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What Constitutes Intent to Dedicate in South Carolina

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WHAT CONSTITUTES INTENT TO DEDICATE IN SOUTH CAROLINA

History and Scope

Closely akin to dedication in principle, and appearing much earlier in the common law, is the doctrine of customary rights. The nature of these rights is pointed out in the New York case of *Post v. Pearsall:*[1]

> A custom can exist only in favor of a community of a town, village or hamlet; and because the claimants have been in immemorial use of the right claimed, the legal presumption in England is, that these customs were originally based upon and created by Act of Parliament; although not by that body as it is now constituted.

Even more simply stated, a custom is a mere local usage, not belonging to any particular person, but belonging to the community rather than its individuals.[2] Blackstone states that customary rights arose out of the necessities of the public and are based on the fact that from time immemorial certain uses were permitted.[3] It was on this theory of customary rights that ways were acquired by the public (or rather by a local public) at early common law.[4]

When the doctrine of customary rights became incapable of effective operation because of modern conditions, the English courts seized upon a new doctrine which they called dedication.[5] This doctrine was first recognized in the 1713 case of *Queen v. Inhabitants of Hornsey:*[6]

> If a vill be erected, and a way laid out to it, if there be no other way but that to the vill, it is not material *quo animo* it was laid out, it shall be deemed a public way.

The landmark case, the first to call the doctrine dedication, was *Lade v. Shepherd,*[7] decided in 1735. While dedication was named and started into the stream of the common law by this case, the doctrine

1. 22 WEND. 425 (N. Y. 1839).
2. 1 THOMPSON, REAL PROPERTY § 414 (2d ed. 1939).
3. 2 BL. COMM. § 33.
4. Chaplin, *Dedication in Its Relation to Trust Legislation,* 16 HARV. L. REV. 330 (1903).
5. *Id.* at 333.
6. 10 Mod. 151, 88 Eng. Rep. 670 (Q. B. 1713).
7. 2 Strange 1004, 93 Eng. Rep. 997 (K. B. 1735).

did not come prominently into view until the nineteenth century.[8]

While it is an important part of the law of England, the doctrine of customary rights has never received much recognition in the United States. This is mainly due to the fact that customary rights are of much less importance in a new society than in an ancient state.[9] At least one American jurisdiction, New Hampshire, does recognize customary rights, however.[10] Dedication, unlike customary rights, has developed rapidly in America, and is now a much broader field of law here than in England.[11]

In 1821, less than a hundred years after the landmark case of *Lade v. Shepherd,* the South Carolina court by way of dicta recognized the doctrine of dedication in the case of *Witter v. Harvey.*[12] Since the almost passing reference to the doctrine in this case, the law on this subject has developed quite broadly in this state.

Leading text-writers point out the difference in common-law dedication and statutory dedication as being that the former works as an estoppel *in pais,* while the latter works by way of grant.[13] Thompson defines a common-law dedication as the setting aside of land for public use, which must be done with the intent of the owner clearly indicated by his words or acts, and an acceptance by the public of the dedication.[14] A common-law dedication leaves the legal title in the owner, but makes such legal title subject to the public easement created.[15] South Carolina cases bear out this last statement.[16]

A statutory dedication is a dedication effected by recording a plat in substantial compliance with the statute authorizing it.[17] The

8. Chaplin, *supra* note 4, at 333.

9. AM. AND ENGLISH ENCYC. OF LAW 373 (2d ed. 1904). It should be pointed out that while the South Carolina court sometimes speaks of customary rights, they are not public property rights as are discussed here. See Walker v. Chichester, 2 Brev. 67 (S. C. 1806) and Knox v. Artman, 3 Rich. 283 (S. C. 1832) in which an ancient custom of the city of Charleston requiring joint land owners to contribute equally to partition fences was upheld.

