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with the train, automobile, and airplane being desirable, and accepted, instruments of social convenience. Yet, these same instruments are responsible for a tremendous loss of life, limb and property. Rather than penalize the individual, society itself should bear the burden of the loss produced by dangerous, but desirable, activity if it wishes to enjoy the benefits of our modern machine age. The focus of legal attention is shifting to the compensation of the inevitable victims of a mechanized society.⁴¹ In the field of industrial accident, this attention is reflected in workmen's compensation and employer liability laws. Such laws are based upon the theory that an activity should bear the loss which it produces. This theory could be extended to a system of compulsory liability insurance or social insurance.

These advancements, however, will be realized only in the distant future. At present, our legal concept of negligence liability is based upon personal fault. In such a system of tort law the doctrine of last clear chance plays a significant role.⁴² This concept is useful as an instrument by which legal decisions may be made to conform to current notions of justice. Perhaps jurists and legal scholars will soon recognize and accept a more satisfactory approach.

ROBERT WALTER JONES

Whither the Guideposts? Diversion of Dedicated Lands

The consternation evidenced by the courts in attempting to bind past decisions concerning diversion of dedicated lands into a cohesive unit is epitomized by the trial judge's remarks in the recent case of *Board of Education v. Unknown Heirs*.¹ In commenting upon the question of title to dedicated lands, the court stated:

A study of these and other cases reveals an almost indiscriminate use of such legal labels, brands or tags as "fee subject to a use," "fee held in trust," "determinable fee," "a base or qualified fee," and others. And although the legal profession has made almost a fetish of these and similar words, they hold no magic in themselves. Rather, they lead to meaningless by-paths of confusion with dead ends instead of acting as guideposts to understandable and equitable solutions of everyday problems.²

In this article an attempt will be made to analyze some of these confusing "dead ends" relating particularly to diversion of dedicated lands and perhaps uncover "guideposts" indicating a solution to this highly perplexing problem.

⁴¹ James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549 (1948).

⁴² James, *Last Clear Chance, A Transitional Doctrine*, 47 YALE L. J. 704 (1938).

The facts in a recent Illinois case³ highlight the problem confronting the courts as to what checks are to be placed upon a governing body in its disposition of dedicated lands. In 1852 a plat was filed by the proprietors of the town of Virden, dividing the village into numbered lots. One block in the center of town was not so numbered or divided, but instead, had been designated as "public ground." The town of Virden had since maintained the property, erecting a city hall on one portion, which housed the city jail, the town fire engine, a garage and a workshop. The city proposed to lease a portion of the southeastern section to a separate municipal corporation providing fire protection for the entire public within its boundaries, for the erection of a building to house fire fighting apparatus. The plaintiff sought to enjoin the city from leasing that portion of the "public ground," contending that the leasing and subsequent construction of a fire house would be a diversion from the intended use. The plaintiff asserted that the land had been specifically dedicated as a public park, title being held by the municipality in trust for the public; thus the city was without authority to convey or lease any part thereof.

The Illinois Supreme Court held that although a portion of the "public ground" had been used for park purposes, the city authorities had in the past utilized other parts of the land for whatever public use they deemed advisable. The court upheld the city's contention that the dedication was unrestricted.⁴ Such a fire house, decided the court, would be in furtherance, rather than restrictive of the public use to which the property had been dedicated.

The court reasoned that by merely leasing the property the municipality retained sufficient control to prevent an inconsistent use, in compliance with its duty as trustee to control the property for its intended use. By way of dictum, the court further stated that an injunction would issue to prevent a conveyance of the fee of the property, but there was no proof that such an action was threatened or contemplated.

On the other hand, the Ohio Supreme Court, when confronted with a similar situation in *Babin v. Ashland*,⁵ decided that a municipality could convey the fee to dedicated lands. The city of Ashland, as holder of the

¹ 128 N.E.2d 534 (Ohio Com. Pl. 1954)

² *Id.* at 545.

³ *Schien v. Virden*, 5 Ill.2d 494, 126 N.E.2d 201 (1955).

⁴ In like instances, where the words of dedication were ambiguous, Ohio has held that the contemporaneous acts and declarations of the dedicatory, and the usage of the land may be adverted to, to explain the dedication. See *Lebanon v. Warren County*, 9 Ohio 80 (1839); *LeClercq v. Gallipolis*, 7 Ohio (Part I) 217 (1835); *Cincinnati v. Hamilton County*, 7 Ohio (Part I) 88 (1835); *Brown v. Manning*, 6 Ohio 298 (1834).

