declaring a vacancy and making an appointment to fill the vacancy, the court said:

> "The action taken at that time by council was authorized by the provisions of Section 4242, General Code, which provides that council may declare vacant the office of any person elected or appointed to an office who fails to qualify therefor within the time required by law and the election of Larsen to fill the vacancy was authorized by Section 4236, General Code."

I am of the opinion therefore that, at the commencement of the term beginning in January, 1932, a vacancy occurred under the provisions of section 4748, General Code, and the board is authorized to fill such vacancy.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4047.

SCHOOL PROPERTY—BUILDING NO LONGER NEEDED MAY BE SOLD AT PRIVATE SALE WHEN VALUE $300 OR LESS—CONVEYANCE OF LAND FOR SCHOOL PURPOSES—REVERTS TO HEIR OF ORIGINAL GRANTOR WHEN.

SYLLABUS:

1. *School buildings which are no longer needed for school purposes, and which do not exceed in value the sum of* $300.00 *may be sold either at private sale or by public auction to the highest bidder without giving the statutory notice required by Section* 4756, *General Code, for sales of property exceeding in value the sum of* $300.00.

2. *A conveyance of lands to school directors given without valuable consideration, and, as stated in the instrument of conveyance, "for divers good and charitable purposes and in pursuance of a legislative act for the encouragement of schools passed A. D.* 1827" *and which recites in its granting clause that it gives and grants as a donation for school purposes certain property therein described, is equivalent to a dedication for a specific use and does not confer power of alienation so as to extinguish that use; upon abandonment of the property for school purposes it reverts to the heirs of the original grantors.*

COLUMBUS, OHIO, February 8, 1932.

HON. WILLARD D. CAMPBELL, *Prosecuting Attorney, Cambridge, Ohio.*

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

> "One of our Boards of Education of a consolidated district composed of most of two townships and a village, desire to dispose of the now unnecessary sub-district school properties, some ten or twelve in number. Upon examination of the several titles, and the rights of the

board in regard to same, the following questions have arisen on which we desire your opinion:

First: From the instrument conveying one property we quote: 'For divers good and charitable purposes and in pursuance of a Legislative act for the encouragement of schools passed A. D. 1827.'

'Hath granted and given and by these presents doth grant and as a donation freely give for school purposes and for the erecting a house thereon to be occupied as a school house under the direction of said directors and their successors in office a certain moiety or parcel of land.' (Description follows):

"To have and to hold the said described moiety or parcel of land with the appurtenances to the said ———, ——— & ——— (directors) and their successors in office forever, for the only proper use benefit and behoof of school purposes, and the said John Carlile and Elizabeth, his wife (grantors), all and singular the premises hereby granted, or mentioned or intended so to be, with the appurtenances to them the said Anderson, Savage & Hays (directors) & their successors in office against him the said Carlile & Elizabeth his wife and their heirs and against every other person lawfully claiming or to claim the same, they will Warrant and forever defend by these presents.'

'In testimony whereof' etc.

(No clause of reverter)

Question: Can the Board of Education sell this property and convey a fee simple title? If not, can they sell and give right to remove within reasonable time, the school building?

Second: From one instrument we quote:

'hath demised, granted, leased, and doth hereby demise, grant and lease unto the said ———, ——— and ———, school directors as aforesaid, and to their successors in office' one-half acre of land for the purpose of erecting a schoolhouse thereon for said school district number five and for the use and benefit of the school there to be kept.'

'To have and to hold the said tract of land so long as the said directors or their successors in office continue to use and occupy the same as a site for a district schoolhouse.'

'The said half acre of land being' etc. (description)

'for which the said ———, ———, ——— agree to pay the sum of $1.00' etc.

'In testimony whereof' etc.

(No clause of reverter)

Question: Can Board of Education convey a fee title to this? If not, what, if anything, can they sell?

Third: New centralized buildings taking the place of these old buildings, we presume there is no legal impediment to their sale at any time; and if none of these old properties will sell for an amount to exceed $300.00, do you see any legal objection to an advertisement (such as the Board thinks best) of all to be sold at public auction at office of Board of Education at one certain time, and the auctioning of them off, one at a time, to the highest bidder?"

