

Louisiana Law Review

Volume 16 | Number 3
April 1956

Property - Cemeteries - Dedication - Prescription

Edwin L. Blewer Jr.

Repository Citation

Edwin L. Blewer Jr., *Property - Cemeteries - Dedication - Prescription*, 16 La. L. Rev. (1956)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol16/iss3/15>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

The writer suggests that the court correctly distinguished the instant case from the cases involving dismissal of public employees. In the interest of public safety and welfare some inquiry must be made into the character of the public employee. If the employee does not cooperate in this examination of his character, then he has not qualified himself as a public servant. However, the status of the attorney is not "public employment" but is a "public trust." If such status is to be denied the attorney for refusing to disclose his subversive activities, this denial should come from the client and not from the public authority. It is an entirely different matter, however, when *membership* in a subversive organization is *proved*. In that case the attorney is no longer qualified to hold this "public trust."

Jerry G. Jones

PROPERTY — CEMETERIES — DEDICATION — PRESCRIPTION

In 1895 a tract of land was sold to one of defendant's authors in title subject to a reservation of a portion of the land as a public graveyard. This reservation was included in every subsequent act of sale. No formal acceptance was made or other action taken by the governing authorities, but since 1895 the land has been used by the general public as a cemetery. Plaintiffs, relatives of deceased persons interred in the cemetery,¹ brought an action to establish the boundary between the cemetery and defendant's land, alleging that defendant had appropriated a portion of the cemetery property. Defendant pleaded the acquisitive prescription of thirty years, which was sustained by the trial court. On appeal, *held*, reversed. The reservation in the original act of sale, combined with the public use of the cemetery for more than half a century, constituted an effective dedication of the land to public use. Land dedicated for use

conviction should be by an American process, that is, charge, try, *prove*, and convict on the basis of time-honored tradition of democratic precepts. The state has failed to establish a "preponderance of evidence" which would justify disbarment. 82 So.2d 657, 667 (Fla. 1952).

1. Defendant contested the plaintiffs' right to sue, but the court, relying on *Humphreys v. Bennett Oil Corp.*, 195 La. 531, 197 So. 222 (1940), in which the same problem was presented, found that plaintiffs' personal interest in preserving the cemetery as a burial place for members of their family and in being buried alongside their departed relatives gives them standing to sue. For earlier cases granting citizens the right to sue where "public things" were involved, see *Sheen v. Stothart*, 29 La. Ann. 630 (1877); *Morgan v. Lombard*, 26 La. Ann. 462 (1874); *Burthe v. Fortier*, 15 La. Ann. 9 (1860); *Allard v. Lobau*, 2 Mart. (N.S.) 317 (1824).

by the general public is classified as a public thing and is not alienable, nor susceptible of private ownership, whether the purported acquisition be by estoppel, prescription, or otherwise. *Locke v. Lester*, 78 So.2d 14 (La. App. 1955).

The instant case raises once again the problem of dedication of land to public use. There are two aspects of that problem, namely, what action is required to effect a dedication and, once dedication is accomplished, what will be its effects. Most of the difficulty has been caused by a failure to distinguish between the various forms of dedication.² There are two basic types of dedication, namely, formal or statutory dedication and common law dedication.³ The requirements for a formal or statutory type of dedication are set out in R.S. 33:31⁴ and 33:5051.⁵ The purpose of these statutes is to establish the method by which towns and subdivisions may be created. R.S. 33:5051 requires recordation of a full description of the land to be included in the subdivision and a formal dedication of the various "streets, alleys and public squares or plats." However, the courts have held that "substantial compliance" with the requirements of the statute is all that is necessary.⁶ Thus, the mere recordation of a map or plat will be sufficient to constitute a dedication of

2. One of the areas in which difficulty has arisen has been in distinguishing the many methods by which the public may acquire rights in roads and streets. For a discussion of this problem, see Comment, *Establishment and Termination of Public Rights in Roads and Streets in Louisiana*, 16 LOUISIANA LAW REVIEW 521 (1956).

3. The following cases have noted the types of dedication: *B. F. Trappey's Sons, Inc. v. City of New Iberia*, 225 La. 466, 73 So.2d 423 (1954); *Collins v. Zander*, 61 So.2d 897 (La. App. 1952); *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229 (1938); *Bomar v. Baton Rouge*, 162 La. 342, 110 So. 497 (1926).

4. LA. R.S. 33:31 (1950): "If any person desires to found a city, town or village on his land, he shall cause a survey of the land to be made and file a plat thereof . . . in the office of the recorder of the parish in which the land is situated . . . giving the names of the city, town or village to be founded; and exhibiting its streets, alleys, sidewalks, or paths, squares, if any, blocks and lots . . . He shall further execute and cause to be recorded . . . an act in which he dedicates the use of . . . the public squares, if any, for the purposes of recreation and for the purpose of being ornamented with shrubberies and shade trees."

