The Third Dimension of Dedication in Louisiana

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COMMENTS

THE THIRD DIMENSION OF DEDICATION IN LOUISIANA

The subject of dedication has been provocative of litigation and commentary throughout the United States, particularly in Louisiana. While the basic issues seem to have been solved in Louisiana since 1938, the question remains whether resolution of these issues has been dictated by some compelling logic founded in the civil law system, or whether common law principles have been wholly adopted as the law of Louisiana. This Comment will examine the legitimacy of the heritage of dedication in Louisiana with particular emphasis on the nature of the right created in the public. To gain an overall picture of the important issues presented by recent cases, it is necessary to review briefly the common law of dedication and the case of Arkansas-Louisiana Gas Co. v. Parker Oil Co. With this review in mind, the recent problems and the Parker case itself can then be evaluated by comparison with the pertinent Louisiana jurisprudence.

The Parker Case and the Common Law of Dedication

Dedication in other states is the setting apart of land for public use, and it is either statutory or common-law. The former operates by grant and conveys fee title of the land. There have been numerous law review articles dealing with the subject of dedication. See, e.g., Notes, 8 Baylor L. Rev. 87 (1956), 23 Ill. L. Rev. 607 (1929); 37 Ind. L.J. 554 (1962), 48 Ky. L.J. 473 (1960), 11 Marq. L. Rev. 160 (1927), 46 N.C.L. Rev. 663 (1968), 45 N.C.L. Rev. 564 (1967); Comment, 53 Calif. L. Rev. 559 (1965). See also Freese, Subdivision Regulations and Compulsory Dedications, 29 Dicta 299 (1962); Parks, The Law of Dedication in Oregon, 20 Ore. L. Rev. 111 (1941); Whatley, Common Law and Statutory Dedications in Alabama, 17 Ala. Law. 43 (1956).


5. See Dillon, Municipal Corporations § 1071; Elliott, Roads and Streets § 125.

6. See note 7 supra. These authorities state that the fee title passes to the public if required by an express provision or necessary implication in the statute. The Louisiana statute neither expressly nor impliedly requires such a result; however, this seems to be the unquestioned result in the juris-
dedicated without necessity of acceptance, while the latter operates by way of estoppel *in pais* and conveys only an easement which must be accepted either expressly or impliedly by public use.

Common-law dedication may be further categorized as either express or implied, depending upon the extent of the landowner's manifestation of intent to dedicate. However accomplished, an easement is conveyed to the public. An express common-law dedication involves some affirmative, unequivocal act by the landowner evidencing an intent to dedicate. The typical example of this type is recordation of a plat showing streets, alleys, or squares when no statute is applicable. An implied common-law dedication arises from lesser manifestations of intent to dedicate including silence and acquiescence in the public's use.

When property is dedicated to public use, the state or nation does not hold it for private purposes, but for purely public

prudence. The statute on abandonment by the public of dedicated lands is necessarily applicable only to situations where full ownership is in the public. This seems to lend some support to the argument that the public acquires full title by a statutory dedication. *See LA. R.S. 33:5051 (1962)* and *id. 48:701.*

9. *See Dillon, Municipal Corporations § 1071; Elliott, Roads and Streets § 125.*

10. *See Dillon, Municipal Corporations §§ 1070-1071; Elliott, Roads and Streets § 125. Contra, 2 H. Tiffany, The Law of Real Property § 484 (2d ed. 1920) (hereinafter cited as Tiffany, Property).* The latter author states that dedication antedates estoppel and is based on the principle that, for legal purposes, one's intention is such as his acts would lead a reasonable man to believe to be his intention. This seems to be a chicken-or-the-egg problem since estoppel is essentially a method of achieving equity when a situation cannot be fitted into a particular legal form, such as contract, gift, or sale. Both “theories” are based on the ancient principle of Roman law that one should not disappoint expectations which he has created. *See DeArmas v. Mayor and City of New Orleans, 5 La. 132 (1833) (dissenting opinion).*

11. *See Dillon, Municipal Corporations § 1071; Elliott, Roads and Streets § 125.*

12. *See Dillon, Municipal Corporations § 1079; Elliott, Roads and Streets §§ 133-134.*

13. *See note 12 supra.* These are the authorities most often cited by Louisiana courts when discussing dedication in this particular fact situation. Often the cases conclude that perfect title to the dedicated land is in the public while these authorities deal with express common-law dedication creating only an easement or servitude.

*See Dillon, Municipal Corporations § 1083.* This oft-quoted passage emphasizes that this factual situation is handled as an express common-law dedication since it creates only private contractual rights by estoppel until accepted by the public.

14. *See Dillon, Municipal Corporations § 1079; Elliott, Roads and Streets §§ 133-134.*
poses. It is not necessary that there be any particular grantee to take the fee title when conveyed, since generally the ordinary rules of law relating to private rights have been modified, relaxed, and molded by public convenience and necessity.

In 1938, the Louisiana Supreme Court, in *Arkansas-Louisiana Gas Co. v. Parker Oil Co.* explicitly outlined the rules of law applying to dedication in Louisiana. The court's opinion, while based partly on past decisions, appears to be a complete adoption of the common law of dedication. While duplicating the general requirements of statutory and common-law dedications, as discussed above, the court emphasized that these were the only two types of dedication in Louisiana. The court referred to "implied, common-law dedication" (informal), but apparently, the concept of express common law dedication (formal) was not considered. The court by omitting discussion of this third type of dedication conveniently seemed to ignore the Louisiana jurisprudence, as will be examined below.

