2624.

ABANDONMENT OF LAND BY RAILROAD — QUERY: REVERSION TO GRANTORS, HEIRS AND ASSIGNS — ALLIANCE PUBLIC SERVICE COMPANY, SUCCESSOR TO THE STARK ELECTRIC COMPANY — ABANDONED PROPERTY FORMERLY USED FOR TRACTION RIGHT-OF-WAY PURPOSES — CONVEYANCE TO STATE OF OHIO — COLUMBIANA COUNTY.

Columbus, Ohio, August 8, 1940.

Hon. Robert S. Beightler, Director, State Highway Department,
Columbus, Ohio.

Dear Sir:

You have submitted in connection with the proposed purchase of certain traction right-of-way property in Columbiana County, copies of two deeds wherein S. A. Greenamyer and Sarah Grenamyer appear as grantors in one instrument and Carey A. Greenamyer and Carrie Greenamyer appear as grantors in another such instrument. In both deeds the Stark Electric Company appears as grantee.

An inquiry to your department reveals the fact that the Alliance Public Service Company is the successor in title to The Stark Electric Company and that the property formerly used for traction right-of-way purposes has been abandoned.

In the deeds under examination, the following condition appears:

> "the aforesaid parcel of land being conveyed to the said grantee, its successors and assigns, for the purpose of constructing thereon and operating thereover, an electric railroad."

The question therefore arises whether by the abandonment of the railroad the land in question reverts to the grantors, their heirs and assigns.

The Supreme Court of Ohio had a purpose covenant under consideration in the case of In Re Matter of Copps Chapel Methodist Church, reported in 120 Ohio State at Page 309 (decided 1929) and the syllabus of that case reads as follows:

"Where a quit-claim deed, for valuable consideration, conveys to trustees of an unincorporated church association certain real property, 'To have and to hold * * * unto the said grantees and their successors * * * so long as said lot is held and used for church purposes,' without any provision for forfeiture or reversion, such statement is not a condition or limitation of the grant. Since the deed contains no provision for reversion or forfeiture, all of the estate of the grantor was conveyed to the grantees. Hence, a church building affixed to the realty does not pass to the heirs of the grantors when such a lot and building cease to be used for church purposes."

In the opinion of the court at page 315, the court made the following observation:

"There are no words of condition or forfeiture in the deed. There is no reverter clause, nor any provision establishing the right of reentry. Hence, taking the deed by its four corners, it shows that the grantor intended to convey, and did convey, to the grantees all of his estate in the land."

In the case of First Presbyterian Church v. Tabb, et al, 63 Ohio Appellate, 286, decided Nov. 1, 1939, the first branch of the syllabus reads as follows:

"1. A devise of real estate to a religious society 'to be used as a parsonage' but with no provision for forfeiture or reversion, conveys all the estate the testator has therein to the devisee, and the failure of the devisee to use the property as a parsonage will not cause the title to revert to the heirs of the testator."

In 16 Ohio Jurisprudence, Page 393, Section 16, the following appears:

"As indicated in the preceding section it is the general rule that in situations where property is conveyed for a specified use but no express provisions are made for a condition of reverter, the mere statement of the purpose for which the property is to be used will not of and by itself debase a fee."

In the case of Boyer v. Miller, decided by the Court of Common Pleas of Licking County, reported in 21 N. P. (n. s.) 225, the following statement of law appears as the headnotes of the case:

"Land conveyed in consideration of one cent to a school board, to have and to hold 'in trust for the sole and only use of said district for school purposes and no other' does not revert in the original grantor or his heirs upon abandonment of the use so specified, unless the deed contains a forfeiture clause so providing."

To the same effect the Court held in 5 O. C. C. 347, Watterson, Trustee v.

Ury, et al, as disclosed by the seventh branch of the headnotes, reading as follows:

> "A grant of real estate, purporting to be upon a valuable consideration, to be held by the 'grantee, his heirs and assigns forever as a burial ground for Roman Catholics," containing a covenant to 'forever warrant and defend said premises with the appurtenances against the lawful claims of all persons whomsoever, to be held by such grantee in trust for the Roman Catholics of Columbus, Ohio,' and containing no words of forfeiture or re-entry, is not a grant upon condition; and a discontinuance or diversion of the use contemplated by the grant will not entitle the heirs at law of the grantor to recover the granted premises."

