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Dedication–Right of Municipality to Deviate From Intended Use

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ment. Although the variance is apparent, other courts have held as did the West Virginia court and extended the discretion of the trial court to the point of allowing it to permit demonstrations outside the courtroom when it was impossible to have them conducted inside. *Dobbin v. Little Rock R.R.*, 79 Ark. 85, 95 S.W. 794 (1906); *Clayton v. Southern R.R.*, 110 S.C. 122, 96 S.E. 479 (1918). The courts, by this extension of the trial court’s discretion, have created a judicial exception to the rule that conducting court at the authorized place is a jurisdictional requirement. The only reasons ever extended to justify this exception are that the circumstances of the situation demand such a procedure, *State v. O’Day*, 188 La. 169, 175 So. 838 (1937); and that it is the “triumph of practical common sense over narrow technical traditions.” 4 WIGMORE, EVIDENCE § 1164 (3d ed. 1940), 6 id. § 1802.

Yet it would seem that if the court in one instance can judicially create an exception to this jurisdictional requirement it can do so in other situations. Perhaps if the necessity of the situation and the practical benefits to be derived from it are brought to the attention of the court, it will allow other inroads into the rule which makes sitting at the prescribed place necessary to the court’s jurisdiction. The principal case perhaps indicates that such further inroads will be made sparingly.

S. F. B.

DEDICATION—RIGHT OF MUNICIPALITY TO DEVIATE FROM INTENDED USE.—Plaintiff, a municipal corporation, petitioned for judgment by the court of common pleas of Ohio declaring whether the city was entitled to use property previously dedicated to it for a market house, for erection thereon of a public office building and prison. *Held*, that, in view of the right given by statute to appropriate property for certain specified purposes, including public halls and prisons, and since the originally intended purpose had become obsolete, the municipality could “appropriate” such property and hold the same in trust for a public use different than the one originally intended. *Zanesville v. Zanesville Canal & Mfg. Co.*, 100 N.E.2d 739 (Ohio, 1951).

While from the standpoint of public convenience the result reached is a desirable one, the method used by the court in reaching the decision is, perhaps, questionable. Although it is not entirely
clear on what the court based its decision other than its readiness "to recognize or admit new centuries, new populations, new conditions and new needs, when called upon to judge new questions," the opinion is devoted primarily to the right of a municipality to appropriate property according to statute with but passing reference to the analogy of the doctrine of cy pres.

It is universally accepted that land dedicated to a specific and definite purpose may not be diverted to any other use or purpose except under the right of eminent domain: *Ward v. Field Museum of Natural History*, 241 Ill. 496, 89 N.E. 731 (1909); 11 McQuillin, *Municipal Corporations* § 33.76 (3d ed. 1950); 3 Dillon, *Municipal Corporations* § 1102 (5th ed. 1911). However, such a use as can fairly be implied from the terms of the dedication, and which can convert the property to a public enjoyment substantially in the manner contemplated, will not be considered a misuse or diversion. *Spires v. Los Angeles*, 150 Cal. 64, 87 Pac. 1026 (1906). The mere fact that the proposed change will be more advantageous to the public will not allow a diversion. *Poole v. Rehoboth*, 9 Del. Ch. 192, 80 Atl. 683 (1911).

In parallel situations the weight of authority does not condone stretching the use at the expense of the actual words: *Headley v. Northfield*, 35 N.W.2d 606 (Minn. 1949) (dedication for a public square not to be used as a high school athletic field); *McVean v. Elkins*, 127 W. Va. 225, 32 S.E.2d 233 (1944) (dedication for a park—could not cut trees to clear for a playground); *Hall v. Fairchild-Gilmore-Wilton Co.*, 66 Cal. App. 615, 227 Pac. 649 (1924) (dedication for a park not to be used as a highway); *Melin v. Community Consol. School Dist.*, 312 Ill. 376, 144 N.E. 13 (1924) (dedication for a public square not to be used as a school site); *Hopkinsville v. Jarrett*, 156 Ky. 777, 162 S.W. 85 (1914) (dedication for a park not to be used for a public library).

The attempt on the part of the court to justify its decision on the basis of the right of a municipality to appropriate private property for certain public uses under *Ohio Gen. Code* §§ 3677, 3679, 3680 (Page, 1938) falls short of the mark in view of a prior Ohio decision which states in effect that the above statutes are authority to appropriate for the purposes therein indicated, but that such power to take is to be exercised only as provided in the rest of the chapter, requiring proceedings in compliance with the provisions set forth and due compensation to the owner for the
It is contended that such an analogy as strong and obvious as the doctrine of *cy pres* should not have been dealt with so lightly by the court. Where the expressed intention of the dedicator has proved impossible, or, as here, impracticable of successful accomplishment, the court may give effect to his general intention as closely as possible, by other means. As stated by a leading authority in the field of trusts, "The real problem is how far the control of the founder should extend, how far it is permissible to depart from the directions of the founder when in the course of time, circumstances have so changed as to make it impossible, illegal, or at least, inexpedient, strictly to comply with them." Scott, *Education and the Dead Hand*, 34 HARV. L. REV. 1, 3 (1920).

The distinction between a dedication and a charitable trust has not always been carefully observed. Quite to the contrary, the extension in the early American cases of the doctrine of dedication to cemeteries and parks arose, apparently, from a failure to draw a distinction between trusts for religious purposes and dedications, as an attempt to supply the lack of a grantee to take, the title. Note, 16 HARV. L. REV. 128 (1902). The title taken by the municipality to dedicated lands, especially in case of statutory dedication, such as in this case, is often held to be that of trustee for the public. *Hames v Polson*, 215 P.2d 950 (Mont. 1950); *Riverside v. MacLain*, 210 Ill. 308, 71 N.E. 408 (1904); 3 DILLON, MUNICIPAL CORPORATIONS § 1072 (5th ed. 1911). The purpose of the application of *cy pres* in both instances is a move on the part of the courts to prevent a reversion to the grantor of a benefit enjoyed by the public.

While conceding that the end result of the case is eminently desirable, it is nonetheless contended that the court should have used sounder reasoning to overcome established law. To accomplish that, it is submitted that the court could have made better use of the analogy of the *cy pres* doctrine.

W. O. S.

**LANDLORD AND TENANT—CONDITIONS AND LIMITATIONS.**—P contracted with B, the sublessee of a coal lease to operate the mine and pay all royalties due and divide the net proceeds with B. One of the provisions of the parent lease was as follows: "It is agreed that