1988.

APPROVAL, WARRANTY DEED OF CLARE ALICE WILLIARD CONVEYING TO THE STATE OF OHIO LANDS IN COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, June 13, 1930.

State Office Building Commission, Columbus, Ohio.

GENTLEMEN:—On June 11, 1930, I directed to you Opinion No. 1966 of this office, in which I found, upon an examination of the abstract of title covering fractional inlots numbers 117 and 118 in the city of Columbus, as the same are numbered and delineated on the recorded plat thereof, of record in Deed Book "F", page 332, Recorder's Office, Franklin County, Ohio, that Clare Alice Williard, sometimes known as Clara Alice Williard, has a good and indefeasible fee simple title to the above described property, free and clear of all encumbrances except certain taxes and assessments therein noted.

There has been this day submitted for my examination and approval the warranty deed of said Clare Alice Williard (sometimes written as Clara Alice Williard), who is unmarried, by which the property above described is conveyed to the State of Ohio. Upon examination of said warranty deed I find that the same has been properly executed and acknowledged by said Clare Alice Williard, and that as to form said warranty deed is sufficient to convey to the State of Ohio a fee simple title to the above described property, free and clear of all encumbrances whatsoever, except the taxes and assessments thereon due and payable on and after the June, 1930, payment.

With said warranty deed there is submitted to me encumbrance estimate No. 627 covering the purchase price of the above described property. Upon my examination of said encumbrance estimate, I find that the same has been executed in the manner required by law, and that there are sufficient balances in the proper appropriation account sufficient to pay the purchase price of said property.

Said warranty deed and encumbrance estimate are accordingly hereby approved by me, and the same, together with said abstract of title, are herewith returned to you.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1989.

BOARD OF EDUCATION—RIGHT TO PURCHASE LAND WITH STIPULATION OF REVERTER UPON HAPPENING OF CERTAIN CONTINGENCY UPHELD.

SYLLABUS:

A board of education may lawfully purchase land needed for school purposes and accept a deed for said lands containing a condition subsequent with a clause of forfeiture and reversion upon the occurrence of said condition, and pay therefor from the public funds of the district.

COLUMBUS, OHIO, June 14, 1930.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

"Attached to and made part of this communication is a copy of a deed tendered to the board of education of Granville Township Rural School District, Licking County. Because of the restrictions and the forfeiture provision, and for the further reason that this is not a deed of gift, the board has asked the advice of this office as to whether it may legally accept the conveyance in its present form.

Under Sec. 7620 of the General Code, there would seem to be authority for the board to purchase a right of way; and Sec. G. C. 7624-2 would seem to give them authority to provide land for the right of way or street. The terms sought to be imposed, however, are such that I am still very doubtful as to the right of the board to pay the consideration named and accept such a deed and, therefore, request the benefit of your opinion in the premises."

With your inquiry you submit a deed which purports to convey certain real estate to the board of education of Granville Village School District in consideration of $100.00. The deed is a straight warranty deed containing the usual covenants of warranty but also containing certain conditions upon the happening of which the property is to revert to the grantors.

Your question goes to the right of the board of education to accept the said deed in the form in which it is made and pay therefor from the funds of the district. The pertinent part of the deed is as follows:

"KNOW ALL MEN BY THESE PRESENTS, That whereas, The Board of Education of Granville Village School District of the County of Licking and State of Ohio, is desirous of acquiring certain real estate hereinafter described for the purpose of dedicating the same for street purposes to the village of Granville in the County of Licking and State of Ohio, and

WHEREAS, the undersigned, the grantors, are desirous of assisting said board of education in dedicating said real estate of said village for street purposes.

NOW, THEREFORE, ----------, widow, and ---------- and ----------, his wife, in consideration of the sum of one hundred dollars ($100.00) paid to them by said The Board of Education of Granville Village School District of the County of Licking and State of Ohio, the grantee, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto said The Board of Education of Granville Village School District of the County of Licking and State of Ohio, its successors and assigns, for the purpose of said Board of Education dedicating for street purposes as aforesaid, the following described premises, to wit: * * *

Should the above Board of Education fail to dedicate said real estate to said Village of Granville, Ohio, for street purposes within two years from date hereof, and, if said Village of Granville, Ohio, should fail to accept said dedication within said time, and if said dedication should fail to be fully consummated and completed within said time limited as aforesaid, then said real estate shall revert to the said ---------- and ---------- or their heirs.