The question of a third dimension in the Louisiana law of dedication was raised specifically in 1967, when the Louisiana Supreme Court gave its approval to *Banta v. Federal Land Bank of New Orleans* by denying certiorari, and thus reopened for consideration the bulk of Louisiana jurisprudence concerning dedication. In *Banta* the original landowner had divided his land into large tracts of 40 to 100 acres and had filed a plat of the area describing the roads thereon as "public roads." The court stated that Louisiana jurisprudence recognizes that sub-

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17. Dillon, Municipal Corporations § 1107; Elliott, Roads and Streets § 186. This is consistent with the interrelationship of estoppel with common-law dedication. See note 11 supra. It is interesting to note that the common law writers apparently feel that the Louisiana system is different, see Dillon, Municipal Corporations § 1105.
18. 190 La. 957, 183 So. 229 (1938).
19. See Dillon, Municipal Corporations §§ 1070-1107; Elliott, Roads and Streets §§ 122-186; Tiffany, Property §§ 480-486. See generally 26 C.J.S. Dedication (1950); 23 AM. JUR. Dedication (1965) and the authorities cited there.
21. The words "implied" and "common-law" were treated as interchangeable terms rather than independent, restrictive modifiers of the word "dedication."
22. 200 So.2d 107 (La. App. 1st Cir. 1967), cert. denied, 251 La. 46, 202 So.2d 657 (1967).
division of lands prior to Act 134 of 1896 (the basis for statutory dedication in Louisiana), followed by a sale of lots, constitutes a dedication. Furthermore, this rule has been applied after 1896 when Act 134 of 1896 was not complied with or not mentioned. The court pointed out that Parker, for the first time, announced that a declaration may be either statutory or common-law, and that it implicitly, if not directly, held that a dedication not in substantial compliance with Act 134 of 1896 amounted to an implied common-law dedication conveying only a servitude to the public. However, the court felt that the Louisiana Supreme Court had since recognized, in Parish of Jefferson v. Doody, that aside from compliance with Act 134 of 1896, there is an implicit intention in the filing of a plat to dedicate streets. Since the present case involved large lots, the court correctly determined that Act 134 of 1896 was not intended to apply; however, the plat contained words of dedication and expressed an intention to dedicate. The court concluded that the inapplicability of Act 134 of 1896 does not preclude other forms of dedication, such as filing a plat which results in an “informal” dedication which needs no acceptance to convey title in the dedicated lands to the public.

Whether Banta is correct depends upon its allusion to older cases and the effect of Parker upon these cases, but it seems clear that Banta has created or clearly revived a third form of dedication in Louisiana. While one case in the sea of Louisiana jurisprudence on dedication might easily escape attention, it is rather amazing that the implication of Banta can go unnoticed by the courts and writers. What is even more beguiling is that


24. The court cited what appear to be appropriate cases for this proposition. Richard v. City of New Orleans, 195 La. 898, 197 So. 594 (1940); Jaenke v. Taylor, 190 La. 109, 106 So. 711 (1928); Town of Vinton v. Lyons, 131 La. 673, 60 So. 54 (1912); Flournoy v. Beard, 116 La. 224, 40 So. 84 (1906); Kemp v. Town of Independence, 156 So. 56 (La. App. 1st Cir. 1934); Faunce v. City of New Orleans, 148 So. 37 (La. App. Orl. Cir. 1933).

25. For this proposition the court cited Iseringhausen v. Larcade, 147 La. 515, 85 So. 224 (1920); Esposito v. Gaudet, 8 So.2d 783 (La. App. Orl. Cir. 1942). It is true that dedications were found in these cases, but it is not at all certain what type of dedications were involved: implied common-law or express dedications not covered by LA. Acts 1896, No. 134.

26. 247 La. 839, 174 So.2d 798 (1965). The court in this case, however, found a statutory dedication, although they cited common law authority which involved express, common-law dedications. See Dillon, MUNICIPAL CORPORATIONS § 1079.

27. The terminology is somewhat confusing since the dedication involved was formal, but not in compliance with LA. R.S. 33:5051 (1962).

28. For a scant discussion of the case on a wholly unrelated issue, see
the same court, later in the same year, relied on *Parker* in stating that there were only two forms of dedication in Louisiana—statutory and common-law.  

A recent case, *Chevron Oil Co. v. Wilson*, makes inquiry into the types of dedication recognized in Louisiana even more desirable. In *Chevron*, a road had come into use through the sufferance of the landowner who later subdivided, surveyed, and filed a plat of his subdivision. The plat only acknowledged the existence of the highway by a notation of an “improved highway.” The State of Louisiana claimed ownership through a statutory dedication. The landowner claimed that only a servitude had been created by an implied dedication. The court, relying on *Parker*, concluded that the facts presented amounted to a statutory dedication. The court was not impressed by the fact that the highway antedated the plat, since, it asserted, Louisiana courts have held that whenever a plat is recorded, ownership passes to the public. Intention to dedicate was found from the platting, recording, and selling of lots according to the plat. It is at least questionable whether a pre-existing highway is covered by the terms of R.S. 33:5051 which involves real estate laid out by the landowner into squares or lots intersected by streets. The phantom jurisprudence to which the court alluded does not concern statutory dedication but an old, obscure type of formal dedication (not covered by the statute) which was “re-vived,” perhaps unintentionally, by *Banta*. Assuming then that R.S. 33:5051 is not really applicable because of the existence of the highway before recordation of the plat, can the *Chevron* case be sustained on another theory? More specifically, is the formal non-statutory dedication discussed in *Banta* a reality in our jurisprudence? If so, what types of dedication exist in Louisiana today, and what interests are created in the public—perfect ownership or servitude?

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30. Village of Folsom v. Alford, 204 So.2d 100 (La. App. 1st Cir. 1967).