⁵ 160 Ohio St. 328, 116 N.E.2d 580 (1953).

legal title to land designated "public ground" on the town plat, was held to have the power to convey that title. The decision is indicative of the readiness of Ohio courts to allow a municipality to dispose of dedicated lands as it deems advisable, and to prevent title from reverting (even if it means overruling a former Supreme Court decision, as was done in the *Babin* case).⁶

Whenever possible, Ohio courts have shown a tendency to hold that title never reverts and that there are no conditional or determinable fees, regardless of the phraseology used. In justifying certain decisions, the courts have held that the intention of the parties is the guiding principle, while at other times holding that it is not what the parties intended, but what they did that governs.⁷ The treatment by the courts of such determinable or conditional fees is not within the scope of this article.

The court in the *Babin* case interpreted the words "public ground" to mean ground *belonging* to the public, and not ground to be *used* by the public. The public therefore, clearly has the authority to dispose of its own land, within its powers of local self-government conferred by the Ohio constitution.⁸ If, to the contrary, the words "public ground" were to be interpreted as meaning ground to be *used only* by the public, then it is arguable that those representing the public can not sell the dedicated land because it would prevent the use by the public.⁹ To more fully appreciate the implications of the decisions, a brief summary of the principles of dedication will precede an analysis of Ohio's treatment of the subject.

DEDICATION

A dedication may be defined as the devotion of land to a public use by an unequivocal act of the owner of the fee, manifesting the intention that it shall be used presently or in the future for such public use.¹⁰ There need not be any consideration, since the public interests and the benefits derived by the dedicator are sufficient to support the dedication.¹¹ The basic dif-

⁶ In *Van Wert v. Inhabitants*, 18 Ohio St. 221 (1868), it was held that if the "public ground" ceases to be used by or for the public, there will be a reverter to those who dedicated it or those claiming under them. The *Babin* case overruled that particular holding of the *Van Wert* case, stating that where land is dedicated to a public use, and there is no provision for forfeiture or reversion, and the land is no longer needed for such use or purpose, neither the dedicator nor his heirs will have any enforceable rights to prevent the sale of dedicated land by the city.

⁷ For a detailed coverage of conditional and determinable fees, see Meade, *Reverters and Determinable Fees—Trend of Ohio Decisions*, 55 Ohio Op. 355 (1935).

⁸ OHIO CONST. art. XVIII § 3.

⁹ See *Van Wert v. Inhabitants*, 18 Ohio St. 221 (1868); *Le Clercq v. Gallipolis*, 7 Ohio (Part I) 217 (1835).

¹⁰ *Birmingham v. Graham*, 202 Ala. 202, 79 So. 574 (1918).

¹¹ *Babin v. Ashland*, 160 Ohio St. 328, 116 N.E.2d 580 (1953); *Richards v. Cincinnati*, 31 Ohio St. 506 (1877).

ference between condemnation and dedication is that the former is compulsory while the latter is voluntary.¹² A dedication differs from a grant or gift in that there need not be a particular grantee *in esse* at the time of the dedication to give it effect.¹³ A dedication by an owner of the fee to individuals is ineffectual, since the essence of a dedication is that it shall be for the use of the public at large.¹⁴

In Ohio, a dedication may be made in a number of ways. It can be accomplished by express declarations or acts of the dedicator,¹⁵ by deed,¹⁶ or by will.¹⁷ A common method of dedication is by plat. It is accepted in Ohio, in accordance with the general rule elsewhere,¹⁸ that where the owner of real property makes a plat thereof, showing streets, alleys, squares or commons; sells lands with reference to said plat; and the public uses such lands so dedicated in compliance with the provisions of the dedication, the dedicator, in the absence of any circumstances to indicate a limited or private purpose, has thereby dedicated the lands to the public use.¹⁹ Dedication in Ohio may be by the common law²⁰ or the statutory method,²¹ either mode being equally efficacious.

Most state courts are in agreement that the public, with legislative authorization, can determine the use of land generally dedicated to the public without restrictions.²² If, however, the dedication has been made for a specific purpose, the courts differ as to whether such land may be used for purposes other than the dedication. Some hold that there is no power in the legislature, the municipality or the general public to use the land for purposes other than those indicated in the dedication, even though the changed use may be advantageous to the public.²³ Other courts place a

¹² *Venable v. Wabash Western Ry.*, 112 Mo. 103, 20 S.W. 493 (1892).