To HAVE AND TO HOLD SAID PREMISES, unto said The Board of Education of Granville Village School District, its successors and assigns, for the purposes only aforesaid; * * * " (Here follow the usual covenants of warranty, release of dower, signature, attestation and acknowledgment).

Section 7624-2, General Code, reads as follows:

"Where the board of education of any school district in this state shall own or hold lands for school purposes and said lands are not accessible by reason of the want of any street or public highway leading thereto and it becomes necessary that streets and highways shall be dedicated and opened for the purpose of making such lands accessible and available for the public use, and in so doing it becomes necessary to use and occupy part of said school lands for street or highway purposes, such board of education may, by resolution duly passed, authorize that a true map or plat of said lands shall be made by a competent engineer, delineating thereon the proposed streets or highways, and shall authorize the president and clerk of said board of education to execute and acknowledge thereon a certificate of dedication of such lands as are embraced therein as streets and highways, for the use of the general public as such; and the council of any municipal corporation, within which such lands are situated may, by ordinance duly passed, accept such lands, so dedicated as public streets, and the same shall thereafter be under the control and supervision of council of such municipal corporation as streets and highways."

The substantial legal question involved in your inquiry is whether or not a public corporation such as a school district is permitted by law to expend public funds under its control for the acquiring of title to real estate which title is such that upon the occurrence or non-occurrence of certain named contingencies the property reverts to the original grantor.

It is stated in Dillon on Municipal Corporations, 5th Ed., Sec. 979, as follows:

"A grantor, in conveying real property to a municipal corporation for a specific public purpose, may, by the use of apt terms, subject the title to liability to forfeiture for breach of a condition expressed in the deed; and upon the failure of the municipality to comply with the condition, the title will revert to the grantor, as in the case of a similar grant to an individual."

In McQuillin on Municipal Corporations, 2nd Ed., Section 1224 it is stated:

"A municipality has the authority to take the title in fee to property, or it may take a less estate, such as a title based on a condition subsequent or a leasehold estate."

There are many reported cases involving questions relating to what are called conditional estates and base or determinable fees held by public corporations. Most, if not all, of these cases involve the question whether a certain deed is to be construed as containing a condition subsequent rather than the question of the right of the public corporation to accept such a deed. As a matter of fact, public corporations have for many years accepted such deeds without question and the many cases involving the construction of such deeds testify to the frequency of the use of deeds of this nature in conveying property to public corporations.

The terms of the deed here under consideration are clear, and under the law of Ohio there would be no question, inasmuch as the deed contains an express clause of reverter, that if this property be conveyed to the Granville Village School District by the deed, as submitted, and the school district fails to dedicate the property to the village of Granville for street purposes within two years from the date thereof or if the village of Granville fails to accept said dedication within said time the property will revert to the grantors.

In the case of *Schwing* vs. *McClure,* 120 O. S., 335, the question arose of whether

or not a school building located on land held by a board of education by virtue of a deed containing a condition subsequent and a clause of reverter, passed to the grantor with the land upon reversion. The court held that the building did not revert because of a lack of authority on the part of the board of education to construct a building to revert under those conditions but did not hold that the board lacked authority to accept a deed containing such a reverter clause upon the happening of the contingency. It is somewhat difficult to see the distinction between the power of a board of education to accept real estate with a title involving a possibility of reverter and to construct and maintain buildings which may possibly revert with the real estate upon which they are constructed. However, such is the holding of the court in the case named and the distinction is clearly drawn by Judge Allen in her opinion and in the syllabus. It is also noted by Judge Marshall in his dissenting opinion where he said:

