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HIGHWAYS — TITLE WHICH AN ABUTTER MAY OBTAIN IN A PUBLIC STREET BY ADVERSE POSSESSION — By the plat, the lots of *P* and *D* in the unincorporated village of Crescent were separated by a street sixty-six feet wide. Actually the street was never opened and only the twenty feet abutting *P's* property had been used as a way of access to land held by *P* and *D* and others. The remaining two-thirds of the street had been fenced by *D* and used by him as his for thirty years. *P* brought a statutory action to vacate the streets of the village. *D* cross-petitioned to have title to the fenced area quieted in him. *Held,* that there was no public interest involved, since the plat had never been accepted; that by adverse possession *D* had acquired a perfect title in the fenced area; that the remaining strip should not be vacated. *Brewer v. Claypool,* (Iowa, 1937) 275 N. W. 34.

Supported by reason and authority, the majority rule today denies to the abutting owner the right to acquire title in a public street by possession adverse to the public.[1] But though the statute of limitations is not available to the adverse occupant to prove his title against the public,[2] he may avail himself of doctrines which are applied by the courts with sufficient freedom to mitigate the harshness of the rule.[3] Thus when the adverse possession is of a street wherein the public right is clear, still the public's agent may be prevented from asserting that right by the doctrine of equitable estoppel.[4] When the abutter's adverse possession

[1] 4 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 1513 (1928); 2 ELLIOTT, ROADS AND STREETS, 4th ed., § 1188 (1926); Laclede-Christy Clay Products Co. v. St. Louis, 246 Mo. 446, 151 S. W. 460 (1912). *Contra,* City of Tulsa v. Clark, 119 Okla. 122, 249 P. 286 (1926). The weight of authority fifty years ago denied that municipal streets were exempt from the statute of limitations. See 26 L. R. A. 449 at 451 (1894). Many courts have reversed themselves. Cf. the leading cases of Wheeling v. Cambell, 12 W. Va. 36 (1877), and Ralston v. Town of Weston, 46 W. Va. 544, 33 S. E. 326 (1899). Courts which have not reversed themselves have often been forced under the majority rule by statute. See Wahoo v. Nethaway, 73 Neb. 54, 102 N. W. 86 (1905).

[2] Statutes of limitations may apply specifically to bar the public right. Delaware Land & Development Co. v. First & Central Presbyterian Church, 16 Del. Ch. 410, 147 A. 165 (1929). Cases of minor encroachments of buildings on a public street may be covered specially by statute. 556 and 558 Fifth Ave. Co. v. Lotus Club, 129 App. Div. 339, 113 N. Y. S. 886 (1908).

[3] Even in England where the rule is strict that no statute is allowed to run against the Crown, still grants are presumed for the admitted purpose of evading the rule. In Roe on Demise of Johnson and Humphrey v. Ireland, 11 East 280 at 284, 103 Eng. Rep. 1011 (1809), Ellenborough said, "I would presume anything capable of being presumed to support an enjoyment for so long a period." In the matter of grants presumed against the sovereign, see 23 VA. L. REV. 58 (1936). Public interests are not always served by strict insistance of public rights against private interests. See St. Joseph v. St. Joseph Terminal R. R., 268 Mo. 47, 168 S. W. 1080 (1916). Cf. case where substitution of roads was allowed. Almy v. Church, 18 R. I. 182, 26 A. 58 (1893).

[4] 3 DILLON, MUNICIPAL CORPORATIONS, 5th ed., §§ 1191, 1194 (1911); 2 ELLIOTT, ROADS AND STREETS, 4th ed., § 1189 (1926); Chicago v. Illinois Steel Co., 229 Ill. 303, 82 N. E. 286 (1907). The doctrine is widely applied, and far beyond the cases where there is actual reliance on any representation by the public or its

is of areas in which the public right is questionable, as in unused highways, the adverse occupation is evidence to deny the public right, even becoming presumptive evidence of abandonment.[5] The principal case is illustrative of a third situation which arises when the adverse possession of the abutter antedates the improvement of the dedicated street. If the public right was complete before the street was opened or improved,[6] the doctrine of equitable estoppel[7] should apply as in any other case, but adverse possession would be less pursuasive evidence of abandonment[8] than in the case where the street has been opened and has later fallen into disuse. When the public right is incomplete from lack of an acceptance of the dedicated street, adverse possession is not only a factor in determining the power remaining in the public to draw title by an acceptance, but in this situation the adverse possession of an abutter is apt to be a problem between him and his neighbors.[9] As between the adverse occupant and the public, rights will be worked out on much the same theories as though there had been an acceptance: adverse possession will no more cut off the power to accept than it will cut off a title vested in favor of the public;[10] but the public may be estopped from accepting;[11] adverse possession is evidence that a reasonable time for

authorities. Further, the doctrine is criticized as being without any more reason in its application to public interests than a legal estoppel such as the statute of limitations. See the dissenting opinion in St. Joseph v. St. Joseph Terminal R. R., 286 Mo. 47 at 56, 168 S. W. 1080 (1916), setting strict limits to the doctrine and a criticism of its promiscuous application. Also Nixon v. City of Anniston, 219 Ala. 219, 121 So. 514 (1929).

[5] Gregory v. Knight, 50 Mich. 61, 14 N. W. 700 (1883); Meyer v. Mildrum, 237 Mich. 318, 211 N. W. 658 (1927); Clare v. Wogan, 204 Iowa 1021, 216 N. W. 729 (1928).

