selling it in lots bounded by streets designated on the map, or acquiescence in the use of land by the public. The vital principle is

> the intention to dedicate and whenever this has been clearly shown the dedication, so far as the owner of the soil is concerned, is made.

In order that the dedication may be complete it must be accepted and used by the public in the manner

intended and this being shown the owner and all claiming under him are estopped from asserting any ownership inconsistent with such use.

In order that a dedication be valid it must be made by the owner of the legal title. It cannot be made by a tenant or trespasser, a mortgagor or one holding by adverse possession, or by a tenant in common without the consent of his co-tenant. The reason for the rule is that the owner of the fee may be protected from public easements arising from the unauthorized acts of his tenant or one in possession.

In the case of Wood vs. Veal (5 B. & A., 454) where the action was for trespass for breaking and entering a certain yeard of the plaintiff and pulling down his fence which he had erected, it appeared that in the year 1719 a lease for ninety-nine years of the plaintiff's premises, including the yard in dispute, had been granted by the owner of the fee. The lease expired in 1818 and in 1820 the plaintiff erected the fence in question. As far back as any living person could remember the land in question had been used as a public street, yet it was held that there was no dedication unless it could be

proven that it was made prior to the giving of the lease. But a dedication of lands to public uses may be presumed from the fact of its long continued use by the public during the continuance of a lease of the premises, where the owner neglects to resume his rights as reversioner for four or five years after the expiration of the lease. (Schenley vs. Commonwealth, 36 Pa. St., 29)

If during the period that the public had had the use of the land there has been a frequent change of tenants, or if there has been actual notice to the landlord there will be a complete dedication. The consent of the owner will be implied. Thus in the case of Rex vs. Barr (4 Camp., 16) it was proven that the land in question had been used by the public as a way for more than fifty years. During that time there had been a frequent change of tenants. One of those frequently complained to the steward that the public used the foot-way whereby the land was injured: but no action was brought by either landlord or tenant against any one who used it. The defendant, the tenant, enclosed the land in question and he was indicted for obstructing the public foot-way. Lord Ellenborough, who decided the

case said: "After a long lapse of time and a frequent change of tenants, from the notorious and uninterrupted use of the land by the public, I should presume that the landlord had notice of the way being used; and that it was so used with his concurrence." In this case however, we have express evidence of notice, for notice to the steward is notice to the landlord.

If the fee is in the grantor a dedication may be made by any private person, by a corporation if there is nothing in the charter prohibiting it, and by a trustee when it is done in furtherance of his trust. The trustee is the legal owner of the land, but the purposes for which he owns it are expressed in the deed creating the trust and he cannot by his acts be allowed to violate such a trust. But of the trust is of an indefinite nature and a discretion is vested in the trustee as to the manner in which the trust shall be carried out, any acts within his discretion are lawful and binding. So if a trustee in furtherance of his trust dedicates lands to public uses and such act is done for the benefit of the trust estate such dedication is valid. The question whether or not such dedication can be made is one of fact and must be determined by the circumstances and

conditions of each case.

In England it has never been denied that there might be a dedication of lands for a public highway without grant or covenant. If a square was designated as a mere enlargement of the highway and was intended to be used as such it would fall within the same catagory. But there could not, especially by the early common law, be a dedication for any other purpose. (21 Mich., 319.) Parks, squares, and other public grounds were said to rest upon grant or prescriptive right not upon dedication.

The courts of the United States have been more liberal in their application of the doctrine and they have specifically held that there might be a dedication for public squares, for parks, walks and pleasure grounds, for school purposes, for pious and charitable uses generally, for burial grounds, for church purposes, for court houses and other public buildings.

In fact there may be a dedication for any purpose whereby the public will be benefited.. The principle may be applied to every use or easement in lands which can be of any service, convenience, or pleasure to the

community at large, and in many cases where the use was, either expressly or from the necessity of the case, limited to a small portion of the public.

As it has been before intimated two elements are necessary to constitute a valid dedication: an intention on the part of the owner to dedicate, and an acceptance of the dedication by the public; and if the intention is not clear and unmistakable in its purpose and decisive in its character, and the acceptance evidenced by some unequivocal acts no dedication can result. No particular formalities are necessary on the part of the owner to show his intention. It may be shown by deed or other overt act or may be presumed from lapse of time. No clearer or better idea of what acts constitute a dedication can be obtained than by an examination of a few of the adjudicated cases on the subject.

