Volume 29 | Issue 3 Article 8

April 1923

Dedication to Public Use--What Constitutes--Acceptance

R. J. R.
West Virginia University College of Law

the continued operation of such a privately owned concern will be enjoined.[11] If the facts of the case are such that the continued operation of the privately owned concern will not be enjoined, then a court of law should not assume the inconsistent position of allowing successive damage suits and thereby indirectly bring about the same result by forcing the concern to suspend business rather than buy out surrounding landowners at exorbitant prices.[12] We conclude, therefore, that where a nuisance, permanent in the sense above indicated, is being perpetrated by a privately owned concern, whose operation upon a balancing of the interests involved a court of equity will not enjoin, then the damages should be permanent once for all, rather than permit a number of successive damage suits thereafter. The latter policy will force the concern to close down or be subjected to the designs of intriguing landowners. Whether or not the satisfaction of such a judgment could be properly said to convey an easement over plaintiff's land, certainly, as the Alabama court points out, the acceptance of such damages by the plaintiff would bar him and his privies from later complaining.[13] —M. H. M.

DEDICATION TO PUBLIC USE—WHAT CONSTITUTES—ACCEPTANCE. —Dedication may be concisely defined as an appropriation of land by its owner for the public use.[1] The bounds or limits of this doctrine were restricted at its inception to the gift of land to highway uses only, but this strict application has been lost at the present day.[2] Dedication to a public use has been held to include an appropriation of property as a common or square,[3] for use as a cemetery,[4] for educational purposes,[5] for the erection of public buildings,[6] and for numerous other public and quasi-public uses. Another departure from the strictness of the original doctrine is found in decisions declaring that the dedication need not be for the public generally but may extend only to a limited class of

---

[11] See note in 9 COL. L. REV. 540; Bliss *v.* Anaconda Copper Mining Co., 167 Fed. 342 (1909); McCarthy *v.* Bunker Hill etc. Co., 164 Fed. 927 (1908).
[12] See note in 9 COL. L. REV. 540.
[13] Highland Avenue. etc. R. Co. *v.* Matthews, 99 Ala. 24, 10 So. 267 (1892).

[1] Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37 (1901).
[2] TIFFANY, REAL PROPERTY, § 479, citing Lade *v.* Shepherd, 2 Strough. 1004 (anno. 1735).
[3] Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532 (1896).
[4] Benn *v.* Hatcher, 81 Va. 25 (1885).
[5] Sturmer *v.* County Court, *supra.*
[6] Board of Supervisors of Frederick County *v.* City of Winchester, 84 Va. 467, 4 S. E. 844 (1888).

persons.[7] Thus it has been decided in Virginia that a dedication for a charitable use will be upheld though beneficial only to a particular class of the public.[8]

The authorities are agreed that in order to have a proper common law dedication of property three elements must be present: (a) The dedication must be to a public use;[9] (b) there must be an offer made with intent to dedicate by a party legally capable of making a dedication;[10] (c) there must be an acceptance of the property dedicated by a party or parties having power to do so.[11] Ownership of the interest dedicated and the power to alienate it are essential to the capacity of a person making a proper dedication,[12] but no distinction has been made between private persons and corporations in regard to ability or capacity to dedicate.[13]

A majority of the jurisdictions in this country recognize that the offer or intention to dedicate property may be written, [14] oral,[15] or implied from conduct.[16] The rule as generally laid down is that "an intention to dedicate is implied where the acts and conduct of the owner manifest an intention to devote the property to a public use."[17] The West Virginia Supreme Court perhaps applies a more rigid standard in requiring that for the intention of a person to make a dedication to be implied it must be "deliberately, unequivocally, and decisively manifested by his deed or his conduct."[18] The strict standard seems more in keeping with a proper protection of property interests, and leans away from any dangerous leniency or looseness in applying the (modern) doctrine of dedication.

The form of acceptance of an offer of dedication embraces three main possibilities: (a) a formal or express acceptance by the proper authorities; (b) an implied acceptance or acceptance by act of parties having the proper capacity to accept; (c) an acceptance by

---

[7] Trenton Water Power Co. *v.* Donnelly, 77 N. J. L. 659, 73 Atl. 597 (1909).
[8] Benn *v.* Hatcher, *supra.*
[9] Western Union Telegraph Co. *v.* Georgia R. and Banking Co., 227 Fed. 276 (1915); Sturmer *v.* County Court, *supra*; Benn *v.* Hatcher, *supra.*
[10] In re West 172d St. in City of New York, 171 App. Div. 242, 157 N. Y. Sup. 399 (1916); Miller *v.* City of Bluefield, 87 W. Va. 217, 104 S. E. 547 (1920); Gate City *v.* Richmond, 97 Va. 337, 33 S. E. 615 (1899).
[11] Hillmer Co. *v.* Behr, 264 Ill. 568, 106 N. E. 481 (1914); Kniss *v.* Duquesne, 255 Pa. 417, 100 Atl. 132 (1917); Newport News etc. Co. *v.* Lake, 101 Va. 334, 43 S. E. 566 (1903); Nearlong *v.* City of Parkersburg, 84 W. Va. 508, 100 S. E. 394 (1919); Miller *v.* City of Bluefield, *supra.*
[12] Walker *v.* Summers, 9 W. Va. 533 (1876).
[13] Host *v.* Piedmont etc. R. Co., 52 W. Va. 396, 44 S. E. 155 (1903).
[14] Town of Harper's Ferry *v.* Kaplon & Bro., 58 W. Va. 482, 52 S. E. 492 (1906).
[15] Ellis *v.* City of Hazelhurst, 138 Ga. 181, 75 S. E. 99 (1912); Carter *v.* Barksley, 137 Ia. 510, 115 N. W. 21 (1908); Pierpont *v.* Town of Harrisville, 9 W. Va. 215 (1876).
[16] Champ *v.* County Court, 72 W. Va. 475, 78 S. E. 36 (1913).
[17] In re West 172d St. in City of New York, *supra.*
[18] Miller *v.* City of Bluefield, *supra.*