31. This is quite a broad statement of law given without reference to any particular cases. Such a generality would seem to be improper even under the implication in *Banta* that a third type of dedication exists in these situations. The court attempted to factually distinguish the decision of *Wilson Motor Co. v. McDonald*, 69 So.2d 91 (La. App. 2d Cir. 1953), although it seems that intention to dedicate is no greater here than in *McDonald*. 
The Common Law Assault on Perfect Ownership of Public Things

The Louisiana jurisprudence concerning dedication has evolved through various periods of confusion and erosion by the common law in its century and a half. Some of the recognizable periods are: the Louisiana civilian period; the period of Civil Code influence; the post-1896 period; and finally, the post-Parker period. Throughout this entire history it is apparent that the most serious sources of confusion are attempts by the courts to adopt some of the language and principles of the common law.8

Two of the earliest cases concerning the public interest in dedicated land were Mayor and City of New Orleans v. Metzingers3 and Chabot v. Blanc.4 Both cases involved the original plan, in 1728, of the City of New Orleans which showed a "common" between Front Street and the river. The issue was whether the governor of Louisiana could divest the land of its public character by a subsequent grant of a lot to the defendant. Although the court indicated a desire to deny the sovereign's power to alter the public status of the land, the plaintiff failed to show that the lot encroached on public ground. However, of importance is the court's recognition of the public's title in the land according to the civilian principle that "public things" belong to the public.8

Rentrop v. Bourg,35 decided in 1816, rejected the influences of common law principles of dedication and held that the Roman law declaring the soil of a highway to be public property was in force in Louisiana. The issue over which the court disagreed was whether the sovereign necessarily reserves ownership of the soil of a highway when it grants land

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32. In the ensuing discussion the word "dedication," unless a particular type is specified, denotes the general, ambiguous concept of dedication which the courts gradually came to avoid defining and characterizing.
33. 3 Mart.(O.S.) 296 (La. 1814).
34. 5 Mart.(O.S.) 328 (La. 1818).
35. Actually the idea that the public character of things is tantamount to public ownership of them is a Louisiana version of purely civilian principles. By statute, the Louisiana legislature has defined a great part of the public things in Louisiana as owned by the state. Thus, public things are automatically thought of as being owned by the public.

Under purely civilian principles the public character of a thing is not determinative of ownership but simply denotes that the thing is "out of commerce" and "not subject to private ownership." A thing may be owned by no one, as common things; or the public may have only a right to the use of the thing; or the public may actually own the thing. See generally 1 A. Yianopoulos, Civil Law of Property §§ 12, 24, 30 (1966).
36. 4 Mart.(O.S.) 97 (La. 1816).
to an individual; however, the entire court agreed that normally the public does own these lands.37 An authoritative decision recognizing public ownership of dedicated land is Mayor and City of New Orleans v. Gravier.38 The court recognized as authority an 18th century Spanish case which involved the present defendant and intervenor and held that the same square presently disputed was effectively dedicated by the platting of a subdivision followed by a sale of lots with reference to the plan.

With the above cases as authority, the Louisiana courts should have had little trouble adhering to the Louisiana rule that the public has perfect ownership of all public places, whether acquired by dedication or conventional forms of transfer. However, the United States Supreme Court in 1832, in City of Cincinnati v. White's Lessee,39 endorsed the theory of dedication by estoppel. While the reasoning of the case was not objectionable, the Supreme Court avoided deciding whether the public acquired full ownership of dedicated lands or merely an easement, although it made implications in both directions.40 The eventual result in Louisiana was confusion. The effect of the Cincinnati case was at first rejected in DeArmas v. Mayor and City of New Orleans.41 While this case is sometimes cited as the demise of the civil law doctrine of public things and dedication,42 the case actually stood only for the proposition that although a city may derive title to public places from individuals under the Spanish law, the sovereign had overriding power to dispose of the land as he pleased.43

37. Public ownership of public things is the established principle in Louisiana civil law. See note 35 supra.
38. 11 Mart. (O.S.) 620 (La. 1822).
40. On subsidiary issues, such as whether a grantee was necessary to accept a dedication, the Court mentions cases concerning dedications resulting in the conveyance of easements to the public. Subsequently, the Court says that the facts were so positive and conclusive in this case that a jury might have found a grant to the public. The Court concluded that should it be admitted that the landowner retained the fee title, still the city must prevail in the possessory action, since title was not being tried.
41. 5 La. 132 (1833).
42. See McNeil v. Hicks, 34 La. Ann. 1090 (1882), which gave too broad an interpretation to DeArmas with the result that it indicated that dedicated lands were part of the private domain of the public.
43. The court gave a strict interpretation of French law on the point that only the king could charter a municipal corporation and grant it a public domain. As a result the majority held that the city had acquired no title under the old French law, and assuming it had, the sovereign had divested it of title by a subsequent grant. The dissent pointed out that a modern interpretation consistent with the Spanish law was that property could
Another force working toward displacement of the theory that the public naturally had full title to public places was the adoption of article 654 in the Louisiana Civil Code of 1825. This article declared that servitudes of way imposed by law do not deprive the landowner of his ownership of the soil underneath the servient area. But the article used as an example the servitude created by law in public roads, conveying the impression that the soil under "public roads" belongs to individuals, and the public "owns" only a servitude. Subsequent cases began to demonstrate some confusion in the courts' decisions. Municipality No. 2 v. Orleans Cotton Press, in speaking of an open space on the original plan of the city of New Orleans, marked "quai," between the front row of houses and the river, declared that such a plan could have amounted to a "dedication to public use" had it been accepted.

For the next one hundred years the courts of Louisiana vacillated between the older authority and the common law. The common law's influence significantly increased during this period. In City Council of Lafayette v. Holland the court gave effect to the original landowner's intention and found a dedication of streets to the public, even though the plat showed only an "open space" between the street and the river. The court expressly adopted the rule of the Cincinnati case that no particular form or ceremony is necessary to constitute a dedication, although the context in which the principal case was decided indicates that the court felt perfect ownership of the disputed

become public by grant, purchase, or prescription. The dissent felt that the city had acquired title by dedication and such title could not be so easily divested by the sovereign. While the majority rejected the Cincinnati case, the dissent theorized that the case drew its basic logic from the maxims of Corpus Juris Civilis: "Act honestly, keep promises made, and do not disappoint expectations created." However, the dissent stated, somewhat contrary to the apparent reasoning of the Cincinnati case, that the right to use public places results not from any supposed necessity that lot owners need the streets (which would give rise to a servitude), but from the dedication itself which designates these areas as public places (which grants title to the public).

