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Streets--Dedication by Record Plat--Conditions

Charles C. Wise Jr.

West Virginia University College of Law

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an election, where proper, will operate in the absence of reliance and change of position by the other party,¹¹ it would seem unwise to employ that theory as the basis of this decision, for that lays down a rule applicable to all cases where the lessee goes ahead and pays rentals under a covenant for further development, and this the court certainly could not have intended.

If the covenant is construed in the manner suggested above, recovery on a waiver theory would be difficult to support, in that there would not be the same paucity of evidence under the requirement of a longer production period, and therefore no damage from the lessor's change of position.

—STEPHEN AILES.

STREETS — DEDICATION BY RECORDED PLAT — CONDITIONS. —
C real estate company platted a parcel of land into lots and streets. Property was sold with reference to the recorded plat. Prior to paving seven years later, which was the first recognition by the municipality of the street in question as a public thoroughfare, *C* had constructed a railway on a part of the street. Subsequent to this act of acceptance *C* quit-claimed its interests in the railway to *D* railway company. The State Road Commission sued to compel removal of the tracks to the extreme side of the easement to permit enlargement of the street as a state highway. *Held*, before acceptance a dedicator can impose reasonable conditions which are subject to public regulation and control. The condition here was valid but the public interest warrants the issuance of a writ of mandamus commanding the re-location of the tracks. *State Road Commission v. Chesapeake & O. Ry. Co.*¹

The court adopts the view in this case that the act of the dedicator is nothing more than an offer to dedicate to public use until the public authorities have manifested acceptance. The later West Virginia cases would seem to support this conclusion,² but there are earlier decisions, which are, in effect, to the contrary.³ They have not been expressly overruled.

¹¹ *Nagle et al. v. Syer*, 150 Va. 508, 143 S. E. 690 (1928); *BIGELOW ON ESTOPPEL* c. 20; *WILLISTON ON CONTRACTS* § 686.

¹ 177 S. E. 530 (W. Va. 1934).

² *Town of Glendale v. Glendale Improvement Co.*, 103 W. Va. 91, 137 S. E. 353 (1927); *City of Point Pleasant v. Caldwell*, 87 W. Va. 277, 104 S. E. 610 (1920).

³ *City of Elkins v. Donohue*, 74 W. Va. 335, 81 S. E. 1130 (1914); *Hast v. Railroad Co.*, 52 W. Va. 396, 44 S. E. 155 (1902).

It is submitted that the better approach to this question is to consider dedication as an act which may be intrinsically complete regardless of acceptance. Sound reasoning would appear to support the rule that an irrevocable and binding dedication may be established against the owner by his act of platting lots and streets and selling property with reference thereto.⁴ The weight of authority sanctions this rationale of the problem.⁵ The early West Virginia view is seemingly in accord.⁶ A dictum by Judge Brannon unequivocally expresses the opinion that an owner, by platting property and selling lots with reference to the recorded plat, binds himself irrevocably, not simply in relation to the buyers of the lots, but to the public as well.⁷ The reason for this rule is firmly grounded in public interest and necessity.⁸ Streets leading to the homes of citizens are so important socially and commercially that it is not merely the abutting owner but the public, also, which has an interest in their use.⁹

If there had been evidence of use by the public of the highway in question, the principal case could have been decided on that ground without resort to the circuitous technique of the court. It has generally been held that acceptance by the public can be shown by long continued user without any acts or conduct on behalf of the municipality.¹⁰ The requisite of time is satisfied if there has been actual enjoyment of the easement for such duration that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment.¹¹ Some courts have held that it is sufficient to show that the user has been for such time as to manifest intention by the public to accept.¹² It is clear that once acceptance has been established it is

⁴ ELLIOTT ON ROADS AND STREETS (4th ed. 1926) § 128, citing numerous cases; 4 McQUILLIN ON MUNICIPAL CORPS. (2d ed. 1928) §§ 1681, 1717.

⁵ Kruger v. Constable, 116 Fed. 722 (S. D. N. Y. 1902); Drimmel v. Kansas City, 180 Mo. App. 339, 168 S. W. 280 (1914); O'Donnell v. Pittsburgh, 234 Pa. 401, 83 Atl. 314 (1912).

⁶ City of Elkins v. Donohue, *supra* n. 3; Hast v. Railroad Co., *supra* n. 3; Riddle v. Charles Town, 43 W. Va. 796, 28 S. E. 831 (1897).

⁷ Hast v. Railroad Co., *supra* n. 3.

⁸ Cohoes v. Delaware Canal Co., 134 N. Y. 397, 31 N. E. 887 (1892); Spring v. Pittsburgh, 204 Pa. 530, 54 Atl. 310 (1903).

⁹ Cincinnati v. White, 6 Pet. 431, 8 L. Ed. 452 (1832) (declaring the dedicatory estopped as against the public as well as his grantees).

¹⁰ 3 DILLON ON MUNICIPAL CORPS. (5th ed. 1911) § 1086; Pence v. Bryant, 54 W. Va. 263, 80 S. E. 137 (1903).

¹¹ 1 ELLIOTT, *op. cit.* *supra* n. 4, § 178.

¹² Hammond v. Maher, 30 Ind. App. 286, 65 N. E. 1055 (1903). In this case public user for two years was held to be sufficient to constitute an acceptance.

irrevocable and no subsequent condition may be imposed.¹³ There is ample authority that when a street is laid out according to a plat, but the public travel is confined to a strip or part of the entire width of the easement, such use will be deemed to be evidence of the acceptance of the entire width.¹⁴

Although the result in the instant case is eminently satisfactory, the decision is based upon the rather narrow ground of the right of the public to control and regulate an easement in a street.¹⁵ That theory might have proved impotent had the tracks, for example, already been laid at the extreme side of the avenue, since the court holds that the dedicator can reasonably impose as a condition the use of the highway for steam railway purposes.¹⁶ It is believed that to consider the recordation of a plat as establishing a binding dedication of designated streets would better serve the public interest.

—CHARLES C. WISE, JR.

WORKMEN'S COMPENSATION — RISKS COVERED — SHOCK AND EXHAUSTION FROM BEING LOST IN COAL MINE. — P, while employed as a coal loader, left his working place and went in search of the mine foreman to make an inquiry in regard to his work. While in a haulage entry he was confronted by an approaching motor trip and to avoid injury he stepped into what he thought was a "man-hole", but what in fact was a "cross-cut". His light was bad, he became confused, and instead of re-entering the entry, turned, and losing his bearings, walked into the air course. He was lost in the mine for seven days, during which time he suffered from hunger, shock, and exhaustion. The Compensation Commissioner ruled that the event did not happen because of his employment. *Held*, on appeal, that such shock and exhaustion constitute a "personal injury" within the meaning of the Compensation Act and the injury was received "in the course of and resulting from" claimant's employment. *Montgomery v. Commissioner*.¹

¹³ 1 ELLIOTT, *op. cit. supra* n. 4, §§ 186, 172.

¹⁴ 3 DILLON, *op. cit. supra* n. 10, § 1088; *Southern Pacific Ry. Co. v. Ferris*, 93 Cal. 263, 28 Pac. 828 (1892), which held in regard to a railway's right under a franchise to use a street for its tracks that the public user of a part of the street constituted an acceptance of the whole.

¹⁵ *State Road Commission v. Chesapeake & Ohio Ry. Co.*, *supra* n. 1.

¹⁶ *Ibid.*

¹ 178 S. E. 425 (W. Va. 1935).