to the state building commission or to the adjutant general to make a contract for less than the amount paid, or to change the amount of a bid, yet considering the practical effect of this agreement, the procedure proposed in this agreement is not deemed to be in violation of the spirit and intent of the building regulation statutes, and inasmuch as the state is protected by the terms of the contract and the bond to secure its performance, in consideration of the amount appropriated, the availability of which is evidenced by the auditor's certificate hereto attached, it is believed the agreement should be and the same hereby is approved.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1738.

APPROVAL, CERTIFICATE OF AMENDMENT TO ARTICLES OF INCORPORATION, THE LIBERTY MUTUAL INSURANCE COMPANY.

COLUMBUS, OHIO, December 28, 1920.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The certificate of amendment to the articles of incorporation of The Liberty Mutual Insurance Company is herewith returned to you with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1739.

BOARD OF EDUCATION—MAY SELL SCHOOL HOUSE—DEED TO BOARD WAS "FOR SCHOOL PURPOSES ONLY"—SPECIFIC CASE PASSED UPON.

Under the deeds considered in this opinion the grantee, the board of education, may sell and convey the lands therein described.

COLUMBUS, OHIO, December 29, 1920.

HON. VERNON M. RIEGEL, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Receipt of your first letter and the reply to our letter concerning your first communication is hereby acknowledged. The original letter was as follows:

> "Can a board of education sell a rural school house or grounds, or both when the deed to board states that property is for school purposes only, and give title to same when the board abandons rural schools? Some people hold that 'for school purposes only' gives board right to sell and

apply proceeds to school uses. This seems reasonable. The deed does not say that when property ceases to be used for school purposes that it shall revert to original estate. Deed states merely that the property is for school purposes only."

After the receipt of this letter you were requested to supply the original instruments transferring the property to the board of education and you very considerately have supplied those instruments.

They are, first, what purports to be a lease and, second, a quitclaim deed made by the original lessor. The property transferred by what is termed a lease and this quitclaim deed covers the same parcel of land.

You also have enclosed a warranty deed, which is a conveyance of a second parcel of land, to the same board of education who were the grantees in the quitclaim deed of the other parcel of land. The lease and quitclaim deed to the first parcel will be first disposed of.

The lease referred to, or what purports to be a lease, was signed April 1, 1857 and in part is as follows:

GRANTING CLAUSE: "Witnesseth, that the said party of the first part (James Lansing) for the consideration hereinafter mentioned has demised, granted and leased and does hereby demise, grant and lease unto the said party of the second part (Board of Education, Bedford Township) its successors and assigns, on the south side of road on lot fifty-nine, east half, containing one-fourth acre, be the same more or less, with all the privileges and appurtenances thereunto belonging."

HABENDUM CLAUSE: "To have and to hold, the said demised premises with the appurtenances *for and during the time it is wanted for school purposes* from the first day of April and the said party of the second part for itself and assigns agrees to pay the said party of the first part for the said premises the annual rent of one dollar yearly installments on the first day of April respectively."

This lease is not skillfully drawn, is not properly signed, and is not acknowledged. It is a lease for years, the lessee being a continuous body corporate. It should have been signed by the lessor's wife, if he had one at the time it was made, and there is nothing to show otherwise. The law concerning the things enumerated that had been omitted was practically then as it now is, our law concerning these formalities having been passed in 1832. The description of the land conveyed in the lease is very meager and indefinite. If lot fifty-nine is a known parcel of land that had been before platted, then the east half on the south side of the road of said lot as it is described in the lease is sufficiently clear. It is presumed that said lot had been so platted and it is certain that the lessee entered into possession.

It will be observed that the granting clause in the lease demises, grants and leases, with all privileges and appurtenances thereunto belonging, one-fourth acre land, and the habendum clause says, "To have and to hold the said demised premises with the appurtenances for and during the time it is wanted for school purposes."

Some ten years later, to-wit, on May 25, 1867, the heirs at law of James Lansing, deceased, six in number, by quitclaim deed transferred a parcel of land quite clearly described by metes and bounds, six rods, five and one-half feet square out of lot numbered sixty. This is evidently the same parcel intended to be described in the aforesaid lease.

The granting clause of the quitclaim deed is as follows:

"Have given, granted, remised, released and forever quitclaimed, and do by these presents, absolutely give, grant, remise, release and forever quitclaim unto the said grantees to their heirs and assigns forever all such right and title as we, the said grantors, have or ought to have, in and to the following described land, *for school purposes only.*" (Then follows a description of the land, which is omitted.)