¹³ *Carter v. Portland*, 4 Ore. 339 (1873).

¹⁴ *Smith v. Dothan*, 211 Ala. 338, 100 So. 501 (1924); *Prescott v. Edwards*, 117 Cal. 298, 49 Pac. 178 (1897).

¹⁵ *Hicksville v. Lantz*, 153 Ohio St. 421, 92 N.E.2d 270 (1950); *Penquite v. Lawrence*, 11 Ohio St. 274 (1860); *Fulton v. Mehrenfeld*, 8 Ohio St. 440 (1858).

¹⁶ *Carter v. Swan*, 114 N.E.2d 107 (Ohio Com. Pl. 1953); *Magic v. Basquin*, 102 N.E.2d 42 (Ohio Com. Pl. 1951).

¹⁷ *Winslow v. Cincinnati*, 6 Ohio N.P. 47 (1899).

¹⁸ 16 AM. JUR., *Dedication* § 22 (1938).

¹⁹ 17 OHIO JUR.2D, *Dedications* § 26 (1956).

²⁰ In *Cincinnati and Springfield Ry. v. Carbage*, 36 Ohio St. 631 (1881), the court held that to have a valid common law dedication, there must be shown intent by the owner to dedicate the land to the public use, evidenced by some unequivocal act, and acceptance by the public.

²¹ For a complete analysis of statutory dedication in Ohio, see 17 OHIO JUR.2D, *Dedication* §§ 41-58 (1956).

²² *Lowell v. Boston*, 322 Mass. 709, 79 N.E.2d 713 (1948); *Fort Worth v. Burnett*, 131 Texas 190, 114 S.W.2d 220 (1938).

²³ 26 C. J. S., *Dedication* § 65 (1941).

more liberal construction upon a dedication made for specific and defined purposes when the fee is granted absolutely to the municipality. They hold that if the legislature so authorizes, the use may be discontinued or applied in any manner.²⁴

DIVERSION IN OHIO

Diversion has been defined as any use of dedicated property inconsistent with, or substantially interfering with the use of the property in the particular way for which it was dedicated.²⁵ The objects and purposes of the dedication must be construed with reference to conditions then existing which gave rise to the dedication,²⁶ and when ambiguity arises, the contemporaneous acts and declarations of the dedicator and the subsequent use of the land by the public will be considered.²⁷ If the instrument relied upon as a dedication is ambiguous, the construction given must be against the dedicator and for the public.²⁸

Generally, earlier Ohio cases held the municipality to a fairly close compliance with the terms of dedication, while at the same time attempting to apply the dedicated property to all public and beneficial purposes consistent with the terms and purposes of the dedication.²⁹ The court in *Brown v. Manning*³⁰ enjoined the heirs of the dedicator from erecting certain commercial buildings on land previously dedicated as "P Square" and subsequently used by the public as a public square.³¹

In *Langley v. Gallipolis*,³² town officials were attempting to improve land dedicated on the plat as "the place," by erecting an inclosure for the use and benefit of the public. The court held that the inclosure was for the public good and would best accomplish the purpose of the dedication. In an often-cited opinion, the court in part held:

The use and beneficial purposes of a public square or common, in a village or city, where no special limitation or use is prescribed by the terms

²⁴ 3 McQUILLAN, MUNICIPAL CORPORATIONS § 1155 (2d ed. 1928)

²⁵ 26 C. J. S., *Dedication* § 66 (1941).

²⁶ *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988 (1909)

²⁷ See note 4 *supra*.

²⁸ 26 C. J. S., *Dedication* § 40 (1941).

²⁹ *State ex rel. Crabbe v. Sandusky, Mansfield and Newark Ry.*, 111 Ohio St. 512, 146 N.E. 58 (1924); *Louisville and Nashville Ry. v. Cincinnati*, 76 Ohio St. 481, 81 N.E. 983 (1907); *Malone v. Toledo*, 28 Ohio St. 643 (1876); *Van Wert v. Inhabitants*, 18 Ohio St. 221 (1868); *Langley v. Gallipolis*, 2 Ohio St. 107 (1853); *Le Clercq v. Gallipolis*, 7 Ohio (Part I) 217 (1835)

³⁰ 6 Ohio 298 (1834).

³¹ See also *Cincinnati v. Hamilton Co.*, 7 Ohio (Part I) 88 (1835). In *Huber v. Gazley*, 18 Ohio 18 (1849), the court held that a tract of land, designated on the town plat as the "public square," was thereby dedicated to the use of the town and no subsequent disposition made of it by the original proprietor can affect such use.