10. Knowles v. Dow, 22 N. H. 387 (1851); Nudd v. Hobbs, 17 N. H. 524 (1845). As late as 1935 in Gillies v. Orienta Beach Club, 159 Misc. 675, 289 N. Y. S. 733 (1935), the doctrine of customary rights in the public was argued. The court rejected the doctrine on the basis of the different social conditions which exists in America today and the feudalism which gave rise to the doctrine. Also the court pointed out that the justification for the doctrine was the destruction of supposed grants, which theory could find no support in a new state where records and statutes are filed and kept.

11. Chaplin, *supra* note 4, at 333.

12. 1 McCord 67, 10 Am. Dec. 650 (S. C. 1821).

13. 11 McQUILLIN, MUNICIPAL CORPORATIONS § 33.03 (3rd ed. 1950); 2 THOMPSON, *op. cit. supra* note 2, § 482.

14. 2 THOMPSON, *op. cit. supra* note 2, § 482.

15. 11 McQUILLIN, *op. cit. supra* note 13, § 33.03.

16. Leppard v. Central Carolina Telephone Co., 205 S. C. 1, 30 S. E. 2d 755 (1944); Charleston Rice Milling Co. v. Bennett & Co., 18 S. C. 254 (1882).

17. 2 THOMPSON, *op. cit. supra* note 2, § 482.

title acquired under a statutory dedication depends on the particular statute, so that while the majority rule is that a fee passes, where the statute provides otherwise, a lesser interest may pass.[18]

Since South Carolina has no provision for statutory dedication, the scope of this note will be devoted to what constitutes an intent to dedicate under a common-law dedication.

Intent to Dedicate

Dedication can only be made by the owner of a fee in the land or by another with the owner's consent.[19] Stated in the negative, a person cannot dedicate land to the public unless he has capacity to make a grant.[20] A dedication must be made for the use of the public at large, and cannot be for private uses or limited to such persons as the owner may desire.[21]

The main essential of a dedication is the intent of the owner to dedicate, and unless such intent is found from the facts in a given case, no dedication can exist.[22] The unequivocal statement that an intent must always be present is not wholly correct, in that a common-law dedication often rests on the conduct of the land owner, relied on by the public to their injury so as to constitute an estoppel *in pais* against the owner, even though there was never in the mind of the owner any actual intent to dedicate; in brief, the intent may be actual or implied.[23] If the intent is actual and expressed, such expression may be oral or in writing.[24] In the recent case of *Shia v. Pendergrass*,[25] the South Carolina Supreme Court, speaking through Justice Fishburne, said:

> It must be borne in mind that title to real estate, or any interest therein, is ordinarily passed by deed or will, and, while one may lose his land without an actual conveyance of the same, the acts and conduct on his part, and upon the part of the one

18. 11 MCQUILLIN, *op. cit. supra* note 13, § 33.69.
19. Safety Building & Loan Co. v. Lyles, 131 S. C. 542, 128 S. E. 724 (1925); Seaboard Air Line Ry. v. Town of Fairfax, 80 S. C. 414, 61 S. E. 950 (1908).
20. Grady v. City of Greenville, 129 S. C. 89, 123 S. E. 494 (1924).
21. Shia v. Pendergrass, 222 S. C. 342, 72 S. E. 2d 699 (1952): Safety Building & Loan Co. v. Lyles, 131 S. C. 542, 128 S. E. 724 (1925). There are some exceptions to the statement that a dedication cannot be for private uses or limited to such persons as the owner may desire, an exception being a dedication of a graveyard. See *Ex parte* McCall, 68 S. C. 489 (1903) and the dissenting opinion of Justice Cothran in Frost v. Columbia Clay Co., 130 S. C. 72, 124 S. E. 767 (1923).
22. 3 DILLON, MUNICIPAL CORPORATIONS § 1079 (5th ed. 1911).
23. 11 MCQUILLIN, *op. cit. supra* note 13, § 33.29.
24. 2 THOMPSON, *op. cit. supra* note 2, § 486.
25. 222 S. C. 342, 72 S. E. 2d 699 (1952).