> "I also agree that the deed contains a clause limiting the use of the land to school purposes, and that on default thereof the property reverts to the grantor. I also agree that the school at that particular location was legally, regularly, and definitely abandoned, and that the premises will not in the future be devoted to school purposes. I also agree that Section 7730-1, General Code, has nothing to do with this controversy. I put this action upon a broader ground than that stated in the majority opinion. It is not in the power of a Legislature by statute to create or destroy property rights. This section did not purpose to do so. If the buildings belong to the school board, the board may sell them four years after the abandonment of the purpose to conduct schools at that location. If the buildings belong to the land, and the land reverts to the grantor, the board has no title to either the buildings or the land and could never therefore at any time legally sell the same. This case therefore resolves itself into a question of ownership. The majority opinion disposes of that question upon the theory that any clause of reversion and forfeiture affecting buildings would be illegal and void, and as a result of such claimed illegality the law of fixtures, which would apply without question between individuals, will be denied application. This form of conveyance, and similar limitations upon the use of property conveyed, and similar clauses of reverter and forfeiture, have been employed for more than 100 years by rural boards of education and hundreds and perhaps thousands of school buildings have been abandoned and forfeited in the rural districts of the state during the last 100 years, yet in not a single reported case have the courts of this state ever branded such transactions with the taint of illegality.
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> The majority opinion discusses this controversy upon the theory that the grantor and the members of the board entered into an unlawful transaction to do indirectly that which they could not do directly. It is apparently a part of that theory that the action of the school board in accepting a deed with a clause of forfeiture and reversion was for the same reason an illegal act, and that the board could accept the conveyance, and that that portion of the transaction would be legal, but the condition in the deed, which operated as a part of the consideration, would be a nullity. First of all, let us inquire whether there was any illegality about that transaction, and whether the board could legally accept a conveyance containing a condition of reverter and forfeiture. If William Schwing (the grantor) had refused to make a conveyance in fee simple without condition or limitation, the board of education would have had no recourse except to condemn the property for school purposes. By such condemnation, the board would have acquired only the right to use the premises for school purposes, and upon abandonment of the school the land

would have reverted to the grantor. In such event the board of education would have acquired exactly the same title which it received by deed. The authorities on this point are so clear that citation is unnecessary."

It should be remembered in a consideration of the foregoing case of *Schwing* vs. *McClure* that the case does not hold it to be illegal for a board of education to acquire real estate which may revert to the grantors upon the occurrence of certain conditions. In the majority opinion there is no hint that such a transaction is illegal so far as the real estate is concerned. In fact the court says:

"Indeed the school board makes no claim here to the land."

The case deals only with the buildings upon such land.

I am therefore of the opinion, in specific answer to your question, that the board of education of Granville Village School District may lawfully accept the deed submitted and pay for the lands thus conveyed the agreed price of $100.00.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1990.

APPROVAL, LEASE FOR RIGHT TO LAY GAS MAIN ACROSS ABANDONED MIAMI AND ERIE CANAL PROPERTY IN MAD RIVER TOWNSHIP, MONTGOMERY COUNTY, OHIO—OHIO FUEL GAS COMPANY, COLUMBUS, OHIO.

COLUMBUS, OHIO, June 14, 1930.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a certain canal land lease executed in triplicate by the State of Ohio, through you as Superintendent of Public Works, by which for a term of fifteen (15) years there is leased and demised to the Ohio Fuel Gas Company of Columbus, Ohio, the right to lay and maintain a sixteen (16) inch gas main across the abandoned Miami and Erie Canal property, at a point approximately two hundred (200) feet south of the north line of Section 25, Mad River Township, Montgomery County, Ohio, said point being at or near Station 9164 plus 85 as shown by Plat No. 198, of H. E. Whitlock's survey of said canal property.

Said lease, which is a renewal of a lease granted to the Logan Natural Gas and Fuel Company under date of January 6, 1914, which is now owned and held by the Ohio Fuel Gas Company, provides for an annual rental of twelve dollars ($12.00) to be paid to the State of Ohio for the right and privilege granted by said lease.

Upon examination of the provisions of said lease, I find the same to be in conformity with Section 13970, General Code, and with other related sections of the General Code, conferring authority upon you as Superintendent of Public Works to execute canal land leases. Said lease is accordingly approved by me as to its legality and form as is evidenced by my authorized signature upon said lease and the duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,
GILBERT BETTMAN,
Attorney General.