³² 2 Ohio St. 107 (1853).

of the dedication may be improved and ornamented for pleasure grounds and amusements for recreation and health; or it may be used for public buildings and places for the transaction of public business of the people of the village or city, or it may be used for purposes of both pleasure and business, but the place must, for the purposes of the dedication, remain free and common to the use of *all* the public. And an appropriation to the private and individual use of any lot owner or particular class of lot owners of ground so dedicated, would be inconsistent with the objects of the dedication and a plain diversion from its appropriate and legitimate uses.³³

Where land has been granted to the municipality, or conveyed in a deed vesting absolute title, the municipality is authorized to hold and convey the land for corporate purposes, or dispose of it as it deems proper, the same as any individual.³⁴ However when land is dedicated to the public use, it has been held that the municipality's rights are passive and not active, and officials representing the public may merely manage and control the land so dedicated as trustees for the public, to whose use it is dedicated, and cannot appropriate it to the individual use of the public.³⁵ This holding is a crystallization of the earlier Ohio view which placed a limitation on the disposition of public lands.

When confronted with questions of diversion of public streets and roads, the court, in *Callen v Columbus Edison Electric Light Co.*,³⁶ held that the erection of poles by a private lighting company at the curb in a street and the stringing of electric cable lines for the purpose of furnishing energy to private takers was a diversion of the street from the purposes for which it was dedicated. The courts have been increasingly liberal however, in allowing uses of streets and highways for public purposes other than those directly related to moving or passing travel and transportation, but the public use must still remain dominant in the street notwithstanding the construction of any public service or convenience.³⁷ The court held in *Lake Shore & Michigan Southern Ry. Co. v. Elyria*,³⁸ that a municipal council did not have the power to grant a railroad company the exclusive and permanent occupation of a public street.³⁹ A recent case dealing in part

³³ *Langley v. Gallipolis*, 2 Ohio St. 108, 110 (1853).

³⁴ *Babin v. Ashland*, 160 Ohio St. 328, 116 N.E.2d 580 (1953).

³⁵ *First German Reformed Church v. Summit County*, 3 Ohio C.C.R. (n.s.) 303 (1902).

³⁶ 66 Ohio St. 166, 64 N.E. 141 (1902).

³⁷ See 17 OHIO JUR.2D, *Dedication* § 73 (1956).

³⁸ 69 Ohio St. 414, 69 N.E. 738 (1904).

³⁹ In *Mount Vernon v. Berman and Reed*, 100 Ohio St. 1, 125 N.E. 116 (1919), the court held that rights in streets or highways granted to public service corporations such as public transportation companies or public utilities are at all times held in subordination to the superior public use.

with the use of the streets⁴⁰ held that the defendant's stirring up of industrial strife by its picketing on the public streets and sidewalks was a diversion of the dedicated use for public travel and transportation.

ALIENATION

Ohio statutes have vested the fee to lands dedicated by *plat* in the municipal corporation in trust for the uses and purposes set forth.⁴¹ A proper extension of the statutes, in conformity with the modern theory of dedication, would be that the title to *all* dedicated lands, platted or otherwise, would vest in the municipality, to be held in trust for the purposes of the dedication. The question of whether the municipality may subsequently alienate the fee was highlighted in the *Babin* case, the court holding that the city, without any special condemnation proceedings, could authorize, by ordinance, the sale of land held in trust for the public. The court determined that land designated on a town plat as "public ground" was meant to be land *belonging* to the public, not ground to be *used only* by the public. Hence the city officials, after determining that land was no longer needed for the public use, could sell the land belonging to the city.⁴²

It is submitted that when such land was dedicated and subsequently used as a "public ground," the dedication was a restrictive one, limiting the land to use *only* by the public. Consequently the legislative body of the city, even though it did not abuse its discretion in determining that the land was no longer needed for public purposes, by such ordinance only alienated the *fee* of the dedicated lands, but not the *use*, which by the substantive principles of dedication, remained solely for the benefit of the public. Even if the municipality was properly exercising its right of eminent domain by an appropriation of the land, such an appropriation of property that has been dedicated for a specific public use can only be made for another public purpose.⁴³ To facilitate its conclusion that the city could sell its own lands

⁴⁰ *Chucales v. Royalty*, 164 Ohio St. 214, 129 N.E.2d 823 (1955)