> claiming to have acquired such title in such way, must be so unequivocal and positive as to leave little doubt that it was the intention of the owner to dedicate the same to public use. By this we do not mean that the expression of such an intent upon the owner's part need be proven, but his acts and conduct in regard to the property must be of such character that the public, dealing with him upon the strength of such conduct, could not but believe that his intention was to vest an easement therein in the public.

In some jurisdictions the general rule in civil law cases requiring only a preponderance of evidence to establish a disputed fact applies where the fact of a dedication is at stake.[26] But in South Carolina an intent to dedicate must be clearly and unequivocally manifested,[27] and must be shown by clear, cogent, and convincing evidence.[28]

Seven ways by which an intent may be shown are:[29] (1) by a plat executed and recorded as provided by statute so as to constitute a statutory dedication, (2) by a plat executed and filed by the owner of property which is not sufficient as a statutory dedication, but is evidence of an intent to dedicate, (3) by an owner platting his land and selling lots pursuant to the plat, (4) by recitals in a deed which recognize the rights of the public, (5) by the owner's oral declarations, (6) by affirmative acts on the part of the owner, (7) by the owner's acquiescence in the public's use of his property for a public purpose; this intent need not be actual.

Since there is no provision for statutory dedication in South Carolina, the first two methods of showing intent listed above cannot arise in this state.

The third method, intent being shown by the owner platting his land and then selling lots pursuant to this plat, gives rise to such problems as to necessitate a separate section of this note, and will be dealt with later.

The fourth way of showing intent, by recitals in a deed recognizing the rights of the public, has been touched on in South Carolina in the case of *Glenn v. Woodworth*.[30] In this case a deed was given to the city of Spartanburg of a tract of land, partly in and partly out of the city, for park purposes, with a provision that: "the City

26. Spencer v. Peterson, 41 Ore. 257, 68 P. 519 (1902).
27. Antonakas v. Chamber of Commerce, 130 S. C. 215, 126 S. E. 35 (1924).
28. Seaboard Airline Ry. v. Town of Fairfax, 80 S. C. 414, 61 S. E. 950 (1908).
29. 11 McQUILLIN, *op. cit. supra* note 13, § 33.30.
30. 197 S. C. 56, 14 S. E. 2d 555 (1941).

of Spartanburg is to improve all roads and streets located within the city limits on the said tract of land by grading and top-soiling, and I [the grantor] am to improve roads and streets lying outside of the city limits on the said tract of land." The court held this to be a dedication of the roads and streets outside the city. While the court gave no reasons or authority for so holding, it would appear that it was because the deed recognized the rights of the public.

The fifth and sixth methods laid down above for determining intent to dedicate, namely by oral declarations and affirmative acts respectively, are so widely known and accepted as to require no further comment. The seventh method laid down above, whereby an intent to dedicate may be shown by the public's use, is extensive enough to require a separate section of this note and will be dealt with later.[31]

Sale with Reference to a Plat

When a land owner plats his land into lots and streets and then sells lots in reference to the plat, two main questions arise. The first of these is whether the sale in reference to the plat constitutes a dedication of the streets and alleys on the plat to the public or merely shows an intent to dedicate; the second question involves the rights of the purchasers to the streets on the plat which were referred to and relied upon when the sale took place.

It is a general rule that if an owner of a tract of land plats it, and thereafter sells lots with reference to the plat, he is regarded as having dedicated the streets and alleys which appear on the plat to the public.[32] Some cases hold, however, that the making of a plat and the sale of lots in reference thereto are merely evidence of an intent to dedicate, which offer or intent must be acted upon or accepted like any other common law dedication in order to create any rights in the public.[33] This latter view is the basis of early South Carolina cases[34] and recent cases,[35] but for a period the South Carolina court adopted the general rule stated above.[36]

31. It has been pointed out on the negative side in Shia v. Pendergrass, 222 S. C. 342, 72 S. E. 2d 699 (1952) that the fact that a person who disclaims an intent to dedicate, continued to pay taxes after the time the supposed dedication took place, was not of itself, considered very strong evidence of an intent not to dedicate, yet, it is of some value as evidence tending to negate an intent.