44. 18 La. 122 (1841).
45. The phrase "dedicated to public use" is a favorite expression of common law writers, used when speaking of express common-law dedications which convey only an easement or servitude to the public. See Elliott, Roads and Streets § 133.
46. This is the first mention of the requirement of acceptance by the municipality. The court cites no particular authority for this additional element, but it is probable that the Cincinnati case is responsible.
47. 18 La. 286 (1841).
area was in the public.48 Adding to the essential requirements of a dedication was Linton v. Guillotte,49 wherein the court more closely tracked the language of the Cincinnati case in stating that the positive assent of the landowner is necessary to find a dedication. Here, the court found that there was no positive undertaking by the landowner to dedicate.50 Common law dedication theories were further adopted in New Orleans & Carrollton Railroad Co. v. Town of Carrollton,51 and the civil law doctrine of public places and dedication was greatly confused in Hatch v. Arnault.52 The court in Hatch stated that not all roads are “public highways” common to all, but some are “public roads” from which one might infer that the public has only a servitude since the court said that this latter type of roads might be subject to private ownership and upon abandonment the landowner may resume use of them.53

Following Hatch, the Louisiana Supreme Court seemed to avoid defining the effects of a dedication,54 or it alternated theories.55 In an unusual interlude of clarity, Saulet v. City of

48. Although the common law has since been settled that an express common-law dedication, such as the situation where the landowner, in the absence of a statute, plats a subdivision and sells lots accordingly, creates only an easement or servitude, the Cincinnati case implied that title to dedicated lands was held in abeyance until a municipal corporation capable of accepting the dedication came into existence. Presumably, upon acceptance title was supposed to have passed to the public. This implication was recognized in the dissent in DeArmas v. Mayor and City of New Orleans, 5 La. 132 (1883) and may have been of importance in deciding the Holland case.

50. The situation in Linton would probably be sufficient today to constitute a statutory dedication under La. R.S. 33:5051 (1962) were it not for the unusual notoriety of the condition precedent attached by the owner to his “offer” of dedication.

51. 3 La. Ann. 282 (1848). The court spoke of factors absent in this case which would have supplied the elements of an estoppel in pais.

52. 3 La. Ann. 452 (1848).

53. The statement represented somewhat of a policy decision, apparently based on article 654 of the Louisiana Civil Code of 1825, and justified on the grounds that while the Roman rule developed when roads were constructed as permanently as man could make them, and only after acquisition of the land by the public, the roads in a new and unsettled Louisiana were necessarily temporary and subject to change. See 1 A. YIANNOPOULOS, CIVIL LAW OF PROPERTY § 35 n.193 (1968).


55. Compare Burthe v. Blake, 9 La. Ann. 244 (1854), where the court stated that the public right could not be violated, even though not needed by the public, indicating full ownership in the public; with Buisson v. McNeil, 9 La. Ann. 445 (1854), where the court found an intention by the landowner to create a servitude.
New Orleans reaffirmed the ownership theory of dedication, but apparently based its decision on principles distilled from the Cincinnati case. The court defined the public domain and the private domain of the public and stated that only in relation to the former type of property is there an exception dispensing with the rules prevailing in private grants and supporting dedication for public use on the broad principles of equity which have been considered sufficient to prevent a violation of good faith to the public. On these principles, without grant or deed, it must appear: (1) that the land has been used with the owner's assent for public purposes, which, in their nature, exclude the idea of private ownership, and for such a length of time that public accommodation and private rights would be seriously affected by the interruption of that use; or (2) that the intention of the owner to appropriate the property to public purposes is unequivocally manifested by some plan or writing so as to be a violation of good faith to the public and those who have purchased property according to such plan, if the owner revokes the dedication. While the court recognized the ownership theory under Louisiana law, the language used is drawn from the Cincinnati case. The reasoning was quite clear, but not necessarily consistent with the early Louisiana civil law of dedication. The grip of the Cincinnati case was strengthened in David & Livaudais v. Municipality No. 2. The court recognized again the ownership theory, but questioned whether a dedication could transfer title to immovable property without the formalities required by the Louisiana Civil Code. However, the court considered the matter settled by the "adoption" of the Cincinnati rule in previous cases.

For the next half-century, with the exception of City of

56. 10 La. Ann. 81 (1855).
58. The underlying theory in the court's analysis seems to be estoppel, while the early Louisiana civil law recognized title to dedicated lands in the public because the dedication had designated the land as a "public place." See DeArmas v. Mayor and City of New Orleans, 5 La. 132 (1833) (dissenting opinion).
60. The court somehow overlooked jurisprudence and cited Livaudais v. Municipality No. 2, 16 La. 509 (1840), and Municipality No. 2 v. Orleans Cotton Press, 18 La. 122 (1841) as the cases which adopted the Cincinnati rule.
Baton Rouge v. Bird\textsuperscript{61} and City of Shreveport v. Walpole,\textsuperscript{62} Louisiana courts clearly avoided deciding what was acquired by the public by a dedication.\textsuperscript{63} The Bird and Walpole cases use some interesting terms, such as “out of commerce” and “inalienable,” which would indicate that the idea of public ownership was still valid in 1870.\textsuperscript{64} Unfortunately, some of the most oft-cited cases in the Louisiana jurisprudence concerning dedication were decided during this period, but none of these directly decided the issue of ownership. Concluding this era of confusion was Flournoy v. Breard.\textsuperscript{65} The court recited the usual common law utterances of estoppel applied to an owner who sells according to a plan, but then added that the plat in this case was unambiguous and showed no intention of retaining ownership over the streets. The obvious implication is that perfect ownership of the streets was vested in the public.\textsuperscript{66} How the court came to this conclu-

\textsuperscript{61} 21 La. Ann. 244 (1869).
\textsuperscript{62} 22 La. Ann. 526 (1870).

Burke v. Wall, 29 La. Ann. 35 (1877) and Sheen v. Stothart, 29 La. Ann. 630 (1877) are often cited for the proposition that a dedication conveys only a servitude to the public. These cases actually deal with private rights created between a subdivider and one of his purchasers.

64. These cases are actually more consistent with the purely civilian principles mentioned in note 35 supra, but translated into Louisiana legal parlance, the quoted terms would suggest public ownership of the public things involved.

\textsuperscript{65} 116 La. 230, 40 So. 684 (1906).