It is well settled in this state that the mere recital in a deed of a declaration of the purpose for which the conveyance was made, in the absence of an expressed intention otherwise or a clause providing for re-entry by the grantor

if the purpose be not carried out, will be construed as a covenant rather than a condition. *Lessee of Sperry* vs. *Pond,* 5 Ohio, 388; *Village of Ashland* vs. *Greiner, et al.,* 58 O. S., 67; *Washburn on Real Property* (6th Ed.) Section 938; *Thompson on Real Property,* Section 1090; *Opinions of the Attorney General for* 1920, page 1206; for 1928, page 2984. The second and fourth branches of the syllabus of the 1928 Opinion read as follows:

> "A declaration, in a conveyance of lands, of the purpose for which the conveyance was made or for which the granted land is to be used, does not in and of itself render the grant conditional. Thus, a grant of land 'for school purposes' will not be construed as a grant on a condition subsequent, where there are no words indicating an intent that the grant shall be void if the declared purpose is not fulfilled.
>
> Lands deeded to a board of education to be used for school purposes, without an express condition of reverter or a reserved right of re-entry by the grantor, if conveyed for a valuable consideration and containing words of perpetuity, vest in the board of education as a fee simple estate and do not revert to the grantor or his heirs upon abandonment of such use."

The rule stated above, has never, to my knowledge, been held to apply where a declaration to a particular use was contained in a deed given without consideration.

The first instrument spoken of in your inquiry appears to have been given without consideration, its moving cause being as stated in the instrument itself, "For divers good and charitable purposes and in pursuance of a legislative act for the encouragement of schools pass'd A. D. 1827."

The act of 1827, referred to, provided in Section 7 thereof (25 O. L., 66):

> "That the school directors of each school district are hereby made capable to receive a deed of conveyance, for any land whereon to erect a school house, which deed shall be made to the school directors, and their successors in office, for the sole use of the inhabitants of such school district, for the use and support of schools therein, and for no other use or purpose whatever."

It will be observed that the only authority extended to school directors, by the terms of the above statute is to receive a deed for lands "whereon to erect a school house." They receive those lands "for the sole use of the inhabitants of such school district, for the use and support of schools therein, and for no other use or purpose whatever."

No subsequent act of the legislature or act of the school directors would serve to enlarge this power once it is executed by force of this statute, or change the character of a conveyance received by school directors in pursuance of the power granted to them by this statute.

A very similar question was presented to the Supreme Court in the case of *Board of Education* vs. *Edson et al.* 18 O. S., 221. In this case the question of the right to sell certain school lots in the village of Van Wert, and apply the proceeds to the purchase of other property for school purposes was involved. The cause originated in the Court of Common Pleas of Van Wert County by the filing of a petition in 1866. It appeared from this petition that the original

proprietors of the village of Van Wert by a town plat duly acknowledged and recorded in May, 1835, dedicated certain lots designated on said plat "for school purposes, and on which to erect schoolhouses."

The proper authorities shortly afterward erected a schoolhouse on one of said lots and occupied the same, in conformity with the provisions of said dedication until the year 1855. It then became necessary to abandon said lot for school purposes, and secure a site for a school building at some other location. This was brought about by reason of the encroachment of railroads.

It was claimed by the plaintiff that the title to the lots in question vested in the board of education and that they had a right to dispose of the same by reason of an act of the legislature of March 13, 1850, S. & C. 1377. This Act provided in substance, that the title to all real estate and other property belonging, for school purposes, to any city, town, village, township or district, shall be regarded in law as vested in the board of education thereof for the support and use of the schools therein; and said board may dispose of, sell and convey said real estate by deed executed by the president of the board, upon a majortiy vote for such sale at any regular meeting of the electors of the said district. The right to sell and convey this property, and use the proceeds of the sale to purchase other property for school purposes was denied by the court. The syllabus of this case reads as follows:

> "1. That the dedication was for a specific use, and conferred no power of alienation so as to extinguish the use.
>
> 2. That if the use created by the dedication were abandoned, or should become impossible of execution, the premises would revert to the dedicators or their representatives, and that, without their consent, they could not be divested of their contingent right of reversion by an absolute alienation.
>
> 3. The principle upon which a trust may, under certain circumstances, be executed cy pres is not applicable to such a case."

In the course of the opinion the court, after noting the fact that the plaintiff based its contention on the statute of 1850, quoted above, said:

> "But, we think it clear that this statute was intended to apply only to cases where the absolute ownership of the property is in the city, town, etc., which has been organized into a single school district, under the act of February 21, 1849, and that it was not intended to affect any interest of the original proprietors of towns growing out of their dedication of particular lots or lands, for specific uses. The legislature could not thus transfer private rights of property, nor change the character of the use created by such previous dedications. *Le Clercq* vs. *Town of Gallipolis,* 7 Ohio (pt. 1), 217.
>
> By the 8th section of the act of March 3, 1831, to provide for the recording of town plats (S. & C. 1484), it is provided: 'That the plat or map, when recorded as required by this act, shall be deemed and considered in law a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, named, or intended for public use, in the county in which the town is situated, for the uses and purposes therein named, expressed, or intended, and for no other use or purpose whatever.'