The habendum clause of said quitclaim deed is:

"To have and to hold, the premises aforesaid, unto said grantee, his heirs and assigns, so that neither we the said grantors or our heirs, nor any other person or persons, claiming title through or under us, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them, shall by these presents be excluded and forever barred, *so long as it is used for school purposes.*"

The consideration recited in the quitclaim deed is:

"For divers good causes and considerations thereunto moving, especially for twenty dollars received to our full satisfaction of ——— the grantee."

It will be seen that a little more than one-fourth of an acre of land (a parcel 6 rods 5½ feet square) has been purchased at the rate of eighty dollars per acre, which in 1857 was a good round price for the same. The consideration is sufficient to warrant us in saying that this is a direct sale of the land and that the quitclaim deed is a deed of bargain and sale.

In making the conveyance by quitclaim deed the heirs of the original lessor, James Lansing, had before them the paper writing purporting to be a lease given by the said James Lansing to the Bedford Township Board of Education. Evidently they did not see fit to give another lease or renew the one originally made, but did convey by deed for a sum certain which was a sufficient consideration for the land conveyed. This conveyance by deed makes the former lease of no interest or importance herein except that it shows the lessee's lawful possession at the time of the making of the deed, and thus in a way explains why the conveyance was made by the heirs of James Lansing by a quitclaim deed rather than a warranty deed.

The question for our determination evidently is: What is meant by the words of the quitclaim deed in the granting clause, which are "for school purposes only," and those of the habendum clause, which are "so long as it is used for school purposes?" The language of the lease is "for and during the time it is wanted for school purposes."

These words do not furnish what is termed a condition in these grants.

"A condition is not created by a restriction of the use of the property without a clause of re-entry or of forfeiture."

Ashland vs. *Greiner,* 58 *O. S.,* 67.

There is no such clause of re-entry or of forfeiture anywhere in the quitclaim deed made by the heirs of James Lansing to the board of education after the board of education had been in possession under the lease for more than ten years.

This deed conveys to the board of education all the title the grantors had. It states, "And do by these presents absolutely give, grant * * * unto the said

grantee their heirs and assigns forever all such right and title as we have or ought to have in the following described land," and the grantors had succeeded to the fee, if such fee was in the ancestor, therefor the grantees took the fee and all the fee the heirs had, with a vague description of a use and without a clause of forfeiture or of re-entry in case of breach of said use.

The faulty execution of the lease under which the board had possession for more than ten years is cured by the execution of the subsequent conveyance by deed of the parcel of land so occupied by the board.

In the lease the words grant and demise imply a covenant of title and quiet enjoyment. (Young vs. Hargrave's Admr., 7 Ohio, Part II, 63). If a grantor intends expressly to avoid a warranty of title he gives a quitclaim deed, as was done in the present instance. Yet the estate conveyed by the deed is a fee and is made assignable with words of perpetuity being granted to grantees, their heirs and assigns.

If the words "for school purposes only," or "so long as it is used for school purposes," create a condition upon the title conveyed such condition is a condition subsequent. Consequently the board of education could sell the land for the purpose of using the proceeds of the sale to get another site for a school building, or for other school purposes.

In the case of Taylor vs. Binford, 37 O. S., 262, in 1854 Cobbs, who was the owner, conveyed certain land to the board of education by deed, which is in part as follows:

> "That the said parties of the first part, in consideration of fifty dollars to them duly paid before the delivery hereof, have bargained and sold, and by these presents do grant and convey to the said party of the second part, its successors and assigns forever, * * * with the appurtenances, and all the estate, title and interest of the said parties of the first part herein, *for the use of school purposes only,* * * *"

adding thereto a covenant of ownership in fee simple, and

> "that they will warrant and defend the above granted premises in the quiet and peaceful possession of said party of the second part, its successors and assigns forever, *for the above named purposes.*"

The facts in this case are: "The grantees took possession of the land and used it until the year 1874, as a school house site. In the fall of that year the board determined to change the location of the school house and to sell the house and lot." They sold to one Taylor, who took possession, and a deed was delivered to him by the board of education in 1875. The court says:

> "We will assume, without, however, so deciding, that the grant is upon condition, the breach of which would work a forfeiture. Has the condition been broken? Surely not, by the sale to plaintiff. The estate conveyed was a fee, and of this estate the right to assign is an essential incident. Indeed, by the terms of the instrument the estate is expressly made assignable, the grant being to the board its successors and assigns forever. The mere fact of a sale, therefore, would be no breach of the condition, in the absence of a showing that the grantee diverted the land to other than school purposes only; and this fact nowhere appears."