\textsuperscript{66} Several other cases decided about this time also used language which tended to bolster the public ownership theory. Eggerson v. Livaudais, 6 Orl. App. 417 (La. App. 1909), cert. denied, October 13, 1909, involved the narrow issue of a pure donation of a cemetery and a road leading to it, but the court spoke in terms of a grant and a dedication. Speaking generally on the subject of dedication, the court stated: “Dedication to public use, and servitudes in favor of the public, are not regulated by the strict rules which govern private property and transactions between individuals. The visible signs of such dedication and open use of the property by the public afford ample notice and protection to all, and supply the place of both title and registry” (Emphasis added.). \textit{Id.} at 419. The court, if correct in treating dedications to public use and servitudes in favor of the public as two different things, could have the key to harmonizing a great number of past cases. \textit{But see} note 45 supra.

Town of Vinton v. Lyons, 131 La. 673, 60 So. 54 (1912), spoke of a dedication as necessarily withdrawing dedicated lands from private use. City of New Orleans v. Carrollton Land Co., 131 La. 1092, 60 So. 695 (1913) declared that dedicated lands were “common and belonging to all,” “out of commerce,” and “inalienable.”
sion is rather mysterious, but *Flournoy* was of prime importance in the problematical *Banta* decision.67

In 1896, the Louisiana legislature enacted a general statute68 relating to dedication which today forms the basis of statutory dedication under R.S. 33:5051. The effect of this statute has greatly increased recently, but it was occasionally overlooked in the jurisprudence closely following its passage. One of several notable cases ignoring Act 134 of 1896 was *Iseringhausen v. Lar- cade*.69 This case involved a plat made and recorded in 1913 by which lots were sold to the parties. The court recited the rule that a sale of lots with reference to a plan amounted to a dedication of the streets shown on the plan. Common law authority was cited for the proposition that a grantee acquires a right of way in such a situation. Absolutely no mention of the applicability of Act 134 of 1896 was made by the court.

Unscathed by the language used in *Iseringhausen*, the Louisiana Supreme Court decided what is probably the most emphatic declaration of allegiance to the public ownership theory in *Jaenke v. Taylor*.70 This case involved the typical situation of a recorded plan and a sale of lots in accordance therewith. The issue was whether upon abandonment of a dedicated street the burden of a servitude was simply removed from the estate from which it was created, or whether the ownership in the street accrued to each of the adjacent landowners up to the center line under Act 151 of 1910.71 The court recited the *Flournoy* language that the plan showed no intention of the landowner to retain ownership of the streets, and concluded that: "When MacFarlain . . . laid out the town . . ., [and] sold the lots in accordance with his plan . . ., without any reservation or restriction indicating an intention to retain the ownership of the land covered by the streets . . ., he thereby irrevocably di-

67. For an interesting case suggestive of defenses to a claim of dedication in a *Flournoy*-type situation, see City of Alexandria v. Thigpen, 120 La. 294, 45 So. 253 (1907). The court indicated that where a subdivision plan had been made, but not recorded, the sale of the whole subdivision by metes and bounds did not effect a dedication of the streets shown on the plan, nor did the sale of a single lot enclosed on all sides by other lots with no access to any streets. Neither of these acts demonstrated an intention to dedicate nor created a situation which required the application of the doctrine of estoppel.
69. 147 La. 515, 85 So. 224 (1920).
70. 160 La. 109, 106 So. 711 (1926).
vested himself of the fee . . . ,72 and, consequently, Act 151 of 1910 was found applicable. The most interesting fact concerning this case is that it was not speaking of a statutory dedication since the events constituting a dedication took place in 1884 before statutory dedication was possible.

In a changed context, additional confusion was created by Metairie Park, Inc. v. Currie,73 construing Act 134 of 1896. The court made a valuable contribution in holding that a substantial compliance with the statute is sufficient to constitute a statutory dedication since the only penalty for failure to comply is directed at the landowner or his agent. The title to lots purchased is not affected because the streets shown "become dedicated to public use soon as a lot is sold in accordance with the plan. Jaenke v. Taylor, 160 La. 109, 106 So. 711."74 Why did the court resort to Jaenke as authority when it did not involve statutory dedication, but concerned formal non-statutory dedication completed before statutory dedication was made possible by the legislature? Is it possible that the Jaenke theory was considered as a legally permissible alternative for a failure to comply with Act 134 of 1896? Such questions do not seem to have been seriously considered on a comparative basis, although there continued to be inconsistent decisions.75

The foregoing is sufficient to demonstrate how the most reasonable of men could become confused about the law of dedication. When the added element of Act 134 of 1896 began to appear frequently, the need for an authoritative settling of the

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73. Id. at 588, 122 So. 859 (1929).
74. Id. at 595, 122 So. at 862.
75. See, e.g., Jouett v. Keeney, 17 La. App. 323, 136 So. 175 (2d Cir. 1931), where the court emphasized the "necessity" of acceptance of a dedication, stating that it was an essential and indispensable element without which dedications to public use remain inchoate; Wilkie v. Walmsley, 173 La. 141, 136 So. 296 (1931), declaring that where a grantor of land reserves in the grant the return of the land when the public use ceases it is one thing, but when he has made no such express reservation he parts absolutely with all title to the land given to public use; Sliman v. Mayor and Board of Aldermen of Village of Palmetto, 145 So. 410 (La. App. 1st Cir. 1933), involving a statutory dedication which the court said transferred title to the streets to the public but citing the Flournoy case; Faunce v. City of New Orleans, 148 So. 57 (La. App. Orl. Cir. 1933), which is full of quotable quotes from the common law, but which fails to decide what type of interest was conveyed to the public by the dedication; and, finally, Kemp v. Town of Independence, 156 So. 56 (La. App. 1st Cir. 1934), stating that an 1871 plan amounted to a dedication which divested the landowner of all title to the dedicated lands and vested ownership in the public, a feature found by the court to be true of all "public things," citing La. Civ. Code art. 454.
law became irresistible. The result was the Parker case which, as discussed above, only superficially achieved its goal. While Parker purported to reduce dedications to only two basic categories, it did not mention the category of formal non-statutory dedications. Admittedly, Parker is a strong force in the Louisiana law of dedication, to the extent applicable, but it did not serve to remove this third type of dedication from usage.

