

same is not appropriated under paragraph (b) of Section 5625-33, General Code, and there is no certificate of the fiscal officer as provided by paragraph (d) of Section 5625-33, General Code.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

4873.

TORRENS ACT—METHOD OF PROCEDURE IN THE DEDICATION
 AND VACATION OF STREETS OVER TORRENIZED LANDS.

SYLLABUS:

1. *When lands lying without a municipality the title to which has been registered under the Ohio Land Title Registration Act, have been subdivided and the plat of such subdivision or allotment duly recorded and subsequent thereto it becomes advisable to vacate a portion of one of the streets lying within such allotment, proceedings to accomplish such purpose should be had by virtue of the provisions contained in Section 6862 et seq., General Code rather than Section 3600, General Code, and a memorial of such proceedings entered upon the land title registration certificate.*

2. *Method of procedure in the dedication and vacation of streets over Torrenized lands discussed.*

COLUMBUS, OHIO, January 6, 1933.

HON. HOWARD M. NAZOR, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Your recent request for opinion reads:

“In October, 1928, 765 acres of land in Rome Township, Ashtabula County, Ohio, were registered under the Torrens Act (on application of The Grand River Acres Company, an Ohio corporation dealing in real estate.)

On April 19, 1929, 115 acres of the above tract were platted and the plat recorded at said time with the County Recorder. Of the 180 lots contained in the plat, 55 have been sold, and it is now desired to vacate a portion of one of the streets in the plat for a distance of approximately 430 feet. All the owners which abut directly on the part of the street sought to be vacated are favorable to the vacation, but there is one owner, who owns a lot a distance of about 120 feet from one end of the part sought to be vacated, who is opposed to the vacation. Of course, none of this plat is within the limits of a municipal corporation.

What I would like to inquire is what is the proper method of vacating this part of the street? Does Section 3600 apply, or would it be necessary to make application through the County Commissioners, in accordance with Section 6862?

Also, I would like your opinion as to whether or not the streets and ways contained in the plat are public or private streets?”

The language used in Section 3600, General Code, referred to in your inquiry, discloses that the purpose of the legislature in its enactment of such section was to authorize the owners of the legal title to certain lands which had theretofore been platted and the plat thereof recorded by the county recorder, to vacate the plat of such lands as so recorded, and to re-plat them in another manner, without court action, when the owners of all of the lands in such allotment had agreed to such change or consented thereto. Such statute further provides that such re-allotment of the lands has the effect of re-locating the roads shown on the original plat. Such section reads:

"Any person or persons owning, either jointly or severally, and either in their own right or in trust, and having the legal title to, any land laid out in town lots, not within the limits or subject to the control of a municipal corporation, may change such lots and the streets and alleys bounding them, by making, acknowledging and having recorded, as in this chapter provided, a new plat of such land, and having the proper transfers made in the office of the county auditor. No such change shall be made if it affects injuriously any lots on the streets or alleys, or within the plat so changed unless all the owners of the lots so affected are parties joining in making the change, or they give their consent in writing on the new plat, and it be recorded therewith. Any change of a town plat so made shall have the same force and effect as if made by the judgment of a court having jurisdiction thereof."

As stated by the court in *Rodenbaugh, Exr. vs. United States*, 25 Fed 2d, 13: "A statute must be read in the light of its purpose." And in the case of *Cleveland Trust Company vs. Hickox*, 32 O. App. 69, the court held as stated in the third paragraph of the syllabus:

"In construing a legislative act to discover its application, the purpose of the legislature is an element that cannot be ignored."

See also, to the same effect, *Cochrel vs. Robinson*, 113 O. S. 526.

The language of the act indicates that the legislature intended by such section, to provide a cumulative remedy rather than an exclusive one, for, in the last sentence of such section it is provided that any change of a town plat made by virtue of the provisions of such section shall have the same effect as if it were made by a judgment of a court having jurisdiction thereof. The authority granted to a court to alter, change or vacate a plat is contained in Section 3595, General Code, where the following provision appears:

"The vacation of a municipal corporation, addition, or part thereof, shall not vacate any part of a state or county road."

Since Section 3600, General Code, does not purport to grant any authority to change a plat of an allotment or addition beyond that given to a court, it is evident that a county or state road may not be vacated or changed by procedure taken pursuant to the authority granted by such section.

The language of this section makes it evident that the plat of an allotment cannot be changed pursuant to its provisions when any sub-lot or town lot is injuriously affected by such change unless all of the owners of the property therein join in, or consent to such change. Since, in your request, you intimate

that at least one of such property owners is opposed to such a change, it appears that the procedure outlined in Section 3600, General Code, would not be feasible even though the roads shown on the plat thereof may not be public highways.

Section 7464, General Code, reads as follows:

"The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads.