So in the present case which we have before us a sale under this authority may be made of the land now in possession of the board of education if the pro-

ceeds of such sale are not diverted to other than school purposes. This statement, of course, is based upon the assumption, which we do not make, that a condition subsequent obtains in the conveyances which we have set out.

Conditions subsequent are those upon the failure of which, an estate already vested is defeated, and such conditions are strictly construed against the grantor. And their non-performance will not reinvest the title in the grantor. See Black vs. Hoyt, 33 O. S., at page 212.

In Larwill et al. vs. Farrelly, 8 O. A. R., 356, the syllabus is:

> "The use in a deed of general warranty of the words, 'for the use and sole purpose of the Catholic church and such other erections as may be needed for the use of said Catholic church,' does not constitute a condition subsequent or engraft a limitation upon the title, but at most is a mere suggestion of unenforceable request or desire."

From the opinion in this case the following is quoted:

> "Conditions which in any way have a tendency to destroy or lessen estates are not favored by the law, and thus are strictly construed, and all doubts are resolved against restrictions. * * *
>
> The language used by the grantors in the deed in the case at bar is clear, plain and unambiguous, * * * but falls far short of being sufficient to create a condition subsequent.
>
> So far as creating limitations upon the title conveyed, it certainly does not do so. * * * In effect it is a mere suggestion, an unenforceable request or desire. * * *
>
> It is generally known that when an estate granted is intended to be terminated or forfeited, certain terms are used in the granting clause, or somewhere in the deed, declaring that the estate conveyed is to be forfeited in the event that certain conditions are not complied with. But in the deed now before us there is an utter absence of any such provisions."

The case which we have just quoted is on all fours with the one that we are considering except that we have a quitclaim deed, not a deed of general warranty. Such a deed, as we have pointed out, is made by one who does not care to give a warranty of title but it conveys a fee-simple. All necessary and operative words are to be found in this deed to convey such a fee, and it is necessary in Ohio that appropriate words be used in a deed. In a note found on page 137, 9 Am. & Eng. Ency. L., is to be found:

> "Operative words of various forms of conveyance:
> Lease—demise, grant and to farm let;
> Release—remise, release and forever quitclaim;
> Gift—give and grant;
> Grant—give and grant."

Some such appropriate words are necessary to a deed conveying a fee with the words of inheritance. It is necessary in Ohio, as the law now is, to use the word "heirs" to convey a fee-simple estate. See Lee vs. Scott, 26 O. C. C., 811; Sheets vs. Mouat, 18 O. D. N. P., 121.

The warranty deed of Abner G. Walton, of date August 10, 1872, given to the Bedford Township Board of Education, conveys in fee-simple a part of lot number eighty-five in said township. This tract is described by metes and bounds, and the consideration for the forty-hundredths of an acre of land is recited to be

forty dollars. It is a deed of bargain and sale. The consideration is at the rate of one hundred dollars per acre. The granting clause is as follows:

> "Do give, grant, bargain sell and confirm unto it (the board of education, Bedford Township) its successors and assigns, the following described tract or lot of land, situate in * * * (Here follows a description of the land, the last line of which description is: Said board of education are to build and keep in repair line fences)."

The habendum clause is:

> "To have and to hold the above granted and bargained premises, with appurtenances thereunto belonging unto the said grantee and its successors and assign forever, *for school purposes only.*"

Then follow covenants of seizin, of power to convey, of freedom from incumbrances and of general warranty. The deed is properly signed, sealed, acknowledged and recorded. In terms it falls within the law as set out in the case of Larwill et al. vs. Farrelly, supra, and the findings of the court in that case would apply in a proper case under this deed.

Therefore, from what has been said and upon the authorities cited, it is held that in the first transfer the defective execution of the original lease is cured by the giving of a quitclaim deed by the heirs of the lessor, after ten years possession by the lessee under the lease, and that the quitclaim deed of these heirs to the board of education conveys a fee-simple estate. Also that the words of the deed, to-wit, "for school purposes only," and "so long as it is used for school purposes," fall short of a condition subsequent because they are not coupled with a clause of forfeiture or of re-entry; but are descriptive of a suggested use for which the land was granted, and said descriptive uses are unenforceable at law; further, if these words were a condition subsequent, under Taylor vs. Binford, supra, the board of education could sell the land conveyed and use the proceeds for other school purposes. But as in Larwill vs. Farrelly, supra, there being no condition attached to the fee, the board of education may sell this land and use the money thus made for other school purposes. A similar finding is made of the parcel conveyed by the deed of Walton to the board of education. While this is the finding indicated by these opinions under the conveyances considered herein, it is pointed out that usually each such case depends upon the words employed in the grant and must be separately considered.

Respectfully,
JOHN G. PRICE,
Attorney-General.