A feeble assault on the rigidity of the Parker case began almost immediately in another supreme court case decided in 1940, Richard v. City of New Orleans. There the court was again faced with the commonly recurring factual situation of an ancient plat of a subdivision showing streets, parks, alleys, and other public places by which plan the original owner had sold lots. The court found a completed dedication in 1828 and avoided the question of the interest created by this formal, express type of dedication by finding that the plaintiffs could not contest the public character of the streets and their use. Obviously, in 1828, a statutory dedication was impossible; likewise, there is more involved in this factual situation than simply an informal common-law dedication. However, the court did not really decide what type of interest the public acquired in the dedicated lands, but it hinted that perfect title to the land covered by the streets was in the public. The immediate consequence, which does not seem to have disturbed any Louisiana court, was that the supreme court expressly recognized a third type of dedication which Parker did not purport to cover.

The faith of the courts of appeal in Parker was not shaken by Richard. Two cases immediately followed which recognized the two exclusive methods of dedication as dictated by Parker.

76. 195 La. 898, 197 So. 594 (1940).
77. The court recited the language of Flournoy that it was not the landowner's purpose to retain the fee title to the dedicated lands.
78. Life v. Griffith, 197 So. 646 (La. App. 2d Cir. 1940), cert. denied, July 30, 1940, involved a claim by the defendant that there had been no dedication, no acceptance, and no use of streets by a municipality, but the court followed Parker to the letter finding a statutory dedication conveying perfect title to the public without need of acceptance.
In a somewhat questionable fact situation, Brasseaux v. Ducote, 6 So.2d 769 (La. App. 1st Cir. 1942) held that while there was not a statutory dedication, there was a common law offer of dedication which had not been accepted by the public either formally or by use. The lower court's refusal to admit as evidence plats made by original landowner prevented the occurrence of the identical fact situation involved in Richard. The court found conclusive the testimony of the parish clerk that there were no maps on file
A Richard-type factual situation was again raised in *Esposito v. Gaudet*, but, like *Richard*, the context in which the issue of public ownership was raised permitted the court to escape a decision on the point. The suit involved only the necessity of deciding whether a purchaser of land could recover the purchase price for lack of a marketable title. Deciding in the purchaser's favor, the court concluded that part of the land sold had been previously dedicated; however, it was unnecessary to decide whether this dedication was formal-statutory, informal-common-law, or a third type. The common law authorities cited by the court deal with express common-law dedications which would create only a servitude in Louisiana. The Louisiana cases cited as authority also avoided the issue of what type of interest was created in the public, although they cited common law authorities which would lead to the conclusion that only servitudes were created.

During the next five years no decisions were rendered which struck at the validity of the *Parker* case. In 1947, an anachronism was created by the Louisiana Supreme Court when it decided *James v. Delery*. All that was sought by the plaintiff was a right of way over streets within a subdivision in which he was a lot owner. Though the facts justified a finding of statutory dedication, the court stated that it was well established of the town, but it does not explain how the plaintiff came to be owner of "lot 7, square 26 of the Town of St. Francisville" without the existence of a plan or map.

80. See *Dillon, Municipal Corporations* § 1079; *Elliott, Roads and Streets* § 133.


82. Three decisions were rendered between 1942 and 1947 which refined some of the tangent areas in the creation of public interests in roads and streets. *Goree v. Midstates Oil Corp.*, 205 La. 988, 18 So.2d 591 (1944), makes it clear that the public acquires only a servitude under the three-year maintenance provisions of *La. R.S. 48:491* (1950). *Caz-Perk Realty, Inc. v. Police Jury of East Baton Rouge Parish*, 207 La. 796, 22 So.2d 121 (1945), indicated that the local government has wide discretion in abandoning dedicated lands. *Bordelon v. Heard*, 33 So.2d 88 (La. App. 1st Cir. 1947), dealt with the "tacit dedication" under *La. R.S. 48:491* (1950), which conveys only a servitude to the public and does not divest the landowner of title. Even these cases are sometimes cited as holding that a non-statutory dedication creates only a servitude. *See, e.g., 1 A. Yianoupolos, Civil Law of Property* § 35 n.188 (1966), citing *Goree v. Midstates Oil Corp.*, 205 La. 988, 18 So.2d 591 (1944).

83. 211 La. 306, 29 So.2d 858 (1947).

84. In 1917, the landowner subdivided his land, filed a plat of the area, and sold lots with reference to the plat. *See Metairie Park, Inc. v. Curris*, 168 La. 588, 122 So. 859 (1929).
that when a landowner subdivides his land, creating streets, etc., and then sells lots, he creates, by title, a servitude of passage over the streets. The plaintiff was accordingly adjudged to have a right of way over the streets. The court felt that the only contradiction in the jurisprudence on this issue was whether the servitude runs in favor of lot owners or the general public.

The James case appears to have been accepted without question in the jurisprudence, and for another five years Parker was cited approvingly and was further refined. One oft-cited case purporting to bolster the authority of Parker is Collins v. Zander, decided in 1952. The court in Collins reviewed the requirements of statutory and common-law dedications and found that there had been a statutory dedication. In an effort to crystallize dedications in Louisiana into either the statutory or common-law variety (presumably excluding other possible classifications), the court digressed:

85. While it is true that the plaintiff was only seeking a servitude of way, the court, by using such unqualified and authoritative language, leaves the impression that regardless of who is entitled to the servitude, the extent of the interest created was only a servitude.

86. While there is some confusion in the common law concerning exactly when private rights of a grantee inure to the benefit of the public, it is somewhat of an understatement to say that this is the only point of confusion in the jurisprudence. See Dillon, Municipal Corporations §§ 1071, 1083, 1090; Elliott, Roads and Streets § 132.

