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Dedication

By AUSTIN C. GILDEA

The growth of industrialism has increased the urban population of the United States until the people living within the cities are almost equal in numbers to those living on the farms. Around every incorporated municipality, there is an array of subdivisions and additions. With the growth of the city and the need for more taxable property, these sections, some closely built up, while others are not more than open fields with a few bisecting trails, are taken into the corporation and the municipality begins to exercise its functions over the property thus acquired.

It is fundamental that the municipal government exercises two distinct types of powers. Further, it is admittedly fundamental that a municipality cannot be sued for acts of commission or omission while in the exercise of its governmental powers, but that it may be sued for acts of its agents who are acting for it in caring for some proprietary function. The caring for and repairing of the city streets is such a proprietary act as to make the city liable in damages for injuries sustained by reason of the lack of repairs to the street or for the manner in which the repairs were being made.

Let us presume that A while going to the home of B, in a section newly acquired by the city, was injured because of the lack of repairs to a thoroughfare which he claims to be a city street. City defends his suit by claiming no dedication of the street.

Streets are acquired by the city by dedication. Dedication is the giving to the public the use of the land by the owner thereof, or an easement therein (18 C. J., Dedication). From the very earliest times, there seems to have been some form of dedication by which land could be acquired by the public.

Common law dedication, still effective in many jurisdictions, acts merely as an estoppel in pais (18 C. J. 44) or gives an easement in the property to the municipality. There is now, in most states, a statutory dedication which

vests the fee in the municipality (*Ryerson v. City of Chicago*, 247 Ill. 185). In Indiana, the statute providing for dedication seems to be merely directionary for it was held that such a statute did not prevent such uses being created by common law (*State v. Hill*, 10 Ind. 219) if there was an intent to dedicate and an acceptance shown (14 Ind., 66). Indiana also holds that if the public uses adversely to the owner for twenty years the property vests in the public in such a manner as not to be diverted by the owner (*Marion v. Skillman*, Ind., 130) or if it has been used for such a length of time as would affect rights if it were interrupted then much less time is necessary to affect a dedication by adverse user in the public. In common law dedication, there need not be any corporate entity at the time of the dedication (*Board Regents v. Painter*, 14 S. W., 938) and in this respect it differs from a statutory dedication.

Statutory dedication acts as a grant (18 C. J. 41) and being a grant it is only applicable to municipalities that have been legally incorporated in order that there be some one who is able to be a grantee. In Massachusetts, no way not opened to the public in certain prescribed way is not chargeable to the city (22 N. E., 896) which would limit the liability of the cities for repairs to the streets which were taken in under the provisions of the dedication statute. The statute as interpreted by Massachusetts court is not merely directionary but positively mandatory. There must be an intent to dedicate manifested by an express or decisive act. (18 C. J. 52-53)

The doctrine of the states maintaining that dedication statutes are mandatory is expressed in vol. 18 C. J. at page 79, and cases cited, as being, "liability cannot be placed on municipality for maintenance and repair when property is dedicated by user of public." In *Kirsch v. City of Chicago*, Ill. App., 1909, it was held that permissive use of a strip of land as a street does not legally constitute it such so as to render a municipality liable to an action for an injury resulting because of the disrepair thereof. In order to charge a city with liability for failure to care for an alleged public street, both dedication and acceptance must be proven. And, in Kentucky, it was held that a municipality is not liable for the condition of its street which it had not accented or

taken control of, although it had been in use by the owners of houses facing on it or persons going to and from them for years. (*Raines v. East Tennessee Telephone Company*, 152 Ky. 205) A municipality is not bound by common law dedication of a street by the owner so as to impose the obligation of caring for it unless it accepts the dedication, was the Texas version of this doctrine as set forth in *Poindexter v. Schaffner* 162 S. W. 22.

Thus it will be seen from the examples given that to collect damages from a municipality within a jurisdiction that holds to the statutes strictly, it would be necessary to show dedication by strict compliance with the statute. If all the requirements are not shown to have been complied with, these same courts are almost unanimous in holding the plaintiff would be non-suited as against the municipality for not showing a cause of action. If the plaintiff is unable to show the statutory dedication and acceptance, because of the lack of it, his one possible remedy would be to sue the owner of the land who attempted to dedicate the property. Some jurisdictions hold that although the deed for the lot may not set it forth, still every abutting property owner is responsible for all improvements, fronting upon the lot, the full width of the lot to a point midway to the lot line of land directly opposite. In other words, a lot owner is liable for improvements in front of his lot to the center of the street. Under this theory our Mr. A might sue the property owner, in front of whose lot he was injured, in case the owner of the original plat could not be made a defendant. If he sued under the latter theory, A would be going under the theory that the property owner owned to the center of the street and that he held out an invitation to the public to use his property in which case he owes them a duty of seeing that the roadway is kept in repair to a degree which would not ordinarily cause injury.

As we have already seen, there are states which, although they now have statutory dedication, still cling to the common law dedication as well. These states have a much more liberal rule than the "strict compliance" rule of Illinois, Massachusetts, and the other states that hold to mandatory dedication by statute. The liberal rule is generally held to be that: "When a dedication has been ac-

cepted, either expressly — statutory compliance — or impliedly—by some act of the city in repairing, caring, lighting or some other such act—by the proper authorities, the municipality is charged with the duty of keeping it in repairs and is liable for injuries caused by the neglect to do so. (*Fowler v. Lindquist*, 138, Ind. 566) (*James v. Kent County Commissioners-Maryland*, 33LRA291). In our hypothetical case, A could recover from the municipality on the grounds of acceptance of dedication by implication. For it is held that it need not be formally dedicated if the property owners near there held it to be and used it as a street and the public generally held it to be a street for a ten year period, the city is liable for its care (142 S. W., 817) or if the city has done grading and building at any time, it accepts the street by implication (136 S.W., 753)

There is still another line of decisions. The states holding with this group, notably Washington and Missouri, maintain that mere knowledge of the use of a street by the public is sufficient dedication as to make the municipality liable. When a city devotes a dedicated highway to the use of the public, or invites the public to use it as a street it becomes obliged to maintain it as such. (*Curran v. St. Joseph*, 175, S. W., 584). It was further held that allowing it, the street, to remain open was sufficient invitation as to bring it under this rule. The Washington rule, as stated in *Richardson v. City of Seattle*, 166 Pac., 113, is where a city left platted street open to travel with notice that it was used, the city was required to keep it in ordinary repair, though not to grade and improve it for its full platted width or to reduce the grades to the greatest extent.

Summarizing then, we find that A could recover for his injuries from the municipality in all jurisdictions excepting those which have the strict compliance with the statute rule. In the states following Illinois and Massachusetts, it is necessary to show dedication and acceptance and failing this, the plaintiff may be obliged to sue the abutting property owner. In Maryland, New York and Indiana, if plaintiff can not show statutory dedication, he may still sue by showing dedication by implication or by adverse user in the public. In the third group, Washington, Missouri, etc.. A need not show anything but that the street was