2981.

COVENANT RUNNING WITH THE LAND—WHEN COUNTY ACCEPTS DEDICATION FROM GRANTEE'S ASSIGNS IT MUST COMPLY WITH CONDITIONS OF COVENANT—ACCEPTANCE VALID WHEN BURDENS IMPOSED DO NOT EXCEED BENEFITS RECEIVED.

SYLLABUS:

1. *Where a grantor conveys a strip of land to a grantee with a covenant running with the land, requiring the grantee and his successors to maintain a fence along said lands, said grantee's assigns may dedicate said lands to the county for road purposes. However, under such circumstances, if such dedication is accepted, it will be necessary for the county to comply with the conditions of the covenant.*

2. *County commissioners may accept gifts of land for county purposes with reasonable conditions and reservations attached thereto; however, the commissioners may not accept gifts, the conditions of which impose burdens upon the county in excess of the benefits received. Whether or not the conditions are unreasonable, must be determined in the first instance by the county commissioners, and their finding will not be disturbed in the absence of circumstances which clearly constitute an abuse of discretion.*

COLUMBUS, OHIO, February 24, 1931.

HON. G. W. MCDOWELL, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication requesting my opinion upon an inquiry submitted by your predecessor, and enclosing additional information. The letter of your predecessor reads:

> "On June 7th, 1893, T. D. D. acquired two tracts of land, both being narrow strips, one of which was conveyed by J. H. E. and one of which was conveyed by O. C. and wife. The tracts referred to were narrow strips of land and were to be used as a right of way from the public highway to his farm, although that fact does not appear in either of the deeds.
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> In the E. deed, the consideration mentioned was 'that said D. is to build fences and keep same up.' In the C. deeds the consideration expressed was 'that said D. is to build fences and keep same up from the northwest corner of E's. lands to F. T. Pike No. 40.'
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> T. D. D. died many years ago and his lands descended to his son, I. D. I. D. is now dead and the land has descended to his two sons and daughter. The E. and C. farm, from which these two tracts of land were taken, have changed hands a number of times since the deeds were given for those two tracts.
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> The present owners of the two tracts above referred to now propose to dedicate this land for road purposes under Section 6886 of the General Code. Question: If the Commissioners accept this land under said section, will the County be obligated to maintain the fences along the land? Would the County be required to build new fences after the present fences are worn out?"

You enclosed complete copies of the instruments referred to in the letter above quoted. Both of said instruments are ordinary short form of quit claim deeds granting a strip of land one rod wide as more specifically described therein: "To have and to hold the same to the only proper use of the said T. D. Davis,

his heirs and assigns forever." The consideration clause of the Edenfield deed reads:

"KNOW ALL MEN BY THESE PRESENTS:

That I, John H. Edenfield, of Concord Tp., Highland County, Ohio: In consideration that said Davis is to build fence and keep same up. To be paid by T. D. Davis.....the receipt whereof is hereby acknowledged, hereby REMISE, RELEASE, AND FOREVER QUIT CLAIM to the said T. D. Davis, his heirs and assigns forever."

Also, the consideration clause of the Cochran deed is as follows:

"KNOW ALL MEN BY THESE PRESENTS:

That we, Oliver Cochran and Sevena Cochran, his wife, of Concord Tp., Highland County, Ohio: In consideration of..... That said Davis is to build fencing and keep same up from the Northwest corner of Edenfield's lands to F. T. pike No. 40, to be paid by T. D. Davis, the receipt thereof is hereby acknowledged, does hereby REMISE, RELEASE, AND FOREVER QUIT CLAIM to the said T. D. Davis, his heirs and assigns forever."

There is no consideration mentioned in either of said deeds other than as above set forth. Furthermore, there is no reference to the conditions relative to the maintaining of said fences in either deed other than as above set forth in the consideration clauses.

The real question presented is whether or not the language of the instruments in question is of such import as to create conditions running with the land.

It is a well established proposition of law that where a grantee accepts a deed and takes possession of it, he is bound by the conditions in the deed as effectually as if he, himself, had signed the instrument, and is deemed to have entered into an express undertaking to do what the deed says he is to do.