In the case of Carpenter vs. Gwyn (35 Hun, 395) the plaintiff who was the owner of the fee, laid out a road and worked and graded it at his own expense and fenced it on both sides. When the road was first opened gates were placed at both ends, which were maintained while

the plaintiff was grading the intermediate portions of the road. For two years, from 1857 to 1859, the gates were taken down to facilitate the grading and during that time the road was used by the public. When the grading was completed the gates were replaced. Held, that the acts of the plaintiff did not amount to a dedication of the lands as a public highway. That to produce that result the plaintiff must be shown to have expressed by words or by actions, or both, his irrevocable intention to make the strip of land not merely a road or way of passage but a public way. And also, that no one had a right to infer from the removal of the gates, under the circumstances, that it was the plaintiff's purpose never to replace them. No such presumption attached to the acts and no estoppel arose.

In Hagaman vs. Dittman (24 Kas. 32) one Putnam, being in possession of a quarter section of land, the title to which he was seeking to acquire under the Homestead Law, caused a small tract to be laid off as a burial ground. Lot were staked off. corner stones set and a plat made. His intention was to donate this tract for a public burial ground for the neighborhood. The

public, with the knowledge and consent of the owner, treated this as a burial ground and from year to year buried their dead there. After the lapse of the statutory period Putnam acquired his patent from the government. It was held that his acts at the time, together with his subsequent assent to the use of the ground for burial purposes amounted to a dedication which was binding upon him and those claiming under him.

As to the amount and kind of evidence necessary to prove the intention the authorities are numerous and not all of them consistent. But the law in this respect as in most other matters is reasonable. The peculiar circumstances of the coutry must be taken into account. The general rule is this same in this coutry as in England, but facts which there might be considered sufficient might not be so considered here. So, also, stronger proof is required in the case of roads in the country, than would be in the case of streets or lane in the city. Chancellor Walworth in the case of Livingston vs. the City of New York (8 Wend. 98) says, "The right of way as a mere rural servitude is confined to a convenient passage from the property granted to the public

road or highway, and principles of construction applicable to grants of property in the coutry do not apply to conveyances of city lots." And Chief Justice Savage has said, "There is a very proper distinction between grants of property in the country and of city lots. The rules of law applicable to the former are not so to the latter."

But it is not only by express acts or words or by allowing the public an unrestricted use that a dedication may be shown. Where lands are mapped out and certain portions are designated as streets and squares, and lots are sold according to such map, it operates as an irrevocable dedication of the streets and squares to public use. It makes no difference whether it is by one who originally lays out a new town or one who sells lots in an old one. Merely surveying one's own land and laying it out into lots and blocks without any sale would not amount to a dedication; and a late case (42 N. J. L., 341) holds that there must be not only a sale but it must be an effective one made so by a conveyance.

The City of Cincinnati vs. White (10 U. S., 179) is a leading case on this subject and Mr. Justice Thompson

in delivering the opinion of the court, gives a valuable discussion of the law of dedication. It appeared from that case that in 1789 the three persons having title to the land where the City of Cincinnati now stands, proceeded to lay out the town. A plan was made and approved by all the proprietors and according to which the ground lying between Front Street and the river, and so located as to include the premises in qusstion, was set apart as a common for the use and benefit of the town forever; reserving only the right of a ferry. And no lots were laid out on the land thus dedicated as a common.

Among other things the court said: "The right of the public to the use of the common in Cincinnati must rest on the same principles as the rights to the use of the streets; and no one will contend that the original owners after having laid out the streets and sold building lots thereon, and improvements made could claim the easement thus dedicated to the public.

All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the

purposes intended, than may be necessary in an appropriation for a highway in the coutry: but the principle so far as it respects the right of the original owner to disturb the use, must rest on the same ground in both cases, and applies equally to the dedication of the common as to the streets. It was for the public use and convenience and accommodation of the inhabitants of Cincinnati, and doubtless greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners of the land thus thrown out as public grounds.

After being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it the law considers it in the nature of an estoppel in pais which precludes the original owners from revoking such dedication. It is a violation of good faith to the public, and those who have acquired private property with a view to the enjoyment of the use thus publicly granted.

