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Dedication: Rights Under Misuser and Alienation of Lands Dedicated for Specific Municipal Purposes

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McGill Guide 9th ed.
John S. Burton & Herbert J. Jones, "Dedication: Rights under Misuser and Alienation of Lands Dedicated for Specific Municipal Purposes" (1954) 7:1 U Fla L Rev 82.

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to impute the contributory negligence of a driver to his passenger so as to bar recovery by the latter against a negligent third party. The third party is thereby accorded unexpected relief at the expense of one who had, in fact, no right whatsoever in the control and operation of the vehicle in which he was riding. This result is in opposition to the present tendency to increase liability in the field of automobile accident cases.[84] The use of the doctrine to overcome the requirement of a guest statute when the occupants of an automobile are pleasure-bound appears equally undesirable and is contrary to legislative intent. Furthermore, to hold an innocent passenger liable for the negligent acts of the driver is contrary to accepted theories of liability. The passenger has no opportunity to insure against the risk with which he is judicially saddled.

In short, the application of the joint enterprise doctrine to ventures of a nonbusiness nature is subject to serious objection on practical as well as theoretical grounds. A judicial redetermination of the limits of the doctrine is not only desirable but long overdue.

BROOKS P. HOYT
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DEDICATION: RIGHTS UNDER MISUSER AND ALIENATION OF LANDS DEDICATED FOR SPECIFIC MUNICIPAL PURPOSES*

The substantive law of dedication was recognized at an early, unknown date in English common law. The recognition accorded, however, was restricted to highways of public travel. A broader application of the doctrine has been permitted by the various courts of the United States, and dedication now extends to parks, commons, cemeteries, lands for school and church use, and to charitable uses generally.[1] An examination of this field reveals few well-settled principles which have been accepted in common among the jurisdictions, and glaring inconsistencies in the application of these are readily apparent. Con-

[84]See MORRIS, TORTS 340-353 (1953); James, *Accident Liability: Some Wartime Developments*, 55 YALE L. J. 365 (1946).

*Many of the principles discussed herein involving a municipality's interest in dedication are applicable to counties and states.

[1]27 Am. Dec. 559 (1886).

sequently, many ramifications of the subject necessarily are scanned, or omitted entirely, in this note. Particular attention, however, has been focused upon the rights and remedies of the parties under common law and statutory dedication involving governmental corporations, and upon constitutional questions arising from attempts to abrogate these rights.

Common Law Dedication

A common law dedication is the setting apart of land for public use; to constitute such a dedication there must be a clear intention on the part of the owner to dedicate and an acceptance by the public.[2] The doctrine of common law dedication is no longer limited to the dedication of land for highways, but extends to public squares, commons, and parks. A common law dedication may be by grant or other written instrument. A writing, however, is not necessary if there is sufficient evidence of intent on the part of the dedicator and acceptance by the public, the county, or the municipality.[3] Valid common law dedications have been held to result from unsuccessful attempts to dedicate under statute.[4]

Acceptance of a common law dedication does not pass the fee in land.[5] The interest acquired by the municipality is generally held to be in the nature of an easement, with the public having a right of user and nothing more.[6] The dedicator retains the fee simple title, and it is subject to the easement only as long as there is compliance with the terms of the dedication.[7] Common law dedication is said to

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[2]Miami v. Florida E.C. Ry., 79 Fla. 539, 84 So. 726 (1920).

[3]Hooper v. Haas, 332 Ill. 561, 164 N.E. 23 (1928).

[4]*E.g.*, Marsh v. Village of Fairbury, 163 Ill. 401, 45 N.E. 236 (1896); Maywood Co. v. Village of Maywood, 118 Ill. 61, 6 N.E. 866 (1886).

[5]United States v. 5,324 Acres of Land, 79 F. Supp. 748 (S.D. Cal. 1948); Ft. Payne Co. v. Ft. Payne, 216 Ala. 679, 114 So. 63 (1927); Robbins v. White, 52 Fla. 613, 42 So. 841 (1907); Lutterloh v. Cedar Keys, 15 Fla. 306 (1875); Prall v. Burckhartt, 299 Ill. 19, 132 N.E. 280 (1921); Attorney Gen. v. Onset Bay Grove Ass'n, 221 Mass. 342, 109 N.E. 165 (1915); Watts v. City of Houston, 196 S.W.2d 553 (Tex. Civ. App. 1946).