⁴¹ See OHIO REV. CODE § 711.07. This section appears to be incompatible with OHIO REV. CODE § 711.11, which also vests a fee subject to the uses for which the land was dedicated in the *county* in which the village is situated. However OHIO REV. CODE § 711.07 was originally a part of OHIO REV. STAT. § 2601 and related to grounds within an incorporated municipality. OHIO REV. CODE § 711.11 was part of OHIO REV. STAT. § 2604 and in its original form expressly provided that plats of maps "other than those mentioned in section 2601," would be sufficient to vest fee in the county. The legislature apparently intended to vest title to dedicated lands in fee in the municipality in trust to and for the uses and purposes of the dedication and that all other public properties, situated in an unincorporated town or hamlet, should vest in fee in the county, for such uses and purposes.

⁴² *Babin v. Ashland*, 160 Ohio St. 328, 116 N.E.2d 580 (1953)

⁴³ See OHIO REV. CODE § 719.01, which lists the various purposes for which land may be appropriated under eminent domain proceedings.

without special condemnation proceedings, the *Babin* court sanctioned an unwarranted legislative short-cut by the municipality. The court's interpretation of the words of dedication is irreconcilable with the substantive principles of dedication, and runs contrary to a series of older Ohio decisions. In *LeClercq v. Gallipolis*,⁴⁴ the court had stated:

The fee of lands dedicated to public objects sometimes passes directly to the corporation for whose use it is intended, and is sometimes held by a corporate town, or a county, in trust for the uses designated. In the first case, as where land is given to a town for corporate purposes, or where land is acquired by a county for purchase, or where given for county objects, an absolute estate is held by the corporation, which they may alien. But when the corporation takes as trustees, to hold to prescribed uses, the *cestus que use* acquires a vested estate, the enjoyment of which may be obtained in chancery.⁴⁵

Two lots were dedicated for "school purposes" in *Van Wert v. Edson*,⁴⁶ but were subsequently rendered unsuitable and even dangerous for school purposes because of the subsequent location of a railroad depot nearby. The board of education requested the court to order that the lots be sold and the proceeds applied to the purchase of a suitable schoolhouse site. The court held that the dedication was for a specific use and conferred no power of alienation to extinguish that use, stating that the trust created by the dedication was for school purposes and none other. The court stated that the principle upon which a trust may, under certain circumstances, be executed *cy pres* was not applicable.⁴⁷ The court further held that if the use created by the dedication was abandoned or should become impossible of execution, the premises would revert to the dedicators or their representatives. This particular holding is irreconcilable with the modern treatment of dedication and was properly overruled in the *Babin* case.

Another Ohio case following the *Van Wert* rule was *Louisville & Nashville Rd. Co. v. Cincinnati*,⁴⁸ in which the court held that neither the state nor the municipality within which the dedicated property is situated has a proprietary interest which can be sold or diverted to any use inconsistent with the purpose of the dedication. The court stated:

It is so easy to give away the property of others, so difficult to preserve public rights, that it is necessary in order to defeat the former and effect

⁴⁴ 7 Ohio (Part I) 217 (1835).

⁴⁵ *Id.* at 221. The *Babin* court distinguished the *Le Clercq* case by stating that in the dedication of the "public place" in *Le Clercq*, private property rights were acquired by the abutters, while in *Babin*, no private property rights were vested in those abutting on the "public ground."

⁴⁶ 18 Ohio St. 221, 226 (1868).

⁴⁷ *Id.* at 228.

⁴⁸ 76 Ohio St. 481, 81 N.E. 983 (1907).

the latter that the power to control the use of property dedicated to the public must be limited to the purposes of the trust.⁴⁹

*Galion v. Galion*⁵⁰ corroborates this holding that public streets, squares, landings and grounds are held in trust for the public in accordance with the provisions of the dedication and are subject to the property rights of abutting owners under the absolute control of the legislative power of the state. *Northern Boiler Co. v. David*⁵¹ also deals with the rights of abutting property owners in dedicated lands, a problem which is not within the scope of this article.⁵²

CY PRES — A GUIDEPOST

In *Zanesville v. Zanesville Canal & Mfg. Co.*,⁵³ a municipal corporation wanted to appropriate property previously dedicated for use as a market house, for the purpose of a public office building and prison. The court held that since the originally intended use had become obsolete, the city could appropriate the property and hold it in trust for a public use different from the one for which it was originally dedicated. In upholding the appropriation the court made passing reference to the *cy pres* doctrine,⁵⁴ citing the *LeClercq* case, which stated:

Where circumstances are so changed that the dedication cannot be literally carried into effect, the legislature or the court in those cases where general intention can be effected, may lawfully in some cases, enforce its execution as nearly as circumstances permit, by the application of the doctrine of *cy pres*.⁵⁵

In *First German Reformed Church v. Weikel*,⁵⁶ there was a gift of land to be used as a parsonage, which subsequently became unsuitable for that purpose. The court permitted the sale of the property and ordered the proceeds to be invested in a new location and parsonage, any surplus to be applied to its maintenance.⁵⁷

⁴⁹ *Id.* at 504, 505, 81 N.E. at 989.