Your attention is directed to the case of *Hickey* v. *Railway Company,* 51 O. S. 40. In that case it was held, as disclosed by the syllabus, that:

"Where a railway company makes a deed poll of land in fee, along which its right of way is located, 'subject to the condition that the said grantee, his heirs and assigns, shall make and maintain good and sufficient fences on each side of the right of way of the railway as now located and built, * * * which condition and obligation shall be perpetually binding on the owners of the land.'

Held:

1. That the grantee, by accepting the deed, will be deemed to have entered into an express undertaking to perform the condition contained in the deed, and such undertaking will run with the land, and become obligatory upon a subsequent owner by purchase from the grantee of the company.

2. After the grantee of the company has ceased to be the owner of the land, by conveying the same in fee to another, the company will not have a right of action against its grantee, for non-performance of the condition to make and maintain fences between the right of way and the land sold."

In said case it was provided in the deed that the condition and obligation to maintain the fence should be perpetually binding on the owners of the land. In

the body of the opinion it is indicated that if the language of the deed had only required the grantee, his heirs and assigns to maintain the fence, as distinguished from the language hereinbefore mentioned, which required the obligation to be perpetually binding on the owners of the land, the grantor could have pursued either the original grantee or his vendee or both for payment. Therefore, it would appear from an examination of said opinion that the effect of the obligation upon the assigns of the grantee would not be changed because of the absence of the language making it perpetually binding.

While neither of said deeds makes reference to the obligations to maintain the fences as being for the benefit of the heirs or assigns of the grantors, and neither of said deeds expressly mentions the heirs or assigns of the grantee in connection with the maintenance of the fences, it is believed that this fact is not necessarily determinative of the problem.

In the case of *Johnson* v. *The American Glass Co.,* 8 O. A. 124, a somewhat analogous situation was presented. It appears from the facts in that case that the grantor has conveyed a right of way to a gas company for the consideration of one dollar. The instrument further contained a provision to the effect that the grantee was to furnish free gas for one fire in the residence of the grantor without using the words heirs or assigns in connection with either the grantor or grantee. The headnotes of said case read:

> "1. The use of the words 'assigns' or 'heirs and assigns' is not necessary or essential to create a covenant running with the land, and in determining whether a covenant will run with the land the material inquiries are whether the parties intended to impose such burden on the land, and whether it is one that may be imposed consistently with principle and equity.
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> 2. Where the owner of farm lands grants to a company, its successors and assigns, the right to lay and maintain a pipe line over said farm for the purpose of transporting gas, in consideration of one dollar and said company furnishing gas free for one fire in the residence of said owner, and said company lays said pipe line, and it and its successors in title maintain the same, and furnish free gas in said residence to the then owner, and continue to furnish such gas for a number of years to his first and second successor in title, such covenant runs with the land, and the successor of said company will be required to furnish free gas to the successor or successors in title of said land, according to the provisions of such contract, so long as the successor of said company continues to use such right of way to transport gas."

The opinion in the case last above mentioned contains a comprehensive discussion of the history of the law relative to the language necessary to create a covenant running with the land and indicates that it is not the words used alone but the intent as gathered from the whole instrument. On page 133 the following language is used:

> "In determining whether a covenant runs with the land the material inquiries are:
>
> 1. Whether the parties meant to charge the land.
>
> 2. Whether the burden is one that can be imposed consistently with policy and principle."

In view of the foregoing, it would appear that under the facts being con-

sidered, the instruments mentioned would contain covenants running with the land or at least it certainly would be unsafe to proceed upon any other theory of the law. When covenants run with the land, it is fundamental that the rights of the parties for whose benefit such covenants are made may not be taken without compensation. While, of course, such interest as one may have may be dedicated to the public use, the present parties who are in possession of the lands in question may not take an action which will have the effect of dedicating the interest of the assigns of the original grantors.