public user. In all jurisdictions a formal or express acceptance, (as by order, resolution or action of public authorities made and entered of record) being perfect in form and free of any doubt is held to bind both the dedicator and the dedicatee.[19] It is also almost the universal rule that an implied acceptance, as by acts showing conduct consistent only with an acceptance, will be binding both as to the dedicator and the dedicatee.[20] However, it must be remembered that in order for an acceptance of a dedication to be good so as to bind the parties it must have been made by a person or body having the power or authority to accept.[21] Thus unauthorized repairs by a street commissioner have been held not good as an acceptance of a street dedicated for public use.[22]

Various standards have been set by the courts in determining the effect to be given user by the public of the property dedicated, as a proper acceptance of that dedication. It would seem that if the use was for a greater length of time than the satutory period, as against the dedicator it would be question of gaining an easement by prescription or adverse user rather than involving acceptance of a dedication. Yet Virginia treats this as raising a presumption of acceptance of the dedicator's offer.[23] Where the public use was for a period of time less than the statutory requirement, the courts are not agreed as to the effect of such a use by the public as acceptance of a dedication. For purposes of logical discussion it is necessary to distinguish between cases where the dedicator is the one to be charged or bound by the acceptance, and those wherein the dedicatee is the one sought to be held as having accepted. Most text writers and a slight majority of courts favor the rule that in order for the dedicator to be bound a substantial user by the public for the purposes of the dedication may be proved as an acceptance.[24] Some jurisdictions, however, hold that user by the public alone will not constitute a sufficient acceptance to bind the dedicator.[25] West Virginia adheres to the latter view.[26] An entirely different attitude towards the question is shown where the dedicatee, gener-

[19] Hillmer Co. *v.* Behr, *supra;* City of Baltimore *v.* Canton Co., 124 Md. 620, 93 Atl. 144 (1915); Basic City *v.* Bell, 114 Va. 157, 76 S. E. 336 (1912); City of Pt. Pleasant *v.* Caldwell, 87 W. Va. 277, 104 S. E. 610 (1920).
[20] Hillmer Co. *v.* Behr, *supra;* City of Baltimore *v.* Canton Co., *supra;* Kniss *v.* Duquesne, *supra;* Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020 (1895).
[21] Ogle *v.* City of Cumberland, 90 Md. 59, 44 Atl. 1015 (1895); People *v.* Underhill, 144 N. Y. 316, 39 N. E. 333 (1895).
[22] White *v.* Bradley, 66 Me. 254 (1876).
[23] Richmond *v.* Galleys Mills Co. 102 Va. 165, 45 S. E. 877 (1903).
[24] Eltinge *v.* Santos, 171 Cal. 278, 152 Pac. 915 (1915); Palmer *v.* City of Chicago, 248 Ill. 201, 93 N. E. 765 (1910); Atty. Gen. *v.* Onset Bay Grove Ass'n., 221 Mass. 342, 109 N. E. 165 (1915).
[25] People *v.* Underhill, *supra;* Cincinnatti & N. W. Ry. Co. *v.* Village of Roseville, 76 Ohio St. 108, 81 N. E. 178 (1907).
[26] Boyd *v.* Woolwine, *supra.*

ally a city or county, is made defendant in a suit where liability is based on alleged acceptance of a dedication. In such cases the courts by a great majority say that public user alone will not bind the dedicatee.[27]

The reason for the strictness of the West Virginia Supreme Court in determining what constitutes an acceptance of a dedication, and its opposition to public user as an acceptance, is found in the statute imposing absolute liability on a county or municipality for injury by reason of a public road being out of repair,[28] and the definition given in our statutes to the words "road and street."[29]

—R. J. R.

LANDLORD AND TENANT—INJUNCTION TO STAY WASTE.—The tenant in possession under a one year lease let out a part of the demised premises, a farm, to striking miners for a tent colony. The miners erected tents, frame houses of a temporary nature, dug holes, ditches and drains through the meadowland. The lessor filed his bill in equity against the lessee for an injunction, one of the grounds for relief being that the lessee and those under him were committing waste. The lower court granted the injunction. It appears that the waste complained of was not irreparable and of a substantial or permanent nature. Upon appeal, the Supreme Court reversed the decree of the lower court, holding, *inter alia,* that in a suit by the lessor to restrain the lessee from committing waste on the demised premises the bill must aver facts sufficient to show that the injury is irreparable by an action at law. *Gwinn* v. *Rogers,* 115 S. E. 428, (W. Va. 1923).

The Court cites as authority for this holding the case of *Greathouse* v. *Greathouse,* 46 W. Va. 21. In that case the Court refused to restrain the life tenant from committing waste on the ground that the waste proven was trivial and capable of pecuniary compensation; that the injury must be substantial and irreparable in order to give equity jurisdiction and authority to grant an injunc-

[27] Downing *v.* Coatesville Borough, 214 Pa. 291, 63 Atl. 696 (1906); Road Dist. No. 1 *v.* Beebe, 213 Ill. 147, 83 N. E. 131 (1907); Michaelson *v.* Charleston, 71 W. Va. 35, 75 S. E. 151 (1912); Host *v.* Piedmont etc. Ry Co., *supra. Contra,* State *v.* Birmingham, 74 Ia. 407, 38 N. W. 121 (1888).
[28] W. VA. CODE, c. 43 § 154.
[29] Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48 (1889).