(a) State roads shall include the roads and highways on the state highway system.

(b) County roads shall include all roads which have been or may be established as a part of the county system of roads as provided for under sections 6965, 6966, 6967 and 6968 of the General Code, which shall be known as the county highway system, and all such roads shall be maintained by the county commissioners.

(c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act."

It is therefore evident that at most only township roads may be altered or vacated by means of the provisions contained in Section 3600, General Code.

Other provisions of the statutes grant authority for the vacation of highways. In Section 6860, General Code, specific authority is granted to the county commissioners to vacate public roads within the county. Such section in so far as is material to the facts at hand reads:

"The county commissioners shall have power to * * * vacate * * * roads as hereinafter provided. This power extends to all roads within the county, except that as to roads on the state highway system the approval of the director of highways shall be had."

Section 6862, General Code, referred to in your inquiry, and the succeeding sections, provide the manner of procedure by the county commissioners to accomplish such purpose. Section 6862, General Code, reads:

"Applications to locate, establish, alter, widen, straighten, vacate or change the direction of a public road shall be made by petition to the county commissioners signed by at least twelve free holders of the county residing in the vicinity of the proposed improvement. Applications to alter, widen, straighten, vacate or change the direction or name of a street or alley on any dedicated plat, shall be made by petition to the county commissioners, signed by at least twelve owner of lots or land in the immediate vicinity of the proposed improvement. Said petition shall set forth the route and termini of the road, street or alley, or part thereof, to be located, established, or vacated, or the particular manner in which such road, street or alley, is to be altered, widened, straightened, or the direction thereof changed.

When such road or proposed road lies wholly within any school district and is necessary for the convenience and welfare of the pupils in such district, the board of education of such district may, by resolution, petition for such road. The word 'improvement' used in sections 6862 to 6878 inclusive of the General Code signifies any location, establishment, alteration, widening, straightening, vacation or change in the direction of the public road, or part thereof, as requested in a petition filed under the authority of such sections, or determined upon by a board of county commissioners or joint board by resolution adopted by unanimous vote."

In such sections the authority is granted to vacate "public roads." From the facts contained in your inquiry I am unable to ascertain whether the roads shown on the plat of the allotment or addition in question, have been dedicated, or in other words, have become public roads. In the case of unregistered lands, the dedication of a highway in Ohio may be made in either of two ways, that is, by statutory dedication or by common law dedication. *Fulton vs. Mehrenfeld*, 8 O. S. 440; *Wisby vs. Bonte*, 19 O. S. 238. However, by reason of the provisions of Section 8572-85, General Code, a common law dedication cannot be made of Torrenized or registered lands. Such section reads:

"No title to registered real property in derogation of that of the registered owner shall be acquired by prescription or adverse possession."

Whether a common law dedication has been made, is a question of fact as to whether there was a gift to the public of the use of the land for highway purposes and an acceptance by the public of such gift has been made, which may be evidenced by the continued use thereof, or, as is sometimes said, by prescription.

Section 3583, General Code, provides that before a plat or map of an allotment or subdivision of lands may be recorded by the county recorder, it shall have endorsed thereon the approval of the county commissioners and that such approval so endorsed thereon "shall operate as an acceptance and confirmation of the dedication of the public highways contained therein * * *." The designation of parcels on such map or plat as highways, and the approval by the county commissioners, endorsed thereon, is referred to as a "statutory dedication."

The provision of the statute requiring the acceptance by the county commissioners to be endorsed on the recorded plat, was inserted in such section in its amendment in 113 O. L. 642, which became effective July 26, 1929. Prior to such date, the recording of the plat, with the designation thereon of certain lands as highways, constituted an offer to dedicate such lands so designated as public highways. *Wright vs. Oberlin*, 3 O. C. C. (N. S) 342; *Abraham vs. Cincinnati*, 6 O. N. P., 47. While acceptance of a dedication is ordinarily presumed unless the property allotted is in a municipality, the case of *Wallace vs. Land Company*, 92 O. S. 349, creates some doubt as to the legality of this presumption. It is true that the rule established by the case purports to apply to a dedication of highways within a municipality. Such case hold that a presumption does not arise from the recording of a plat upon which are designated certain lands as roads, highways or streets since the acceptance of such offer to dedicate would create a burden upon the city to maintain and repair such streets or highways. Like reasoning would be clearly applicable to the dedication of highways without a municipality.