The right of the public in such cases does not depend upon a twenty years possession. Such a doctrine applied to public highways and the streets of the numerous vil-

lages and cities that are so rapidly springing up in every part of our country would be destructive of public convenience and private right."

Other leading cases on this subject and which follow substantially the doctrine laid down in the case abov above mentioned are In re Brooklyn North Thirteenth Street, 73 N. Y., 179: Clarke vs. Elisabeth, 40 N. J. L., 172: Schenly vs. Commonwealth, 36 Pa. St., 62: Lockland vs. Smithly, 26 O. St., 94.

The second of the elements necessary to constitute a valid dedication is an acceptance by the public. Some courts hold that the mere use of the premises or property in question is sufficient to constitute an acceptance. Others maintain that mere user is not sufficient, while in other jurisdictions the matter is settled by statutory enactment. (68 N. Y., 261; 36 Iowa, 485.) In states where acceptance may be shown by user, there is a conflict as to the length of time necessary to vest a title in the public. Some courts hold that there must be a use for the period of the Statute of Limitations, while others hold a shorter period sufficient. In State vs. Tucker, supra, the court said,

"To establish a highway by prescription there must be an actual public use, general, uninterrupted, continued for the period of the Statute of Limitations, under a claim of right. While in Hunter vs. Sandy Hill (6 Hill, 407) it was held that no definite or certain period of time is requisite to establish a dedication. It does not depend upon lapse of time but on the intent of the parties, and this might be established by acts of the owner and the public, unequivocal in their character, though occurring on a single day."

Many of the decisions confound the user sufficient to establish a dedication with that required to give a right by prescription. The distinction, however, is clear. The intention of the owner is the deciding element. Against his intention to devote the land to the use of the public, must be brought a continuous and adverse user for the period of limitation, to give the public a permanent easement; and that easement is a prescriptive right. But if an intention to set aside the land to the public use be shown, a user on the part of the public is pursuant to the dedication, and will in a great majority of the states be sufficient evidence of

a complete acceptance and dedication, if continued for the statutory time; and in many cases user for a less time is sufficient. And though the statutory time may have elapsed, yet the claim of right under a dedication may be overthrown by showing that the owner did not intend to dedicate. (Kyle vs. Logan, 87 Ill., 64).

The best rule would seem to be that the use is required to be of such duration that the public interest and private rights would be materially impaired if the dedication were revoked and the use discontinued by the public. (28 Am. Rep., 464).

Judge Butler in Guthrie vs. New Haven (31 Conn., 308) gave a valuable discussion of the facts necessary to constitute an acceptance. He said, "The whole matter, acceptance, as well as dedication, has been left by a majority of the court to rest on the principles of the common law with which it originated. These principles authorize the gift, estop the giver from recalling it, and presume an acceptance by the public where it is shown to be of common convenience and necessity and therefore beneficial to them. For the purpose of show-

ing that it is beneficial an express acceptance by the town or corporation within whose limits it is situate and who are liable for it repair, the reparation of it by the officers of such corporation , or a passive acquiescence in the open public use of it is important."

The principal evidence will be the actual use of it without objection by those who are beneficially interested. (Green vs. Canaan, 29 Conn., 157).

The decisions requiring a formal acceptance by public authority have arisen entirely in the case of highways. The question usually is as to the liability of the town or district to make repairs if no acceptance has been proved. (4 Cush., 332). For the most part statutes have settled the matter directing what acts make a road public, and when the duty to repair the same rests upon the town or district. But there might be a complete dedication so far as the owner is concerned without any duty to repair resting on the authorities.

Before a dedication is accepted it may be revoked, but having been rendered complete by acceptance it is binding upon the donor and all claiming under him, so long as the land remains in the use to which it was dedicated.

(Curtis vs. Keesler, 14 Barb., 511; State vs. Trask, 1 Vt., 355.) But though it cannot be revoked by the donor it may be relinquished or discontinued by the public or lost by abandonment. Whenever the right to the property is given up or where its use is abandoned, the locus in quo reverts to the original owner of the fee or those claiming uder him. The fee has all the time remained in the grantor though he has been estopped from asserting his right, but when the estoppel ceases he may reclaim as his own that which he had given to the public and over which he had lost all control.