32. 4 TIFFANY, REAL PROPERTY, § 1103 (3rd ed. 1939).

33. 3 DILLON, *op. cit. supra* note 22, § 1090.

34. State v. Carver, 5 Strob. 217 (S. C. 1850); Town Council of Aiken v. Lythgoe, 7 Rich. 435 (S. C. 1854).

35. Outlaw et al. v. Moise, 222 S. C. 24, 71 S. E. 2d 509 (1952); Cason v. Gibson et al., 217 S. C. 500, 61 S. E. 2d 58 (1950).

36. Marshall v. Columbia & Eau Claire Electric Street Ry. Co., 73 S. C. 241, 53 S. E. 417 (1905).

The trilogy of cases[37] arising out of the sale of three lots, in reference to a plat containing an open space referred to as a park circle, to a Mrs. Marshall, who subsequently claimed the right to have the circle left undisturbed, show the change of the law in this state from the general rule by which a platting of land and sale in reference to the plat constitutes a completed dedication to the public of the streets and alleys on the plat, to the view which regards such actions as resulting only in an offer to dedicate. In 1897 the Eau Claire Electric Street Railway Co. sold Mrs. Marshall three lots of land in reference to a plat on which a circle of land adjoining her lots was preserved for a park. Orally the president of the railway company assured Mrs. Marshall that the circle was dedicated by the company to public uses and would be kept open for a park. In the case of *Marshall v. The Columbia & Eau Claire Electric Street Ry. Co.*,[38] decided in 1905, the question of whether there had been a dedication of the park circle by the sale of the lots in reference to the plat was raised. The court held that there was a dedication to the public. In *Diseker v. Eau Claire Land and Improvement Co.*,[39] decided in 1910, the court was again confronted with the same problem, arising out of the same set of facts, as was raised in the *Williams* case, but avoided a change of stand on the question of dedication of the circle. In 1925, the case of *Safety Building & Loan Co. v. Lyles*[40] came before the court. Confronted once more with the same question arising out of the same set of facts, the court announced that the sale in reference to the plat was not a dedication of the circle since it was never accepted by the public or the Town of Eau Claire, the town not even being in existence at the time of the sale of the lots. In a recent case, *Outlaw v. Moise*,[41] the court cleared up the law on this subject, holding that a sale in reference to a plat showing streets and alleys shows merely an intent to dedicate, and must be accepted like any other common-law dedication to be complete.

Strictly speaking, there can be no dedication to private persons, so it is improper to speak of a sale of lots in reference to a plat on which streets appear as effecting a dedication as between a grantor

37. Marshall v. Columbia & Eau Claire Electric Street Ry. Co., 73 S. C. 241, 53 S. E. 417 (1905); Diseker v. Land & Improvement Co., 86 S. C. 282, 68 S. E. 529 (1910); Safety Building & Loan Co. v. Lyles, 131 S. C. 542, 128 S. E. 724 (1925).

38. Marshall v. Columbia & Eau Claire Electric Street Ry. Co., *supra* note 37.

39. Diseker v. Land & Improvement Co., 86 S. C. 241, 53 S. E. 417 (1905).

40. Safety Building & Loan Co. v. Lyles, 131 S. C. 542, 128 S. E. 724 (1925).

41. 222 S. C. 24, 71 S. E. 2d 509 (1952).

and a grantee; yet this is often done.[42] Whether the grantee by buying a lot in reference to a plat has a right of way in the streets and alleys on the plat is actually entirely independent of any rights which might exist in the public.[43]

The rights of a grantee who purchases in reference to a plat are so closely tied up with, and confused with the rights of the public, however, as to justify treatment here.