The question now presents itself as to whether the county commissioners may accept a dedication and fulfill the obligations of the covenants with reference to maintaining the fence. Undoubtedly, under the power of commissioners to appropriate lands for road purposes proceedings could be instituted to obtain title from all of the parties interested. Such proceeding, however, contemplates payment of compensation for the land taken and damages to the residue, if any. Section 6886, General Code, expressly authorizes any person or persons, with the approval of the county commissioners, to dedicate lands for road purposes. A definite description of the lands to be dedicated with a plat signed by the party dedicating the same, with the approval and acceptance of the county commissioners endorsed thereon, is required to be placed upon the proper road records.

There is nothing stated in the statutes with reference to conditional dedication. While it has frequently been said that such boards as county commissioners have only such powers as are expressly delegated to them by statute, it is well settled that they have such implied powers as are necessary to carry into effect the express powers. In the instant case it would seem absurd to say that the commissioners could negotiate with all of the parties and purchase the right of way in question or could institute an appropriation proceeding and acquire the entire title and yet may not accept a dedication and carry into effect an incident such as the maintenance of the fence in order to meet with the requirements of the covenants which run with the land.

Section 18, of the General Code, expressly authorizes the county among other sudivisions to receive,

> "by gift, devise or bequest, moneys, lands or other properties, for their benefit or the benefit of any of those under their charge, and hold and apply the same according to the terms and conditions of the gift, devise or bequest. Such gifts or devises of real estate may be in fee simple or of any lesser estate, and may be subject to any reasonable reservation."

In view of the foregoing, it is believed that the county commissioners are empowered to receive a dedication with any reasonable reservation or condition that may be attached thereto. Of course, if a condition should be attached which would impose a burden upon the county which would not be commensurate with the value of the property received by the county by reason of a given gift or dedication, then, of course, the acceptance of such a gift or dedication would be an abuse of discretion.

In the case of *Carder* v. *Commissioners of Fayette County,* 16 O. S., 354, the conclusion is supported which I have hereinbefore reached with reference to the power of the commissioners to accept a gift with conditions attached. In that case, a devise of a farm to the county was sustained which required an annuity of $700.00 per year to be paid to the widow of the devisor. Whether or not the condition requiring the maintenance of the fence under the circumstances is one that would impose an unreasonable burden upon the county in view of the benefits which the county would receive from the use of the roadway is a question of

fact, which must be determined in the first instance by the county commissioners. It is believed that a more specific answer to your inquiry may not be made.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2982.

PENSION—MUNICIPAL EMPLOYES—WHEN LEGISLATIVE AUTHORITY MAY ENTER INTO AGREEMENT WITH INSURANCE COMPANY TO PAY PENSIONS—WHEN GROUP LIFE OR INDEMNITY INSURANCE MAY BE PROVIDED—PREMIUMS PAYABLE FROM PUBLIC FUNDS.

SYLLABUS:

1. *In the absence of charter provisions prohibiting or limiting such action, a municipality through its legislative authority may enter into an agreement with an insurance company whereby the insurance company agrees to pay pensions to employes of a municipality after the employe has reached a certain age, or has become incapacitated, in such amounts and under such terms as may be determined by the said legislative authority.*

2. *Unless prohibited from so doing by provisions of its charter, a municipality may provide group life or indemnity insurance for its officers and employes and pay the premium for such insurance, either in whole or in part, from the public funds of a municipality.*

COLUMBUS, OHIO, February 24, 1931.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion in answer to the following questions:

> "Question 1. May a municipality through its council enter into an agreement with any insurance company, whereby the insurance company agrees to pay pensions to employes of the municipality, after the employe has reached a certain age, or has become incapacitated, in such amounts and under such terms as council may determine? (Members of the Police and Fire Departments excepted.)
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> Question 2. May funds of a municipality be expended in making payments to the insurance company of part of the cost of such agreement, the remainder of the cost being contributed by the employe, on a basis of rates determined by council?
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> Question 3. May the funds of a charter municipality be expended in making such payments, when the charter contains provisions as follows:
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> 'It (the city) shall have all powers that now are, or hereafter may be, granted to municipalities by the constitution or laws of Ohio; and all such powers, whether expressed or implied, shall be exercised and enforced in the manner prescribed by this charter, or when not prescribed herein,