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Adverse Possession: Application Against Unaccepted Dedicated Property

Garth A. Webster

to his guilt or innocence may well depend on his being able to prepare for trial with an accurate knowledge of the prosecution's case.

LOUIS EARL CONWAY

CASE COMMENTS

ADVERSE POSSESSION: APPLICATION AGAINST UNACCEPTED DEDICATED PROPERTY

Waterman v. Smith, 94 So.2d 106 (Fla. 1957)

Plaintiff brought suit to remove an obstruction from an alley dedicated by plat. The alley as it appeared on the plat, filed in 1886, was in the shape of an inverted *L*. Defendant, having obstructed the alley since 1920, claimed title by adverse possession. The city paved the north-south portion in 1929. The east-west part had not been opened, but there was evidence of public user in 1912. The lower court rendered a decree in favor of defendant. On appeal, HELD, whether dedication was accepted by public user in 1912 or by the act of paving in 1929, title could not be acquired by adverse possession, since there was no evidence of withdrawal of the offer to dedicate. Judgment reversed.

The majority of American jurisdictions hold that platting of land with portions set apart and dedicated to public use constitutes merely a revocable offer of dedication to which no public rights accrue before acceptance.[1] A gift cannot be bestowed without the assent of the person to whom it is proffered, and if he declines to accept it he can assert no claim of title.[2] It follows that in these jurisdictions the doctrine of adverse possession is applicable to such lands.[3]

A number of states have enacted statutes that affect this problem in various ways. For example, in Texas no person may acquire by adverse possession any right or title to land that has been dedicated to the municipality.[4] In Pennsylvania the municipality has twenty-

[1]Brewer v. Claypool, 223 Iowa 1235, 275 N.W. 34 (1937); Lee v. Walker, 234 N.C. 687, 68 S.E.2d 664 (1952); Parrillo v. Riccitelli, 123 A.2d 248, 249 (R.I. 1956) (dictum). *Contra,* Osterweil v. Newark, 116 N.J. 227, 182 Atl. 917 (1936).

[2]Kelsoe v. Town of Oglethorpe, 120 Ga. 951, 48 S.E. 366 (1904).

[3]See note 1 *supra.*

[4]TEX. REV. CIV. STAT. ANN. art. 974a (Vernon 1952), art. 5517 (Vernon 1954),

one years from the time of dedication to accept the property.[5] All public rights, which cannot be barred by adverse possession, cease if there has been no acceptance within that time.

In Florida it is questionable whether the doctrine of adverse possession is applicable to property dedicated to but not accepted by the municipality. There are no Florida statutes directly affecting this problem. Florida has followed the majority view that no public rights attach to the dedicated land until there has been "clear, satisfactory and unequivocal" proof of acceptance.[6] Until the public accepts a dedication, the rights of the parties who purchase with reference to a plat are strictly private rights.[7] These private rights, which would be public rights had there been acceptance, have been barred by adverse possession.[8] Dictum in a recent case indicates that adverse possession is applicable prior to acceptance:[9]

> "[U]nless, prior to such acceptance, some person has acquired ownership, title and right of possession of, a particular street by (a) mesne conveyance, or (b) adverse possession, or (c) the public authorities are estopped as to a particular street by the well-known principles of estoppel."

It follows from these cases that adverse possession should be applicable against unaccepted dedicated property.

On the other hand, there are cases holding that public acceptance may be made within a reasonable time, but before withdrawal of the offer of dedication, as the convenience of the public requires.[10] In *Earle v. McCarty*[11] the Court pointed out that failure of the claimant

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McLennan County v. Taylor, 96 S.W.2d 997 (Tex. Civ. App. 1936).

[5]PA. STAT. ANN. tit. 36, §1961 (1954), Rahn v. Hess, 378 Pa. 264, 106 A.2d 461 (1954).

[6]County Comm'rs v. F. A. Sebring Realty Co., 63 So.2d 256 (Fla. 1953); Miami v. Florida E.C. Ry., 79 Fla. 539, 84 So. 726 (1920); Kirkland v. Tampa, 75 Fla. 271, 78 So. 17 (1918).

[7]Mumaw v. Roberson, 60 So.2d 741 (Fla. 1952); see Welch v. Iserman, 4 Fla. Supp. 131 (1953).

[8]Mumaw v. Roberson, 60 So.2d 741 (Fla. 1952).

[9]Indian Rocks Beach South Shore v. Ewell, 59 So.2d 647, 655 (Fla. 1952).

[10]*E.g.*, Indian Rocks Beach South Shore v. Ewell, 59 So.2d 647 (Fla. 1952); Miami v. Florida E.C. Ry., 79 Fla. 539, 84 So. 726 (1920); Kirkland v. Tampa, 75 Fla. 271, 78 So. 17 (1918).

[11]70 So.2d 314 (Fla. 1954).

to allege revocation of the dedication prevented his establishing an adverse claim. In *Miami v. Florida East Coast Ry.*[12] the Court held that "while the city and the public were *entitled* to a reasonable time within which to accept the proffered dedication . . . ," use of the dedicated property inconsistent with the dedication by the successor to the dedicator's title "would operate in law as a revocation of the proffered dedication as to the *public rights therein* . . . ." (Emphasis added). Twenty-five years was held not to be an unreasonable time for acceptance in one case,[13] since there was no evidence that the offer of dedication had been revoked.

These cases emphasize the continuance of the dedicatory offer and suggest that the public has a right to accept the offer as long as it stands unrevoked.[14] The instant case reiterates this point. The defendant's possession began in 1920. The statutory period for adverse possession would have run in 1927. If the doctrine of adverse possession were applicable to property dedicated to but not accepted by a municipality, the defendant would have acquired title before the paving of the east-west part of the alley in 1929. Thus, it is readily apparent that acceptance was possible in 1929 only if the original offer created a public right that could not be barred by adverse possession.

The Court found adequate evidence of acceptance but failed to indicate when it occurred. A finding that acceptance occurred prior to 1927 would have obviated the necessity for the holding that, whether the dedication was accepted in 1912 or 1929, title could not have been acquired by adverse possession unless the offer had been withdrawn.

It is possible that the Court found acceptance by the city prior to 1927, but this is not explicit, or necessarily implicit, in the opinion. Failure to base the holding on an explicit finding that the city had accepted the dedication prior to 1927 indicates that the Court thought it unnecessary. It was unnecessary only if adverse possession was precluded. Thus, the *Waterman* case leads to the conclusion that an offer of dedication gives a municipality certain undefined rights of acceptance, and that those rights cannot be barred by mere adverse possession for the statutory period.

GARTH A. WEBSTER

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[12]79 Fla. 539, 557, 84 So. 726, 732 (1920).

[13]Gainesville v. Thomas, 61 Fla. 538, 54 So. 780 (1911).

[14]See Walker v. Pollack, 74 So.2d 886 (Fla. 1954).