In the case of Cleveland Terminal and Valley Railroad v. The State, ex rel, reported in 85 O. S., 251, the State of Ohio deeded certain canal lands located in Cleveland and in the deed given to the City of Cleveland, pursuant to the Act abandoning said lands for canal purposes, it provided that said lands shall be used for "public highway, or other purposes, * * * ". These lands were subsequently leased by the City of Cleveland to the railroad company for railroad purposes and a suit was instituted by the State of Ohio to oust the company from further exercising the alleged right to maintain tracks on said land and the court held, as disclosed by the second branch of the syllabus, that:

> "When land is granted to a city upon a valuable consideration to be used for streets and other purposes, the title will not, in the absence of an express stipulation to that end, revert in the grantor because the land is subsequently used for street and railroad purposes."

The above case reaffirmed the doctrine laid down in the Village of Ashland v. Griender, 58 O. S. 67, the Court stating in its syllabus:

> "That as said deed had no words of forfeiture or re-entry, the diverting of said lands to uses and purposes, other than those expressed in the deed, did not in legal effect revert title to said lands in the grantor, or his heirs."

The general purposes to which the land was applied and will be applied, are the same; to wit: the purposes of a public way, to facilitate the transportation of persons and property. Means, modes and appliances are different but the objects are the same, and the legislation of the State and the decisions of the Courts have always favored both.

In the case of Arnold v. Morgan (decided 1911) 2 K. B. (England) 314, it was held that a railway could dedicate a highway over land vested in it by statute, provided the dedication was not incompatible with the objects prescribed by the statutes.

The Supreme Court of Vermont in the case of Bacon v. Boston and M. R. Co. (1910) 83 Vt. 421 held that a railroad company might make a dedication of a highway across its right-of-way and tracks.

In the case of Realty Title and Investment Co. v. The F. P. and E. R. Co. found in 12 O. A. 73, the Court laid down the following rule of law in regard to use of property as disclosed by the syllabus:

> "The conveyance by deed of a lot in an allotment, which deed contains a grant as an appurtenance to said lot of a perpetual right to the grantee, his heirs and assigns, to use and enjoy but in common with the owners of the residue of said allotment, a private way for pleasure, recreation, amusement, health and travel, confers on the owner of said lot the right to use said private way as a means of ingress and egress *for any and all purposes to which said lot may be adopted.*" (Emphasis the writer's.)

In the case of Hale v. The State of Ohio, et al, being numbered 21752 on the dockets of the Court of Common Pleas of Licking County, Ohio, Judge Huston had before him the question, whether an easement acquired by appropriation proceedings for railroad purposes could be in effect, transferred to the Department of Highways of the State of Ohio for highway purposes.

The Court held in the course of his opinion, that the principal purpose and main object in acquiring the land was for transportation purposes, and this use was "not inconsistent with or materially different from the use the same was to be put to at the time of its appropriation except as to the motive power" and the Court held that the State of Ohio was entitled to use the lands for highway purposes.

In the case of Hatch v. Cincinnati and I. Rd. Co. 18 O. S. 92, it was held that land appropriated for canal purposes could be transferred and be used for railroad purposes since the general purposes were the same, namely, the purposes of a public way to facilitate the transportation of persons and property.

In the case of Malone v. Toledo, 28 O. S. 643, it was held that the

State, having appropriated land in fee simple for canal purposes, could transfer the same to the City of Toledo for street purposes, it being for purposes of similar nature, and such new use would not have the effect of working a reversion to the original owner from whom it was taken.

In view of the foregoing I am of the opinion that the Alliance Public Service Company can convey to the State of Ohio, for highway purposes, the land conveyed to The Stark Electric Company and subsequently acquired by the said Alliance Public Service Company, although in the deeds to The Stark Electric Company the grantors provided that the lands were to be used for railroad purposes.

Respectfully,

THOMAS J. HERBERT,
Attorney General.