[6] Without opening the streets the dedication may be completed either by acceptance of the plat or by force of the dedication itself without acceptance. St. Louis v. Clegg, 289 Mo. 321, 233 S. W. 1 (1921). Although the Missouri court denies the need of acceptance in all statutory and some common-law dedications on principles that seem indisputable, the weight of authority requires acceptance even when the statute declares that filing a plat conveys the fee. Uptagraff v. Smith, 106 Iowa 385, 76 N. W. 733 (1898). 4 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., §§ 1700-1701 (1928); 1 ELLIOTT, ROADS AND STREETS, 4th ed., § 126 (1926).

[7] Auburn v. Goodwin, 128 Ill. 57, 21 N. E. 212 (1889).

[8] Henshaw v. Hunting, 1 Gray (67 Mass.) 203 (1854); Cambridge v. Cook, 97 Iowa 599, 66 N. W. 884 (1896). In any event it is not clear how adverse possession itself could be logical evidence that the use which it prevents is abandoned.

[9] The problem could arise in other situations where the private problem between the abutters would be independent of any public question, but the cases would necessarily be few. Cady v. Fitzsimmons, 50 Conn. 209 (1882); Woodruff v. Paddock, 130 N. Y. 618, 29 N. E. 1021 (1892). If the street were open and the public interest active, it is doubtful if the statute of limitations would run against an abutter's right to complain as a member of the public. 556 and 558 Fifth Ave. Co. v. Lotus Club, 129 App. Div. 339, 113 N. Y. S. 886 (1908).

[10] Barton v. City of Portland, 74 Ore. 75, 144 P. 1146 (1914); St. Paul & Duluth R. R. v. City of Duluth, 73 Minn. 270, 76 N. W. 35 (1898). In the latter case, the statute of limitations would run against the public's interest after acceptance, but not before.

[11] Often the estoppel is more nearly a balance of convenience against the public

acceptance has passed; [12] the time within which an acceptance is reasonable is calculated with deference to private developments.[13] As between the adverse occupant and other abutters, rights are worked out according to strict rules of law, so as to them allocation of the fee pending acceptance may be of much importance. If a fee "in abeyance" pending acceptance as a public street could still be in the public,[14] it is submitted that the adverse occupant should gain no prescriptive rights in the street before vacation against other abutters, as no action would lie to them to oust him. However, if the fee pending acceptance of a statutory dedication as well as of a common-law dedication is in the dedicator and his grantees, then an action would lie to the party whose fee was invaded, and the statutory period should run in favor of the adverse occupant.[15] It is submitted that as between the public interests and the abutter occupying the dedicated street adversely, rights are really worked out on the lines of the equitable theories indicated and no harm is done thereby as predictability here is rarely essential. But as between abutting owners, strict rules of law apply and legal theories should be sharply defined. Though the conclusions of the Iowa court are undeniably just, it would be desirable if the theories of the court were more sharply defined and if it was clear on what basis *D's* possession had been adverse to *P*.

authorities than reliance on a representation. In John Mouat Lumber Co. v. Denver, 21 Colo. 1, 40 P. 237 (1895), the city allowed plaintiff to improve the area dedicated for a public street without objection, and on this an estoppel was raised. More concrete elements of estoppel appear in Blennerhasset v. Town of Forest City, 117 Iowa 680, 91 N. W. 1044 (1902).

[12] Uptagraff v. Smith, 106 Iowa 385, 76 N. W. 733 (1898); Swartwout v. Caledonia Township, 240 Mich. 398, 215 N. W. 293 (1927). Adverse possession as evidence that a reasonable time for acceptance has passed is much the same type of evidence as in cases of abandonment. For a collection of cases on the factors that determine a reasonable time for acceptance, see 66 A. L. R. 321 (1930). Statutes may require acceptance within a certain time. Milford Borough v. Barnett, 288 Pa. 434, 136 A. 669 (1927); Smith v. King Co., 80 Wash. 273, 141 P. 695 (1914); McVee v. Watertown, 92 Hun 306, 36 N. Y. S. 870 (1895).

[13] Reichert Mill Co. v. Freeburg, 217 Ill. 384, 75 N. E. 544 (1905). In denying that the town could accept the dedication and open the streets, the court said (217 Ill. at 389) that the improvements of appellants had been "acquiesced in by the village for so long a time that to require appellant to reconstruct its mills and ponds, and re-arrange its yards, which would cost it a considerable amount of money, would clearly be inequitable."

[14] An acceptance may well be necessary to impose liability on the municipality or public trustee to maintain the dedicated area as a street. When the statute declares that filing the plat conveys the fee, it is not so clear why acceptance is more of a problem than in ordinary conveyances. It is submitted that when the statute recites that filing the plat conveys the fee, it would be clearer to say that thereby the dedicator is divested of his ownership than to talk of fees in abeyance and inchoate public interests. However, the Iowa statute is interpreted as requiring an acceptance for any operation. Iowa Code (1935), § 6278. The same section is referred to in Burroughs v. City of Cherokee, 134 Iowa 429, 109 N. W. 876 (1907).

[15] Cf. Huffman v. State, 21 Ind. App. 449, 52 N. E. 713 (1898), as to the rights against trespassers of the abutter who owns the fee of the street.