⁵⁰ 154 Ohio St. 503, 96 N.E.2d 881 (1951).

⁵¹ 157 Ohio St. 564, 106 N.E.2d 620 (1952).

⁵² See 17 OHIO JUR.2D, *Dedication* § 89 (1956)

⁵³ 100 N.E.2d 739 (Ohio Com. Pl. 1951), *rev'd on other grounds*, 159 Ohio St. 203, 111 N.E.2d 922 (1953) On retrial in 116 N.E.2d 54 (Ohio Com. Pl. 1953), the trial court expressed the same holding as previously cited.

⁵⁴ The *cy pres* doctrine is applied where literal execution of the trust of a charitable gift is inexpedient and impracticable. Equity will execute the purpose as nearly as it can, according to the original plan, but the doctrine applies only where the testator has manifested the general intention to give to charity. 7 OHIO JUR., *Charities* § 38 (1929).

⁵⁵ *Le Clercq v. Gallipolis*, 7 Ohio (Part I) 217, 221 (1835)

⁵⁶ 7 Ohio N.P. (n.s.) 377, 19 Ohio Dec. (N.P.) 239 (1908).

⁵⁷ See also *Gearhart v. Richardson*, 109 Ohio St. 418, 142 N.E. 890 (1924); *Ameri-*

The court in *Van Wert v. Edson*, however, held that the *cy pres* doctrine was inapplicable, as did the court in *Allen v. Bellefontaine*,⁵⁸ in which it held that a home bequeathed as a memorial to the testatrix's late husband as a meeting place and research home for local physicians was a memorial to the late husband and not a dedication to the general public. Thus the sale of the house and the proceeds therefrom to be applied to local hospitals was unauthorized.

CONCLUSION

Public habits, needs and advancements often render inapplicable the use of dedicated lands; consequently the courts must recognize social, economic and political changes and strive to meet changing public needs. Of primary importance is the intent of the dedicator, which may be determined by his contemporaneous acts and declarations, and his acquiescence in the use of the land. In those instances where the dedicator evidences an intent to dedicate his land to the public use generally, without specifications or reservations, it is submitted that a municipality, under an extension of the *cy pres* doctrine, within its powers of local self-government, may divert the land to other uses beneficial to the public. Likewise the land may be leased or alienated if the proceeds therefrom are applied to the public use.

However, when the dedicator specifically declares in an unequivocal manner the particular use to which the dedicated land shall be applied, it is submitted that the dedicator meant the land not only *to belong* to the public, but also to be *used only by* the public, and a subsequent alienation, for a private use by public authorities, even when the land is decidedly unsuitable for the purpose that it was dedicated, is unwarranted. Since the land in a restricted dedication is to be used only by the public, if the application of the specific intention of the dedicator has proven impossible, the court may, by an extension of the *cy pres* doctrine, give effect to the general intention of the dedicator as nearly as possible by utilizing the land in some other way that would prove beneficial to the public.

It is submitted that this is the only logical result when such a restricted dedication occurs. The land may be diverted to other uses beneficial to the public, since the use still remains with the public, but the *cy pres* doctrine should not be applied when the municipality attempts to alienate land that has been restrictively dedicated. The public acquired only the right to the physical use of the land instead of the income and proceeds therefrom,

can Tract Society v. Atwater, 30 Ohio St. 77 (1876); McIntyre v. Zanesville, 17 Ohio St. 352 (1867); Hullman v. Hancomp, 5 Ohio St. 237 (1855); Williams v. First Presbyterian Society, 1 Ohio St. 478 (1853); Zanesville Canal and Mfg. Co. v. Zanesville, 20 Ohio 483 (1852); American Legion v. Collville, 25 Ohio N.P. (n.s.) 375 (1925); Cincinnati v. McMicken, 6 Ohio C.C.R. 188 (1892).

⁵⁸ 47 Ohio App. 359, 191 N.E. 896 (1934).