87. Martin v. Fuller, 214 La. 404, 37 So.2d 851 (1948) found a statutory dedication, but announced that in order to affect the rights of third parties, a dedication or revocation of a dedication must be recorded in accordance with the laws of registry. Jeffries v. Police Jury of Rapides Parish, 53 So.2d 157 (La. App. 2d Cir. 1951) reiterated the principle that local authorities have wide discretion in abandoning dedicated lands under La. R.S. 48:701 (1950), which is the companion statute to the statutory dedication provision, id. at 851.

88. 61 So.2d 897 (La. App. Orl. Cir. 1952).

89. The court also decided two minor issues in the area of dedication in dictum. First, the court hinted that although no provision for acceptance is made in La. R.S. 33:5051 (1962), still "the parish surveyor must acknowledge his approval." Collins v. Zander, 61 So.2d 897, 899 (La. App. Orl. Cir. 1952). (It is questionable whether the mandatory interpretation given this provision is correct. See Metairie Park, Inc. v. Currie, 168 La. 588, 122 So. 859 (1929).) Second, the court indicated that all that is necessary to complete a statutory dedication is recordation: "The dedication becomes complete immediately upon the recordation of the plan or map and substantial compliance with Act No. 134 of 1896 is all that is necessary to create a valid statutory dedication." Id. at 899. This reasoning is consistent with the idea that the elements of estoppel are not needed in a statutory dedication, so the sale of lots does not become the critical requirement; however, it is questionable whether a statutory dedication might be found even without a recordation, since other cases indicate that a failure to comply with La. R.S. 33:5051 (1962) subjects the landowner to a penalty, but does not invalidate the dedication. See Parish of Jefferson v. Doody, 247 La. 839, 174 So.2d 798 (1965).
"Assuming arguendo . . . that the '15' lawn walk' was not statutorily dedicated, then we are of the opinion that it was impliedly dedicated. The principle is well established in our jurisprudence that when the owner of a tract of land subdivides it into lots and designates on the map or survey of the subdivision streets, alleys, roads, walks, etc. and then sells the property or any portion of it with references to this plan or map, he effectively creates, by title, a servitude of passage over the streets, alleys, roads, and walks, as reflected by the plan or map.\textsuperscript{90}

This so-called principle is not clearly established by the jurisprudence as illustrated by the previous discussion, but the court was apparently making every effort to follow \textit{Parker} exclusively. While it is suggested in commentary that \textit{Collins}, by tracking the language of \textit{Parker}, thoroughly settled the law of dedication in Louisiana,\textsuperscript{91} the previous review of the jurisprudence indicates that it should not be credited with such an effect. Cases subsequent to \textit{Collins}, from 1952 to 1967, seem to be consistent with \textit{Parker},\textsuperscript{92} but the law of dedication in Louisiana, as revealed in the \textit{Banta} and \textit{Chevron} cases, is not settled.

\textsuperscript{90.} Collins v. Zander, 61 So.2d 897, 900 (La. App. 3d Cir. 1952).
\textsuperscript{91.} See Comment, 16 La. L. Rev. 521 (1956).
\textsuperscript{92.} Wilson Motor Co. v. McDonald, 69 So.2d 91 (La. App. 3d Cir. 1953), \textit{cert. denied}, Jan. 11, 1954, decided the problem of what to do with a pre-existing road which was alluded to on a plat made by the subdividing landowner. The court, consistently with \textit{Parker}, decided that the owner never intended to dedicate the soil underneath the road in this particular fact situation; however, the court did find an implied dedication. It was affirmatively decided for the first time by the Louisiana Supreme Court that silence and inaction could serve as consent, which, if followed by use, is sufficient to establish an implied dedication. B. F. Trappey's Son, Inc. v. City of New Iberia, 225 La. 466, 73 So.2d 423 (1954). A good factual illustration of the principle that intention to dedicate must be clearly established is found in Mecobon, Inc. v. Police Jury of Jefferson Parish, 224 La. 793, 70 So.2d 687 (1954), although the court cites as authority Saulet v. City of New Orleans, 10 La. Ann. 81 (1855), which had nothing to do with a statutory dedication. Johnston v. City of New Orleans, 234 La. 697, 101 So.2d 206 (1958) held that there need not be a municipal corporation to accept a dedication since the public is an ever-existing grantee capable of taking and enjoying a dedication. The court also indicated that the grantor might make reservations in the dedication and designation of a particular purpose, but it remains a question whether such reservation could be made without offending La. R.S. 33:5051 (1962). The court did make it clear that in the case of a donation the donor can attach conditions, the non-performance of which will justify rescission. See Orleans Parish School Ed. v. Manson, 241 La. 1029, 132 So.2d 885 (1961). A good discussion of substantial compliance with La. R.S. 33:5051 (1962) and its purposes was given in Parish of Jefferson v. Doody, 247 La. 889, 174 So.2d 798 (1965).
The Civil Law and Louisiana—Dedication

The civil law notion of dedication in Louisiana, as evidenced by the earlier cases, apparently consisted of two concepts: (1) public things are owned by the public; and (2) one who designates as "public" does by that act of dedication alone create public ownership of the designated lands. Underpinning these objective rules of law is the same Roman principle which has developed into the common law doctrine of estoppel: "Act honestly, keep promises, do not disappoint expectations created in other men." Louisiana apparently honored these principles until the time of the Cincinnati case, but the jurisprudence subsequently faltered until Parker adopted completely the common law principles of dedication. A close reading of the Louisiana cases will reveal that the language of the common law writers has been taken out of context and used to support dedications in Louisiana. The best example of error is found in Parker itself which is supposedly the fountainhead of authority on the Louisiana law of dedication. The Parker case cites Jaenke v. Taylor as authority for the proposition that a statutory dedication divests the landowner of his ownership and conveys it to the public. In its next breath the court distinguishes Jaenke from the situation under consideration because it involved a common-law dedication. As discussed above, Jaenke involved neither a formal statutory dedication nor an informal common-law dedication, but a formal, non-statutory type of dedication. The definitions given implied common-law dedications and statutory dedications in the Parker case would exclude both theories as a ratio decidendi for the Jaenke situation which involved a dedication before Act 134 of 1896 and expressly recognized that full title was conveyed to the public.