[6]*Ibid.*

[7]Douglass v. City Council of Montgomery, 118 Ala. 559, 24 So. 745 (1898); Ritzman v. Los Angeles, 38 Cal. App.2d 470, 101 P.2d 541 (1940); Mochel v. Cleveland, 51 Idaho 468, 5 P.2d 549 (1930); Ash v. Omaha, 152 Neb. 393, 41 N.W.2d 386 (1950); Hyland v. City of Eugene, 179 Ore. 567, 173 P.2d 464 (1946); King County v. Hanson Inv. Co., 34 Wash.2d 112, 208 P.2d 113 (1949).

act as an estoppel in pais,[8] on the theory that to allow the dedicator to reclaim the land would be a violation of good faith with the public and with those who had acquired private property in anticipation of the use contemplated by the dedication.

The dedicator is not without legal remedies to protect his interests. When the public use to which land has been dedicated is abandoned, it has been held that the rights of the public are terminated and the land by operation of law reverts to the dedicator.[9] Land dedicated for street purposes, upon being relinquished, is generally held to revert to the abutting owners[10] on the theory of an implied term of the conveyance to them or their grantors by the dedicator, since that individual is presumed not to intend to retain the fee to a small strip of land that has little value when separated from the adjacent land. The situation is different regarding public parks, squares, and commons. While some courts do not recognize the distinction, most jurisdictions hold that park land, upon abandonment under a common law dedication, reverts to the dedicator or his heirs or assigns.[11] Some cases involving certain equitable interests hold to the contrary in instances in which the abutting owner was induced as a result of the dedication to purchase his land from the dedicator.[12] Normally, a misuser is not sufficient to cause a reverter to the dedicator; an abandonment by the municipality is.[13] The dedicator, however, is said to have an equitable interest in such land sufficient to obtain an injunction to prohibit a misuser by the grantee.[14] This right is inherent in the public as a whole.

Statutory Dedication

Statutory dedication differs from common law dedication in that in the former instance legal title is conveyed to the municipality,[15]

[8]*See* Dugan v. Zurmuehlen, 203 Iowa 1114, 1117, 211 N.W. 986, 988 (1927).

[9]King County v. Hanson Inv. Co., 34 Wash.2d 112, 208 P.2d 113 (1949).

[10]Smith v. Horn, 70 Fla. 484, 70 So. 435 (1915); Robbins v. White, 52 Fla. 613, 42 So. 841 (1907). *But cf.* King County v. Hanson Inv. Co., *supra* note 9.

[11]*E.g.*, Warren v. Mayor of Lyons, 22 Iowa 351 (1867).

[12]*E.g.*, Mumaw v. Roberson, 60 So.2d 741 (Fla. 1952), 6 U. of Fla. L. Rev. 566 (1953).

[13]Santa Ana v. Santa Ana Valley Irr. Co., 163 Cal. 211, 124 Pac. 847 (1912); Ann Arbor Lodge No. 325, B.P.O.E. v. Ann Arbor, 242 Mich. 340, 218 N.W. 805 (1928); Goode v. St. Louis, 113 Mo. 257, 20 S.W. 1048 (1892).

[14]Warren v. Mayor of Lyons, 22 Iowa 351 (1867); *cf.* Barclay v. Howell's Lessee, 6 Pet. 498 (U.S. 1832); Webb v. Moler, 8 Ohio 548 (1838).

[15]Ryerson v. Chicago, 247 Ill. 185, 93 N.E. 162 (1910); Thorndike v. Milwaukee

whereas in the latter it remains in the dedicator. Usually, the statutory conveyance is held to pass title to the municipality to be held in trust for the public solely for the purpose for which it was dedicated.[16] Consequently, the city does not acquire title in its sovereign capacity but rather as trustee of the interest acquired by the public as beneficiary of the trust.[17] A majority of the courts conclude that, inasmuch as the fee has passed, the dedicator is divested of all proprietary interest in the property.[18] He is said to retain a possibility of reverter which, upon abandonment by the city, re-vests the title.[19] A like result follows when it becomes impossible to comply with the terms of the trust.[20]

Statutes of the various states differ as to the grade of title which passes to the municipality under statutory dedication. An Iowa statute[21] specifies that a dedication made in compliance therewith "shall be equivalent to a deed in fee simple of such portion of the premises platted as is set apart for streets or other public use . . . ." Statutory dedication in Illinois[22] "shall be held in law and in equity to be a conveyance in fee simple . . . to the public . . . ." Under the Indiana statute[23] when the dedication does not mention that title is to pass the public is given an easement and fee title remains in the proprietor. The Florida statute[24] fails to state what title, if any, passes when a dedication is executed thereunder. There are no cases reported as construing this statute. Dicta in a recent case,[25] however, indicate that Florida will hold that the fee vests in the municipality as trustee.