From the facts contained in your request I learn that the plat in question was recorded April 19, 1929, prior to the enactment of present Section 3583, General

Code, and it would therefore not have been necessary to have had the acceptance by the county commissioner endorsed thereon. The presumption as to the dedication of the highways designated on such plat would not control over the provisions of the Torrens Act. If I may presume that the boundaries of the highways in question were not determined in the court proceedings by virtue of which the title to the lands was registered (Section 8572-8, General Code) the dedication of such highways could not become completed for the purpose of vesting the title to the dedicated lands in the state, county or public until the deed or conveyance thereof or the plat thereof was filed with the county recorder pursuant to the provisions of Section 8572-73, General Code, as distinguished from the recording of the plat in the ordinary manner. This conclusion results from the fact that the statutory dedication is a valid conveyance of an interest in real property and Section 8572-88, General Code, being a part of the Torrens Act, provides:

“A deed, mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or a lease for a term not exceeding three years where the land is in the actual possession of the lessee or his assigns, shall take effect only by way of contract between the parties thereto and as authority to the recorder to register the transfer, mortgage, lease, charge or other dealing upon compliance with the terms of the act. (G. C. 8572-1 to 8572-118).”

There appears an apparent inconsistency between the provisions of Sections 8572-88 and 3578, General Code, but it must be remembered that Section 3578, General Code, is a general provision of statute while the land registration act is a special provision relating to a particular type of conveyance of property. There is a well established rule of law that if there are two acts or two provisions of an act of which one is special or particular and, clearly includes the matter in controversy, while the other is general, and would, if standing alone, include it also, the special provision must control over the general provision. *State ex rel. Elliot Co. vs. Connor*, 123 O. S. 310; *Flury vs. Central Pub. House*, 118 O. S. 154; *Perkins vs. Bright*, 109 O. S. 14. The conclusion necessarily results that a dedication of lands is not completed until a memorial of the dedication is entered upon the registration certificate evidencing the ownership of such lands. Without having had an opportunity to examine the certificate of title in question, I am unable to answer your inquiry as to whether or not the streets and ways contained in the plat are public or private streets.

In the case of *Mizner vs. Paul*, 29 O. C. A. 33, it was held that the purchaser of title to real property the title of which had been registered under the Torrens Act had the right to rely upon the condition of the title as shown upon the original certificate in the recorder's office. If this holding of the Court of Appeals of Cuyahoga County is correct, as it appears to be, it would be necessary that a memorial of the vacation of the streets be entered upon the certificate of title of the owner of the vacated premises before the vacation proceedings taken pursuant to Sections 6860 et seq., General Code, would vest marketable title in such owner.

In specific answer to your inquiries it is my opinion that when lands lying without a municipality, the title to which has been registered under the Ohio Land Title Registration Act, have been subdivided, and the plat of such subdivision or allotment duly recorded, and subsequent thereto it becomes advisable to vacate a portion of one of the streets lying within such allotment, proceedings to accomplish such purpose should be had by virtue of the provisions contained in Sections

6862 et seq., General Code, rather than Section 3600, General Code, and a memorial of such proceedings entered upon the land title registration certificate.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4874.

TRUSTEES OF OHIO STATE HISTORICAL SOCIETY—MAY GRANT
RIGHT TO PRIVATE PERSONS TO ERECT REFRESHMENT STANDS
IN PUBLIC PARKS—PROCEEDS FROM SUCH LICENSES PAID INTO
STATE TREASURY.

SYLLABUS:

1. *The Board of Trustees of The Ohio State Historical Society, where not expressly prohibited, possesses the power to grant to private parties the right to erect and use refreshment booths upon the public parks confided to its care, providing the Society reserves the right of supervision, regulation and control and providing such booths are not placed in such numbers or in such a manner as to interfere unreasonably with the free and uninterrupted use of the land by the public as a park.*

2. *Where funds are received by the Board of Trustees of The Ohio State Historical Society from licenses or privileges granted in connection with its care and custody of state public parks, such funds belong to the State and should, pursuant to the provisions of section 24 of the General Code, be paid weekly into the State Treasury.*

COLUMBUS, OHIO, January 6, 1933.

HON. C. B. GALBREATH, *Secretary, The Ohio State Historical Society, Columbus, Ohio.*

DEAR SIR:—Recently I received the following communication from you:

“The Ohio State Archaeological and Historical Society holds and administers in trust for the State, a number of park properties. I am directed by the Board of Trustees of that Society to ask your opinion in regard to earnings of such properties.

Does the Board of Trustees of the Society have authority to enter into contract with private parties to erect and use refreshment booths in such parks and apply the profits arising from rentals of the same for the up-keep of such parks?

Does the Society have authority to use other profits arising from concessions or products from such parks for improvements on the same? An early opinion on these points will be highly appreciated.”

It is patent that, as trustee administering parks for the State of Ohio, The Ohio State Historical Society has not only such powers as are given to it expressly, but that it possesses such implied powers, where they are not expressly prohibited, as are necessary, customary or incidental in the conduct of a park. Having this fundamental principle in mind, it is necessary to determine whether the right to