Three views as to a grantee's rights have developed in the United States: (1) the so-called "broad view" whereby the grantee gets an easement in all streets designated in the plat;[44] (2) another view is that the grantee's rights are limited to the streets on which his land abuts, so far as is necessary in order to reach a cross street in either direction;[45] (3) still another view is that the grantee is not restricted to such streets as border his lots, but that he acquires rights in all ways as are reasonably necessary for access to and exit from his lot.[46] In the *Safety Building & Loan Co. v. Lyles* case, the court, apparently wishing to end the litigation for once and for all, seized upon a fourth theory of the grantee's rights, holding that when Mrs. Marshall bought the lots with reference to the platted circle, she received an easement in gross in the circle, which easement died with her. This theory has never been further developed in the South Carolina cases and seems to have no support elsewhere. In a recent case[47] the South Carolina court speaking through Justice Stukes points out that in the *Lyles* case the successors of Mrs. Marshall's interest in the lots were not included in the suit, and thus the right originally acquired by her in the first suit was not defended; this implies that had the rights acquired by Mrs. Marshall been properly defended, the result may not have been a finding of an easement in gross.

The South Carolina court has never had to rule on the question of whether a purchaser who buys in reference to a plat gets an easement in all the streets appearing on the plat, or only in those which abut his property or only in those which are necessary. Twice recently the court has held that where the owner sells in reference to a plat, the buyer gets an easement in those streets which abut his

42. 11 McQUILLIN, *op. cit. supra* note 13, § 33.24.
43. 3 TIFFANY, *op. cit. supra* note 32, § 800.
44. Collins v. Land Co., 128 N. C. 563, 39 S. E. 21 (1901); Cook v. Totten, 49 W. Vir. 177, 38 S. E. 491 (1901).
45. Reis v. City of New York, 188 N. Y. 58, 80 N. E. 573 (1907).
46. Schermerhorn v. Todd, 51 Mich. 21, 16 N. W. 304 (1883).
47. Cason v. Gibson *et al.*, 217 S. C. 500, 61 S. E. 2d 58 (1950).

property.[48] While the court has not yet had occasion to rule in a case in which the grantee claims an interest in all the streets contained in a plat, there is reason to believe that the "broad rule" set out above would prevail. In the case of *The Town of Estill v. Clark*,[49] the court by way of dictum approved the "broad rule" as stated above. Since this case the court has found three occasions to repeat this dicta.[50]

Public Use As Showing Intent

Under certain circumstances an intent to dedicate may be inferred from mere public user, unless the user is permissive only.[51] If the public user has been openly as of right, and for such a length of time that the owner of the land must know of it, the owner's acquiescence may justify the inference that it was his intention to dedicate the land to such use.[52] If the user by the public is based on a license or permission given to an individual or to a group of individuals, and is not as of right, the owner's acquiescence therein can obviously not support an inference of dedication.[53] While it is impossible to fix any specific length of time necessary to show a dedication, proof of user by the public for a period much shorter than required to show title by prescription may be sufficient to prove the intent to dedicate.[54] In a recent case[55] the South Carolina court held that the length of time of the public user is of no material consequence in showing an intent on the part of the owner of the land to dedicate it to public use unless it becomes important in connection with other circumstances. This is to be distinguished from a situation in which public user is employed to show acceptance of a dedication by the public. In such a case the length of time of the public user becomes very material, it having been held that it must be a long-continued use by the public as of right in order to constitute an acceptance of the dedication.[56] Also to be distinguished is the situation in which a dedication is claimed by virtue of prescription or presumption of a