Aud. Co., 143 Wis. 1, 126 N.W. 881 (1910). *But cf.* Headley v. City of Northfield, 227 Minn. 458, 35 N.W.2d 606 (1949).

[16]*E.g.*, Ryerson v. Chicago, 247 Ill. 185, 93 N.E. 162 (1910); Field v. Barling, 149 Ill. 556, 37 N.E. 850 (1894); Thorndike v. Milwaukee Aud. Co., 143 Wis. 1, 126 N.W. 881 (1910). *But cf.* Headley v. City of Northfield, 227 Minn. 458, 35 N.W.2d 606 (1949).

[17]*Ibid.*

[18]*Ibid.*

[19]St. Clair Housing Auth. v. Southwestern Bell Tel. Co., 387 Ill. 180, 56 N.E.2d 357 (1944). *But cf.* Avery v. United States, 104 Fed. 711 (6th Cir. 1900); Schlanger v. Schulman, 211 App. Div. 601, 207 N.Y. Supp. 723 (2d Dep't 1925).

[20]*Ibid.*

[21]IOWA CODE §409.13 (1950).

[22]ILL. ANN. STAT. c. 109, §3 (Smith-Hurd Cum. Supp. 1953).

[23]IND. ANN. STAT. §48.801 (Burns Cum. Supp. 1953).

[24]FLA. STAT. §177.06 (1953).

[25]*See* Kramer v. Lakeland, 38 So.2d 126, 128 (Fla. 1948).

Notwithstanding clear and unequivocal language employed in these statutes prescribing the procedure and effect of statutory dedications, many courts have felt compelled by their state constitutions and the United States Constitution to hold that title passed by a statutory dedication is something less than fee simple. In a case involving street dedication[26] the Supreme Court of Illinois held that under the Illinois statute[27] a mere base or determinable fee passed to the municipality subject to defeat upon abandonment.

There are two views regarding the reversion upon abandonment of lands held under statutory dedication. *Prall v. Burckhartt*[28] is representative of the view that, upon abandonment, land held for street purposes passes by way of conditional limitation to the abutting grantees and, further, that the dedicator's possibility of reverter in the street is not an estate but a mere "possibility" not protected by any constitutional limitation. Thus the legislature can abolish the reverter or change its devolution as it may see fit. The second view is illustrated by *Bennett v. Davis,*[29] in which the Supreme Court of Georgia held the interest retained by the dedicator in land dedicated to school use to be a true possibility of reverter — not a bare possibility — which may be the subject matter of a sale. This decision logically renders inapplicable to Georgia's park lands the policy argument which gives the reversion of abandoned streets to the abutting grantee.

It is generally held that a mere misuser is insufficient to work a reverter under a statutory dedication.[30] The dedicator's remedy is most often said to be an equitable one, inasmuch as the transaction savors of a trust. The majority view allows the dedicator no greater rights than any other member of the public[31] — that is, the rights of a beneficiary to protect his trust interests. There is authority, however, for the proposition that the dedicator's equitable rights are greater than those of a beneficiary and are similar to those of a settlor in the usual trust situation.[32]

[26]Prall v. Burckhartt, 299 Ill. 19, 132 N.E. 280 (1921).

[27]ILL. ANN. STAT. c. 109, §3 (Smith-Hurd Cum. Supp. 1953).

[28]299 Ill. 19, 132 N.E. 280 (1921).

[29]201 Ga. 58, 39 S.E.2d 3 (1946).

[30]*E.g.,* McAlpine v. Chicago G.W. Ry., 68 Kan. 207, 75 Pac. 73 (1904); Ford v. Detroit, 273 Mich. 449, 263 N.W. 425 (1935); Goode v. St. Louis, 113 Mo. 257, 20 S.W. 1048 (1892).

[31]*E.g.,* Avery v. United States, 104 Fed. 711 (6th Cir. 1900); Schlanger v. Schulman, 211 App. Div. 601, 207 N.Y. Supp. 723 (2d Dep't 1925); Thorndike v. Milwaukee Aud. Co., 143 Wis. 1, 126 N.W. 881 (1910).