5. LA. R.S. 33:5051 (1950): "Whenever the owner of any real estate desires to lay off the same into squares or lots with streets or alleys between the squares or lots, . . . he shall . . . cause the real estate to be surveyed and platted or subdivided by a licensed surveyor or civil engineer . . . and cause to be made and filed in the office of the keeper of notarial records . . . a correct map of the real estate so divided, which map shall contain the following: . . . (5) The name or number of each square or plat dedicated to public use . . . (7) A formal dedication made by the owner or owners of the property or their duly authorized agent of all the streets, alleys and public squares or plats shown on the map to public use."

6. *Metairie Park v. Currie*, 168 La. 588, 122 So. 859 (1929); *Life v. Griffith*, 197 So. 646 (La. App. 1940).

the roads, streets or other public places indicated thereon;⁷ there is no requirement that there be an acceptance by the public.⁸ Statutory dedication vests title to the property in the municipality or political subdivision in which the property is located.⁹ Whether or not a tract of land may be dedicated as a cemetery in this manner has never been determined, but the language of the statutes seems broad enough to permit provision for public cemeteries to be made by this method.¹⁰ The second type of dedication is common law dedication.¹¹ Although no particular form is required to effect this type of dedication,¹² there must be some definite indication of the owner's intention to dedicate his land to the public.¹³ To complete this type of dedication there must be an acceptance by the public.¹⁴ However, this acceptance need be in no particular form and it has been held that the mere use of the land by the public for the purpose intended will be sufficient.¹⁵ A distinction appears to have been made in the

7. *Collins v. Zander*, 61 So.2d 897 (La. App. 1952).

8. *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229 (1938).

9. *Ibid.*

10. See notes 4 and 5 *supra*.

11. See note 3 *supra*. The term "common law dedication" was used in *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229 (1938). Prior to the enactment of L.A. R.S. 33:31 and 33:5051 (1950) the courts did not find it necessary to distinguish the various types of dedication. It was merely stated that no particular form was required to effect a dedication of land to the public; all that was required was an intention to dedicate land to the public. See *Sheen v. Stothart*, 29 La. Ann. 630 (1877); *Shreveport v. Walpole*, 22 La. Ann. 526 (1870); *Baton Rouge v. Bird*, 21 La. Ann. 244 (1869); *Pickett v. Brown*, 18 La. Ann. 560 (1866); *Burthe v. Fortier*, 15 La. Ann. 9 (1860). These cases merely recognize the common law theory which was accepted by the Louisiana courts early in the history of this state. See *De Armas v. New Orleans*, 5 La. 132 (1833), recognizing the ideas expressed in *Cincinnati v. White's Lessee*, 31 U.S. (6 Pet.) 431 (1832). This theory was not very different from the doctrine previously recognized in this state and which appears to have survived from Spanish jurisprudence. See *Mayor of New Orleans v. Gravier*, 11 Mart.(O.S.) 620 (1822), referring to a case decided under Spanish rule and reaching the same result. L.A. R.S. 33:31 and 33:5051 (1950) merely appear to be recognition of the established jurisprudence to the effect that the filing of a map or plat and sale of land with reference to the public places marked thereon constitutes an effective dedication of the land to the public. But an acceptance by the public is required. See cases cited in this note *supra*. Since R.S. 33:31 and 33:5051 (1950) are limited in scope to the situation in which a town or subdivision is being created, it would seem that in other areas the prior jurisprudence is still applicable.

12. *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 60 So. 695 (1913); *Sheen v. Stothart*, 29 La. Ann. 630 (1877); *Shreveport v. Walpole*, 22 La. Ann. 526 (1870); *Baton Rouge v. Bird*, 21 La. Ann. 244 (1869); *Pickett v. Brown*, 18 La. Ann. 560 (1866); *Burthe v. Fortier*, 15 La. Ann. 9 (1860); *Mecobon, Inc. v. Police Jury of Jefferson Parish*, 70 So.2d 687 (La. App. 1954); *Kemp v. Town of Independence*, 156 So. 56 (La. App. 1934); *Town of Kenner v. Zito*, 13 Orl. App. 465 (1916).

13. See cases cited note 12 *supra*.

14. See cases cited note 12 *supra*.

15. See especially *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 60 So.

jurisprudence between the effect to be given the common law dedication of land for roads and streets and that of land for other uses.¹⁶ In several cases¹⁷ the courts have held that a common law dedication of roads and streets will vest only a servitude of passage in the public. But where a common law dedication of land for other uses is concerned, the cases indicate that the owner will be considered to have granted title of the land to the public.¹⁸ Once title is granted to the municipality or governing body by statutory dedication, or to the public by common law dedication, the land becomes a "public thing."¹⁹ Whether it can thereafter be alienated or become the subject of private ownership depends upon the use made of the land.²⁰ If the land is to be available for the common use of all of the inhabitants of the community, it is not alienable nor susceptible of private ownership,²¹ unless it is subsequently abandoned by

695 (1913), where the mere failure to assess the property for taxes was held to be an acceptance.