Other examples of inconsistencies have been noted above, and it seems fair to say that Louisiana courts have been only fair-weather friends to the Louisiana civil law principles of dedi-

94. Id.
95. See Mayor and City of New Orleans v. Gravier, 11 Mart.(O.S.) 620 (La. 1822) and the Spanish opinion there discussed; Renthrop v. Bourg, 4 Mart.(O.S.) 97 (La. 1816); Mayor and City of New Orleans v. Metzinger, 3 Mart.(O.S.) 288 (La. 1814).
97. 160 La. 109, 106 So. 711 (1926).
cation. They have been used, with varying common law modifications, only when the courts could not avoid deciding the issue of public ownership or when the rigid twofold forms of Parker could not be utilized.

The Parker case, while broadly worded, was a practical decision in that it covered the bulk of the problems in the law of dedication. Act 134 of 1896, now R.S. 33:5051, covers virtually all modern cases of subdivision; and the notion of implied dedications, although somewhat foreign to Louisiana civilian principles, appear to be a concept pragmatically developed in an absence of directly applicable legislation. What the Louisiana cases, especially Parker, with its tone of exclusiveness, have failed to do is to take into consideration and clearly distinguish between the various situations in which dedication questions can arise. A helpful suggestion from the common law is to recognize three basic factual situations involved in dedications: (1) formal, statutory dedication—where there is an applicable statute; (2) informal dedication—where there is only an implied intention to dedicate; (3) formal, non-statutory dedication—where there is an express intention to dedicate but no statute is applicable.

The first category is relatively simple, involving only substantial compliance with R.S. 33:5051. The minimal requirements of the substantial compliance doctrine are certainly necessary to accomplish the objectives of the statute and simplify the task of the title examiner. While the proposition that R.S.33:-5051 works a conveyance of full ownership of dedicated lands to the public does not appear to be particularly necessary, it is consistent with established Louisiana law principles that “public things” are not subject to private ownership and are out of commerce.

The second category would involve the various forms of dedication in which the law deems it necessary to infer an intent to dedicate from the landowner’s actions and to estop him from denying the right of the public to use such dedicated areas.

99. See Louisiana Highway Comm’n v. Raxsdale, 12 So.2d 631 (La. App. 1st Cir. 1943), holding that property rights, including servitudes, owned by a municipal corporation which pertain to public places are inalienable and not subject to prescription.
100. See note supra. Cf. note supr"
Implied dedications by individuals to the public seem to be a relatively new area in Louisiana law. While the ancient civil law could be adapted to this situation by recognition of a right of use in the public, it would be confusing to revive these principles of law concerning public things after they have been used in a modified fashion for so long.\textsuperscript{101} There would seem to be no objection to using the common law in this area, with its modifications, such as the necessity of acceptance and the result that only a servitude is conveyed to the public, since the result is the same as would have been reached under the ancient civil law; and a complete change of theory is avoided. Attempting to justify a conveyance of perfect title through an implied dedication to the public could run afoul of basic due process\textsuperscript{102} and the maxim that no one is presumed to give away his property. It is questionable whether implied intent could take the place of an express grant to the public.\textsuperscript{103} A servitude would be sufficient for the public’s needs\textsuperscript{104} without offending any true civil law traditions. The requirement of acceptance of such a dedication would not prejudice private rights which can be created and sustained independent of the public’s rights.\textsuperscript{105}

The third category deals with the situation in which the statute is not substantially complied with or is wholly inapplicable, as in \textit{Banta}. This category would encompass the commonly occurring situation in which a landowner has subdivided and platted his land and sold lots with reference to it. Such formal, express dedications, not of statutory character, should be handled as they have been intermittently throughout the Louisiana jurisprudence. On the basis of established Louisiana civil law principles,\textsuperscript{106} lands designated as public places should become out of commerce and title to such lands should be in the public. These express dedications should be sustained whenever the landowner does some affirmative, express act which

\begin{itemize}
  \item \textsuperscript{101} It is not probable that \textit{La. Civ. Code} art. 658, introduced as \textit{La. Civ. Code} art. 654 (1825), was intended to bear on the question of dedication. It is more probable that the example of public roads given was meant to direct attention to servitudes imposed by law, such as the river road servitude. \textit{See La. Civ. Code} arts. 705, 707. \textit{See also note 35 supra.}
  \item \textsuperscript{102} \textit{See La. Const.} art. I, § 2.
  \item \textsuperscript{103} \textit{See note 107 infra.}
  \item \textsuperscript{104} \textit{See note 98 supra.}
  \item \textsuperscript{106} \textit{See note 95 supra. Cf. note 35 supra.}
\end{itemize}
clearly shows an intention to dedicate, since the policy favoring grants to the public dispenses with the ordinary rules of conveyance, and the formality of the dedication should suffice to convey perfect title to the public. Since such a dedication is similar to a grant to the general public, there should be no requirement of acceptance.

Conclusion

With the above analysis in mind, it would seem that the Banta case is correct, and the Chevron case is sustainable on the theory that it amounted to a formal, non-statutory dedication. Banta did realize the existence of this third type of dedication in the jurisprudence, but even the older authority cited by the court had been somewhat diluted by the common law. There is no objection to relying on common law precedents when dealing with a statutory or implied dedication since neither type reaches results materially opposed to principles of the civil law. But by a return to the principles of Louisiana civil law and a recognition that a complete adoption of the common law is not necessary in the limited third area of formal, non-statutory dedications, the Louisiana courts in the future could begin a consistent line of jurisprudence decided on principles which represent the best of both worlds.

Michael G. Page

THE FICTITIOUS COMMUNITY AND THE RIGHT TO PARTITION

Introduction

The Louisiana Civil Code provides that a community of acquets and gains arises from every marriage contracted in this state, unless the parties agree before marriage to a contrary stipulation. The community is terminated when the bonds of matrimony are dissolved or when there is a separation of property or a separation from bed and board. Upon the dissolution

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2. Id. arts. 136, 2405.
3. See id. arts. 2425, 2430.
4. Id. art. 155.