[32]Warren v. Mayor of Lyons, 22 Iowa 351 (1867).

Whatever the rights of the dedicator and of the public may be, the courts, in the absence of special legislative authority, hold that the municipality cannot alienate or change the use of land dedicated under statute to a specific use.[33] This rule has led the legislatures of many states to enact blanket authorizations enabling cities to alienate or change the use of land which has been dedicated to the public. Such legislation has fallen far short of meeting with the wholehearted approval of the judiciary.

Constitutional Aspects

In determining the constitutionality of statutes that purport to authorize alienation or change of use of dedicated land, the ultimate finding depends, to some extent, upon whether the land was acquired by common law or statutory dedication. The courts further distinguish between dedications made by private parties and those made by the state, county, or municipality.

Private dedications are to be strictly construed according to the terms of the grant.[34] As previously pointed out, under a private common law dedication for street purposes the land reverts to the abutting owners, apparently upon an implied term in the conveyance to the abutting grantees that they should acquire the property upon abandonment. The same rule applies to private statutory grants for street purposes except that the owner retains a mere possibility of reverter which may be divested by the legislature.[35]

A different approach has been taken with regard to private dedications for public parks, squares, and commons. In *Hopkinsville v. Jarrett*,[36] involving a devise of land to be used as a park, the court held that the Kentucky Legislature was without authority to pass a statute authorizing its cities

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[33]Field v. Barling, 149 Ill. 556, 37 N.E. 850 (1894); State v. Marcks, 228 Minn. 129, 36 N.W.2d 594 (1949). *But cf.* Avery v. United States, 104 Fed. 711 (6th Cir. 1900); Friesen v. City of Glendale, 209 Cal. 524, 288 Pac. 1080 (1930); Schlanger v. Schulman, 211 App. Div. 601, 207 N.Y. Supp. 723 (2d Dep't 1925).

[34]Slavich v. Hamilton, 201 Cal. 299, 257 Pac. 60 (1927); Hyland v. City of Eugene, 179 Ore. 567, 173 P.2d 464 (1946).

[35]Prall v. Burckhartt, 299 Ill. 19, 132 N.E. 280 (1921); State v. Marcks, 228 Minn. 129, 36 N.W.2d 594 (1949).

[36]156 Ky. 777, 781, 162 S.W. 85, 87 (1914).

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> " '. . . by ordinance or resolution duly passed for such purpose to grant, donate or authorize the use of either in whole or in part, any land, square, or real estate belonging to such city or town, or dedicated to public use therein, for the purpose of erection [*sic*] and maintaining a building to be used for a public library . . . .' "

The theory upon which the finding was based was that the city merely held the land in trust for the public and solely for its enjoyment.[37]

Private statutory grants for specific purposes present a different problem. Notwithstanding the fact that in statutory dedications the fee passes, courts hold that municipalities are without authority to deviate from the terms of the dedication, even under express legislative authority.[38] The Iowa Court in applying a legislative act which purported to " 'enable incorporated towns and cities to acquire, hold, improve and dispose of lands for public squares, parks, commons and cemeteries' "[39] held that to construe this enactment as permitting a city to sell lands acquired through private statutory dedications would be violative of the Constitution of the United States and of the State of Iowa. In so holding the court found the conditions requiring the lands to be used for park purposes to constitute a contract between the dedicator and the municipality.

Although private grants are held to be subject to strict construction, the courts have been more liberal in construing public dedications.[40] Public dedications arise when a municipality has acquired land through purchase, condemnation, grant, or like procedure and by its own act dedicates the land to the public use.[41] The rules applicable to public dedications for specific purposes do not apply to dedications for general public purposes.[42] Exceptions are to be found when the equities strongly favor one party.[43]

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[37]*Accord,* Ash v. Omaha, 152 Neb. 393, 41 N.W.2d 386 (1950); Hyland v. City of Eugene, 179 Ore. 567, 173 P.2d 464 (1946).

[38]Warren v. Mayor of Lyons, 22 Iowa 351 (1867); Rayor v. Cheyenne, 63 Wyo. 72, 178 P.2d 115 (1947).

[39]Warren v. Mayor of Lyons, 22 Iowa 351, 354 (1867).