48. Cason v. Gibson *et al.*, *supra* note 47; Billings *et al.* v. McDaniel, 217 S. C. 261, 60 S. E. 2d 592 (1950).
49. 179 S. C. 359, 184 S. E. 89 (1936).
50. Outlaw *et al.* v. Moise, 222 S. C. 24, 71 S. E. 2d 509 (1952); Cason v. Gibson *et al.*, 217 S. C. 500, 61 S. E. 2d 58 (1950); Billings *et al.* v. McDaniel, 217 S. C. 261, 60 S. E. 2d 592 (1950).
51. 11 McQUILLIN, *op. cit. supra* note 13, § 33.31.
52. 4 TIFFANY, *op. cit. supra* note 32, § 1102.
53. Grady v. City of Greenville, 129 S. C. 89, 123 S. E. 494 (1924).
54. 11 McQUILLIN, *op. cit. supra* note 13, § 33.33.
55. Shia v. Pendergrass, 222 S. C. 342, 72 S. E. 2d 699 (1952).
56. Caston v. City of Rock Hill, 107 S. C. 124, 92 S. E. 191 (1916).

grant. In such a case the user by the public must, of course, be for twenty years.[57]

Conclusion

Dedication is a fairly young child of the common law, yet it has grown by such leaps and bounds that it often upsets its judicial fathers. It is doubtful if the English judges who gave birth to this doctrine, even in their most far-seeing moments, could have imagined the doctrine growing to its present importance. Because of this rapid growth there has been little time for precedents to become set. As a natural result there is little uniformity among the courts on the subject, and judges often confuse the doctrine with various types of easements which have little connection with dedication.

As stated previously, two important problems arise in relation to dedication. It is believed that the first of these problems has been handled wisely by the South Carolina court. The court has reversed itself and now holds that a sale of a lot in reference to a plat merely evidences an intent to dedicate the streets appearing on the plat rather than as accomplishing a complete dedication. Such a view protects a vendor who, having visions of a vast residential area developing on his land, sells one lot pursuant to a plat and then cannot rid himself of the others. If it were held that such a sale constituted a dedication, his land could be tied up forever, always subject to the public's interest in the streets shown on the plat. Certainly the change of view by the South Carolina court was desirable.

The second of these problems, the interest acquired by a vendee in the streets shown on a plat in relation to which he buys a lot, has yet to be settled in this state. As pointed out previously, three views have been advanced in this country as to the interest which the vendee acquires. The South Carolina court has favored the "broad view". Perhaps the best opposition to this view is found in the dissenting opinion of Justice Douglas in the North Carolina case of *Collins v. Asheville Land Co.*:[58]

> . . . if a man owning two or three thousand acres of land, in a moment of public craze, such as we have recently had, makes a plat of it showing a hundred streets that have never had and never will have any actual or potential existence outside of the fertile imagination of a land boomer, and sells a single quarter-

57. State v. Allen, 107 S. C. 132, 92 S. E. 193 (1916); Hutto v. Tindall *et al.*, 6 Rich. 396 (S. C. 1853).
58. 128 N. C. 563, 39 S. E. 20 (1901).

> acre lot to a man whom he happened to show the plat, he can never close a single one of the hundred paper streets; it makes no difference that the lot sold is on the extreme corner of the plat, and is not affected in value in the slightest degree by the opening or closing of back streets miles away from it, and that its purchaser has no use for the streets which can never be used by him or anybody else for any practical purpose. In spite of these facts, all these hundred streets must be kept open forever, not to subserve his convenience, for they add nothing to that, but simply to gratify his whim, or to enable him to force the vendor to buy his piece at any price he may ask . . . . It may be said that this is *reductio ad absurdum.* Even so, it is the result that may flow from the opinion of the court.

By ruling that a sale in reference to a plat was only evidence of an intent to dedicate to the public the court has removed a great hardship from the vendor. To hold that the vendee gets an easement in all the streets shown on the plat is to place the burden back upon the vendor. An adoption of the "broad view" would therefore be totally inconsistent with the present state of the law in South Carolina. It is to be hoped, therefore, that the court will adopt one of the other two views when the problem directly arises.

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