16. This distinction stems from the holding in *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229 (1938), to the effect that statutory dedication passes title whereas common law dedication vests only a servitude. This holding is based on common law authority. However, it appears to be limited to roads and streets.

17. *James v. Delery*, 211 La. 306, 29 So.2d 858 (1947); *Ford v. Shreveport*, 204 La. 618, 16 So.2d 127 (1943); *Collins v. Zander*, 61 So.2d 897 (La. App. 1952).

18. *McNeil v. Hicks & Howell*, 34 La. Ann. 1090 (1882) ("open space"); *Shreveport v. Walpole*, 22 La. Ann. 526 (1870) ("open space"); *Livaudais v. Municipality Number Two*, 16 La. 509 (1840) ("colyse"); *Gleisse and Holland v. Winter*, 9 La. 149 (1836) (levee); *Mecobon, Inc. v. Police Jury of Jefferson Parish*, 70 So.2d 687 (La. App. 1954) (park); *Town of Kenner v. Zito*, 13 Orl. App. 465 (1916) (park).

19. LA. CIVIL CODE art. 453 (1870): "Public things are those, the property of which is vested in a whole nation, and the use of which is allowed to all the members of the nation. . . ." LA. CIVIL CODE art. 454 (1870): "Things which are for the common use of a city or other place, as streets and public squares, are likewise public things."

20. LA. CIVIL CODE art. 482 (1870): "Among those [things] which are not susceptible of ownership, there are some which can never become the object of it; as things in common, of which all men have the enjoyment and use.

"There are things, on the contrary, which, though naturally susceptible of ownership, may lose this quality in consequence of their being applied to some public purpose, incompatible with private ownership; but which resume this quality as soon as they cease to be applied to that purpose; such as the high roads, streets and public places."

21. *Ibid.* See *New Orleans v. Salmen Brick and Lumber Co.*, 135 La. 828, 66 So. 237 (1914) (land in question held to be prescriptible but see discussion to effect that municipal property dedicated to public use is not alienable or susceptible of private ownership); *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 60 So. 695 (1913) and *Town of Vinton v. Lyons*, 131 La. 673, 60 So. 54 (1912) (land dedicated to use as public parks is out of commerce and not alienable by the city); *Baton Rouge v. Bird*, 21 La. Ann. 244 (1869) (land dedicated to use as public squares is out of commerce and not susceptible of private ownership); *Shreveport v. Walpole*, 22 La. Ann. 526 (1870) ("open space" dedicated to public use is out of commerce and not susceptible of individual or private ownership).

the public²² or its use changed to some purpose not incompatible with private ownership.²³

In the instant case the court was presented the problem of determining the effect of the reservations of land as a public graveyard in the several acts of sale. It concluded that the reservation in the original act of sale constituted a declaration of the owner's intention to dedicate his land to the public. This dedication was of the common law type, requiring an acceptance by the public to be completed. The use of the land as a cemetery by the public constituted such acceptance, completing the dedication and vesting title to the property in the public.²⁴ The land thus became a "public thing"; and its use for the common benefit of all of the inhabitants of the community rendered it inalienable and unsusceptible of private ownership. Although the situation presented in the instant case was one of first impression, the holding appears to be consistent with the prior jurisprudence on this type of dedication. In other cases involving common law dedication land has been given for public use as "open space" next to a river for loading purposes²⁵ and for public squares²⁶ and parks.²⁷ There is no apparent reason why a public cemetery may not be dedicated in this manner. It is submitted that the court was correct in concluding that no part of the cemetery tract could be acquired by a private individual, whether by estoppel, prescription, or otherwise.

Edwin L. Blewer, Jr.

22. LA. R.S. 48:701 (1950).

23. LA. CIVIL CODE art. 482 (1870); *New Orleans v. Salmen Brick and Lumber Co.*, 135 La. 828, 66 So. 237 (1914); *McNeil v. Hicks & Howell*, 34 La. Ann. 1090 (1882).

24. Since the dedication was for a use other than as a road or street, it is assumed that title passed.

25. *McNeil v. Hicks & Howell*, 34 La. Ann. 1090 (1822); *Shreveport v. Walpole*, 22 La. Ann. 526 (1870); *Pickett v. Brown*, 18 La. Ann. 560 (1866).

26. *Baton Rouge v. Bird*, 21 La. Ann. 244 (1869).

27. *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 60 So. 695 (1913); *Town of Kenner v. Zito*, 13 Orl. App. 465 (1916).