[40]Ritzman v. Los Angeles, 38 Cal. App.2d 470, 101 P.2d 541 (1940); Slavich v. Hamilton, 201 Cal. 299, 257 Pac. 60 (1927).

[41]Carson v. State, 240 Iowa 1178, 38 N.W.2d 168 (1949).

[42]Harter v. City of San Jose, 141 Cal. 659, 75 Pac. 344 (1904); Carson v. State, *supra* note 41.

[43]Davenport v. Buffington, 97 Fed. 234 (8th Cir. 1899).

Public common law dedications[44] differ in some respects from private common law dedications, inasmuch as the former involve only the municipality as dedicator and the public as user. Controversies as to public common law dedication normally arise when a municipality has surplus land which it opens to the public for recreational or other purposes and at some later date attempts, under legislative authority, to change the use or divest itself of title to the land. Such was the situation in *Carson v. State*,[45] in which the Iowa Court held that land acquired by eminent domain or through expenditure of public funds, not subject to the terms of any gift, trust, or other condition, and which is devoted to a specific public use gives rise to no contractual trust in favor of the general public.[46] Since no contractual trust arises, subsequent diversion to some other public use is not precluded as long as proper legislative authority exists for such diversion and private rights are not injured thereby.[47] The majority of cases support the Iowa decision[48] and contrary authority[49] is generally distinguishable.

The same rules apply to dedications made by specific statutes devoting the land to some particular use, except when there are special equities.[50]

In *Kramer v. City of Lakeland*[51] the Florida Court failed to specify clearly the particular type of dedication with which it was dealing. The facts, as reported, warrant the assumption that the original transaction was a private common law dedication. The Court, however, ignored any distinction in the types of dedication and concluded that a city could not, without statutory authority, alienate lands held and used for public purposes. The authority cited by the Court dealt with a public dedication: "Legislative power to authorize the discontinuance of public parks and the sale of park lands cannot be questioned where the fee is in the city and when in so doing no

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[44]Designated as such for lack of a better name for situations in which a city merely permits land to be used without a specific municipal land grant.

[45]240 Iowa 1178, 1187, 38 N.W.2d 168, 175 (1949).

[46]*Cf.* Wright v. Walcott, 238 Mass. 432, 131 N.E. 291 (1921).

[47]2 McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §4.134 (3d ed. Cum. Supp. 1953).

[48]*E.g.*, City of Hartford v. Maslen, 76 Conn. 599, 57 Atl. 740 (1904); Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234 (1871).

[49]Friesen v. City of Glendale, 209 Cal. 524, 288 Pac. 1080 (1930); Thorndike v. Milwaukee Aud. Co., 143 Wis. 1, 126 N.W. 881 (1910).

[50]Davenport v. Buffington, 97 Fed. 234 (8th Cir. 1899).

[51]38 So.2d 126 (Fla. 1948).

private property is taken."[52] The Court expressly denied the existence of any such plenary power under the then existing statute.[53]

The 1949 Legislature may have supplied the needed plenary power by the passage of Section 95.36 of Florida Statutes 1953.[54] This statute declares,

> "It is . . . in the best interest of the public that ancient dedications of lands to municipalities for park purposes for . . . thirty years or more shall not . . . be disturbed . . . in law or in equity by the original dedicator . . . or any other person . . . and all rights of such ancient dedicator and all other persons are terminated and declared null and void."

Although the question has not as yet come before the Supreme Court of Florida, it is doubtful that this statute can withstand the test of constitutionality.

Florida has held previously, in cases involving both parks and streets under common law dedications, that the dedicator retains the fee and the public merely acquires an easement.[55] This being true it follows that, in so far as this statute applies to private common law dedications, it is unconstitutional, since it declares the dedicator's rights "null and void." Notwithstanding the impairment of the dedicator's fee simple title to the land, he retains a sufficient interest to render an attempted divestiture without just compensation a violation of due process of law.[56]

Warren v. Mayor of Lyons[57] is authority for the proposition that a statute of this type is unconstitutional[58] as impairing the obligation of a contract in situations involving private statutory dedications.

In addition, the statute appears in certain situations to be in violation of Florida's constitutional prohibition against lessening the

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[52]10 McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §28.38 (3d ed. Cum. Supp. 1953).

[53]FLA. STAT. §167.09 (1953).

[54]A search of the legislative journals adds nothing to the speculation that this statute was enacted to remedy the *Kramer* situation.