> The town plat, in this case, was executed and recorded in 1835, and the result was that the fee simple of the lots in question was thereupon vested in the county of Van Wert, but wholly in trust, for the public use specified in the dedication, and for no other use or purpose whatever.
>
> If subsequent legislation has changed the trustee the trust or use itself remains unchanged. The dedication in this case, as stated in the petition, was 'for school purposes, and on which to erect school-houses.' Without determining whether, under this dedication, the lots could properly be used for school purposes, other than the erection of school-houses thereon, it is enough to say that the dedication is of the land and not of its value or proceeds. It confers no power of alienation discharged of the use by which the purpose of the dedication might be utterly defeated. Should the sole uses to which the property has been dedicated become impossible of execution, the property would revert to the dedicators or their representatives. *Williams* vs. *The First Presbyterian Society of Cincinnati,* 1 Ohio St., 478 (per Thurman, J.) ; *Le Clercq et al* vs. *The Town of Gallipolis, supra* (per Lane, J.)"

In the light of the foregoing case, it is my opinion, that the instrument here under consideration is in effect a mere dedication for a public or charitable purpose and for a specific use and that it does not confer the power of alienation so as to extinguish that use.

With reference to the second instrument referred to in your inquiry, it appears that this instrument is nothing more than a lease; it does not purport to convey a title in fee. The words which correspond to the granting clause of a deed are those which convey an estate only, that is less than a fee. Before an instrument of conveyance will be construed as conveying an estate in fee in lands it must purport to do so by the use of all necessary and operative words for that purpose.

In a note found on page 137, Ninth American and English Encyclopaedia of Law is to be found:

> "Operative words of various forms of conveyance; lease—demise, grant and to forever let; release—remise, release and forever quit claim; gift—give and grant; grant—give and grant."

The conveyance in question having made use in its granting clause of the words "hath demised, granted, leased, and doth hereby demise, grant and lease" do not purport to convey an estate in fee and must, in my opinion, be construed as being only a lease for school purposes, and when that purpose is abandoned, the estate thereby conveyed terminates.

I am therefore of the opinion that neither of the deeds mentioned vests such a title in the school board as will permit the board to convey a title in fee simple to said properties upon their abandonment for school purposes.

Since the decision of the case of *Schwing* vs. *McClure,* 120 O. S. 335, it seems clear that, whether the school district owned a fee in the properties in question or not, the buildings which may have been erected on those properties belong to the district, and even though the circumstances are such that the lots themselves reverted to the original grantors, the buildings may be sold.

This is on the theory that boards of education have limited powers, and

those powers do not include the power to contract in such a way that a building that might be erected with public funds on lands which later reverted to the original grantors, would pass to said grantors with the lands so reverting. The syllabus of this case reads as follows:

> "1. Members of a board of education of a school district are public officers, whose duties are prescribed by law. Their contractual powers are defined by the statutory limitations existing thereon, and they have no power except such as is expressly given, or such as is necessarily implied from the powers that are expressly given.
>
> 2. The members of the board of education of a school district are not authorized to convey or transfer to private parties, without consideration, any of the property of the school district, real or personal. Hence, the acceptance by such members of the board of education of a school district of a deed providing that if at any time the premises in question shall cease to be used for school purposes, the same shall at once vest in the said grantors, their heirs and assigns forever, is not effectual to constitute a public school building erected upon such premises with public funds a part of the realty, so that such building passes with the realty upon reversion to the heirs of the grantor."

I am therefore of the opinion that the buildings on the lands in question may be sold in the manner provided for by Section 4756, General Code.

It will be observed, upon an examination of said Section 4756, General Code, that where personal property is to be sold by a board of education, and it does not exceed in value the sum of $300.00, it may be sold at private sale without giving the thirty days notice by publication provided for by the statute in case the value of the property exceeds $300.00.

I am therefore of the opinion that the school buildings in question may be sold at any time, either at private sale or by public auction, to the highest bidder without giving the statutory notice referred to. The sale of all these buildings may be made at the same time, by public auction, if it is so desired.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4048.

FEES OF CONSTABLE—TRANSPORTATION OF INSOLVENT CONVICT TO WORKHOUSE—PAID BY TOWNSHIP—WHEN COUNTY COMMISSIONERS MAY PAY.

SYLLABUS:

Fees of a constable in connection with the transportation of an insolvent person, convicted of a misdemeanor, to a workhouse cannot be paid by the county commissioners under section 3019, *General Code, but can only be paid out of the treasury of the township where the sentence was imposed under the provisions of section* 4132, *General Code, and where an insolvent defendant has served his costs in jail an allowance to the officers, in place of fees other than transportation, may be made by the county commissioners under the provisions of section* 3019,