

## Opinion No. 105

**Housing Authority—Streets and Alleys—Cities and Towns—Dedication, Owner of Fee Title.**

HELD: Dedication of streets TO THE USE OF the public, as provided in Section 4985, R. C. M., 1935, creates only an easement or right of way, which is lost upon vacation of such street by the city.

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July 26, 1939.

Great Falls Housing Authority  
Great Falls, Montana.

Gentlemen:

You have submitted to this office, for an opinion, the question as to whether or not, by a certificate of dedication, on the plat of an additional townsite to the town or townsite of Great Falls, Montana, title in fee to the land covered by the streets and alleys shown on the plat passed to the public, and whether or not upon the vacation of any of the streets or alleys shown on such plat the fee title to the vacated streets and alleys would revert to the dedicator.

Section 4985, R. C. M., 1935, prescribes a form of certificate of dedication to be executed by one platting his land as a townsite or addition thereto.

This section requires, in effect, that the lands included in streets and alleys shall be granted and donated "to the use of the public forever."

In *Hershfield v. Rocky Mt. Bell Tel. Co.*, 12 Mont. 102, 115, our Supreme Court held that the fee to the land covered by a street once established is vested in the public because the form of dedication required by the above section is equivalent to a deed. To the same effect is *Kipp v. Davis-Daly Copper Co.*, 41 Mont. 509, 516. See also dictum to the same effect in *Faucett et al. v. Dewey Lumber Co.*, 82 Mont. 250, 258.

It is my opinion that in the foregoing cases sufficient stress was not placed upon two very important words in Section 4985, supra, and I feel satisfied that the attention of the court was not called either to Section 1612 or Section 1616, R. C. M., 1935.

It is the general rule that a statutory dedication operates to convey only an easement, except where the statute declares that a fee shall pass; and that in order that a fee shall pass, it is necessary that the statute shall plainly so declare. See:

Elliott on "Roads and Streets" (2nd Ed.), p. 125;

29 C. J. 541;

Thompson on "Title to Real Property", Sec. 105, p. 128.

It is to be observed that Section 4985, supra, does not provide that the lands constituting streets and alleys shall be granted and donated to the public, but only TO THE USE of the public. Hence there is no provision, plain or otherwise, in the Montana statute on dedications of this character, providing that the fee to the streets and alleys shall pass to the public. In order to show that there was an entire absence of legislative intent that the public should acquire title in fee under the above provision the same legislature which enacted Section 4985, supra, enacted Section 2600 of the Political Code of 1895, which, with a slight amendment not pertinent here, is practically identical with Section 1612, R. C. M., 1935, and which provides that all \* \* \* roads \* \* \* streets, alleys \* \* \* dedicated \* \* \* to the public \* \* \* are public highways, and at the same session of the legislature there was enacted what is now Section 1616, R. C. M., 1935, which provides that by taking or accepting land for a highway the public

acquires only the right of way and the incidents necessary to enjoying and maintaining the same \* \* \*.

From the foregoing it is clear that it never was the intention of the legislature that upon the dedication of streets and alleys the title in fee to the same should pass to the public.

In view then of the specific language used in the certificate of dedication provided by Section 4985, and the contemporaneous section defining streets and alleys as highways, and the limitation in Section 1616, supra, upon the extent of the interest received by the public under a certificate of dedication, I am inclined to the belief that our court, in a proper case, upon its attention being directed to these statutory provisions and to the general rule obtaining with respect to the effect of statutory dedications, would hold that by such a certificate above mentioned only an easement was or is conveyed to the public.

In line with the foregoing reasoning it is my opinion that upon the vacation of a street or alley the easement is lost and the whole title to the land vacated reverts to the owner who dedicated, and through him to his grantees owning the property adjoining the land vacated.

My conclusions, as above stated, are fortified because of the liberal and enlightened position taken by the Supreme Court in the last few years, which indicates an abandonment of a former position by which there seemed to be too much adherence to the letter of the law to the disadvantage of the spirit of the law.

The law under which you were organized and incorporated was recently sustained by our Supreme Court as constitutional in all of its aspects, as was the companion statute, Chapter 138 of the Laws of 1935, which provides for the cooperation between municipalities and housing authorities.

In fact, our Supreme Court has, by writ of mandamus, compelled a city government to advance to a housing authority the funds necessary to meet the first year's expenses of such authority.

Your organization is a creature of the city, in effect, and is defined by the law to be a public body and a body corporate and politic. It can exist only for public purposes, and surely the use by a housing authority of a vacated

street or alley, for the purposes prescribed in the housing authority law, is a public use.

It is my opinion that if you purchase city blocks from the owner who dedicated the land within the streets and alleys to the use of the public, as provided in Section 4985, supra, you will thereby become the owner in fee of such streets and alleys, subject to the right of the public, under Section 1616, supra, to use the same as rights of way; and that upon vacaton of such streets and alleys, if you still own such blocks, you will own the lands within such vacated streets and alleys in fee simple absolute, not subject to any easement of any kind in the public, arising out of the certificate of dedication.