[55]Miami v. Florida E.C. Ry., 79 Fla. 539, 84 So. 726 (1920); Lutterloh v. Cedar Keys, 15 Fla. 306 (1875).

[56]*Cf.* County of Hillsborough v. Kensett, 107 Fla. 237, 144 So. 393 (1932).

[57]22 Iowa 351 (1867).

[58]U.S. CONST. Art. I, §10; IOWA CONST. Art. I, §21.

time for commencing a civil action on an existing cause.[59] This type of situation can best be shown by an example. Land was dedicated in 1915 and used according to the terms of the dedication until early 1948, a period of over thirty years, at which time the municipality either misused it or abandoned it to one other than the dedicator. Under these circumstances a cause of action arose in 1948 and had an expected existence of at least seven years under Section 95.12 of Florida Statutes 1941, the existing adverse possession statute of limitations; but Section 95.36 purported to cut off this cause of action instantly in 1949. Since no reasonable time, nor indeed any time, was allowed for the commencing of suit on an existing claim, the statute is unconstitutional.[60] This constitutional prohibition has no effect upon causes arising after the passage of the statute.[61]

Applied to the rights of the public, this statute may also be open to attack by those members of the public who, as beneficiaries of a public trust,[62] have acquired some special interest through reliance upon the dedication. While this argument is not nearly as forceful as that available to the dedicator, there is support for it among the cases[63] and secondary authorities.[64]

Section 95.36 cannot correctly be construed as having any effect upon public dedications unless the words "or any other person" be taken as barring the right of abutting owners or members of the public to bring action in equity to enforce the terms of a dedication on the basis of special property interests. The authorities overwhelmingly support the view that a legislature may authorize a change of use or a sale when there are no private property rights to be impaired.[65] These sources support, by implication, the proposition that even under a public dedication a legislature is without authority to permit a diversion of use or title when private property rights have been acquired. It appears, therefore, that the Florida statute may, in situations involving private rights, be held unconstitutional as to public dedications.

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[59]FLA. CONST. Art. III, §33.

[60]Campbell v. Horne, 147 Fla. 523, 3 So.2d 125 (1941).

[61]*Cf.* Baugher v. Boley, 63 Fla. 75, 58 So. 980 (1912).

[62]*See* Kramer v. Lakeland, 38 So.2d 126, 128 (Fla. 1948).

[63]*E.g.*, Hoffman v. Pittsburgh, 365 Pa. 386, 75 A.2d 649 (1950).

[64]2 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §4.134 (3d ed. Cum. Supp. 1953); 4 TIFFANY, THE LAW OF REAL PROPERTY §1113 (3d ed. Cum. Supp. 1951).

[65]*E.g.*, Carson v. State, 240 Iowa 1178, 38 N.W.2d 168 (1949); 2 MCQUILLIN,

CONCLUSION

In applying the rules set forth in this review, courts have been torn between the desire to protect the rights of parties under a dedication and the necessity of recognizing the demands of new eras, new populations, and the changes wrought thereby, which may arise subsequent to the acquisition of such rights. Notwithstanding the admonitions of many commentators,[66] the great majority of courts construe dedications strictly and refuse to allow a municipality to exercise powers inconsistent with the terms specified by the dedicator.

As regards private dedications, this view is correct, inasmuch as the dedicator has a substantial property interest reserved to himself, his heirs, or assigns. The rights of the public and the benefits accruing through change of use of the property made desirable by municipal growth are amply protected by governmental powers of eminent domain. To hold otherwise would allow a municipality to appropriate, without just compensation, land in which it had acquired a mere use by a gratuitous or nominal grant.

When properly applied to public dedications the rules appear equally just and well-founded. As was revealed by the *Carson* case, cities, by legislative authority, may, when no private property is taken thereby, sell or otherwise alienate land which they hold under a public dedication.

The confusion arises from attempts to take legislative short cuts when it is believed that dedicated land may become more beneficial to the public by a change of use or that its sale may furnish sustenance for the city's famished coffers. With eminent domain available, such short cuts are rightly denied.

JOHN S. BURTON
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THE LAW OF MUNICIPAL CORPORATIONS §4.134 (3d ed. Cum. Supp. 1953).

[66]*E.g.*, Scott, *Education and the Dead Hand*, 34 HARV. L. REV. 1 (1920); 54 W. VA. L. REV. 167 (1952).