

**Dillingham Commercial Company, Inc.**

**v.**

**City of Dillingham**

**705 P.2d 410 (1985)**

City claimed fee title to a roadway by virtue of 43 U.S.C. 932 (RS 2477) or by adverse possession. It also claimed alleys on two other boundaries of the Dillingham Commercial Company property under the same theories.

**Section 932:** In citing Hamerly v. Denton, 359 P.2d 121,123 (1961), the Supreme Court ruled:

Case law has made it clear that section 932 is one-half of a grant - an offer to dedicate. In order to complete the grant "there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

In this case the roadway was used prior to the original homestead entry. The original homesteader squatted on the land prior to making the entry; however, official action such as a homestead entry was required to withdraw the land from the public domain, mere possession did not suffice.

The public's acceptance of the grant required public use for a period of time and under conditions proving the grant had been accepted. That use must have specific termini and a definite location. Once the public use and location is established "it may be used for any purpose consistent with public travel." At 415.

Section 932 grants a right of way and according to the court's ruling in Wessells v. State Department of Highways, 562 P.2d 1042, 1045 n. 5 (1977) the general rule in Alaska is that a "'right of way' is synonymous with 'easement'". At 415.

**Adverse Possession:** The Court ruled that adverse possession was not applicable due to the lack of uninterrupted and continuous possession. Consequently the city did not get fee simple title. However, the Court did rule that a public highway may be created by prescriptive use.

At page 416, the Dillingham Court applied the three tests for adverse possession established in Alaska National Bank v. Linck, 559 P.2d 1049, 1052 (1977), to prescriptive easements.

(1) the possession must have been continuous and uninterrupted;  
(2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner.

Adverse possession involves the fee simple interest therefore the true owner must be excluded. The occupancy by the adverse possessor must be exclusive; whereas, a prescriptive easement does not require exclusive use. The use makes the property subject to an easement, but it does not divest the owner of the underlying fee title.

**Implied Dedication:** Alternatively the theory of implied dedication was discussed. Implied dedication requires (1) an intent to dedicate the road or easement to a public use, and (2) an acceptance of that dedication on behalf of the public. Establishment of the intent to dedicate must be "clear and unequivocal", a heavy burden on the party claiming the dedication. At 416.