4482.

BOARD OF EDUCATION—MUNICIPALITY MAY CONVEY LANDS TO BOARD OF EDUCATION WITHOUT COMPETITIVE BIDDING WHEN.

SYLLABUS:

1. *Municipal corporations may convey lands not needed for municipal purposes, to any Board of Education, upon such terms as may be agreed upon between the municipal authorities and the Board of Education, without competitive bidding.*

2. *A declaration in the conveyance of lands, of the purpose for which the conveyance is made, and for which the granted land is to be used, does not in and of itself render the grant conditional. Thus a grant of land to a municipal corporation "for park or public square 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 or giving to the grantees or their heirs a right of re-entry in the event the declared purpose is abandoned.*

COLUMBUS, OHIO, July 31, 1935.

HON. NORTON C. ROSENTRETER, *Prosecuting Attorney, Port Clinton, Ohio.*

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

> "In the year 1876 one A. Kraemer and Eliza Kraemer, husband and wife, conveyed to the incorporated Village of Oak Harbor, Ohio, certain real estate, for the consideration of $20.00.
>
> This real estate was sold to the village for the purpose of a public park or square. The deed conveying said real estate contains the following stipulation: "For the purpose of a public square or park and to be used for the location and erection of any public building or buildings which may be hereafter erected in the said Town of Oak Harbor, together with the privileges and appurtenances to the same belonging, and to hold the same to the said incorporated Village of Oak Harbor forever."
>
> At about the same time of this grant, another parcel of real estate directly adjacent and contiguous to that conveyed to the village, was conveyed by the same grantors to the Oak Harbor Board of Education. Since that time a school building has been erected on the property so conveyed to the Board of Education.
>
> About five years ago the school system of Salem Township, in which

the village of Oak Harbor is located, and the village school system were consolidated, and all of said territory was then known as Salem Oak Harbor School District, with the outlying township schools abandoned, and all of the school children in said territory now attending the centralized school at Oak Harbor.

This brought about a condition requiring additional school facilities, and which will require the erection of another school building. It is the desire of the Board of Education to locate the new building next to the old school building, upon a part of the real estate heretofore granted to the village as hereinabove set out. However, it is a requisite of the Public Works Administration (which has agreed to pay 45 per cent of the cost of the construction contract) that the sub-division requesting such aid, (in this case the school board) first acquire title to the real estate upon which the improvement is to be made.

The Board of Education and the village council have discussed the permissability of the village to effect an absolute grant of title in fee simple to the Board of Education, in view of the specific stipulation contained in the original deed grant to the village, said stipulation to repeat, is as follows: "For the purpose of a public square or park, and to be used for the location and erection of any public building or buildings which may be hereafter erected in said Town of Oak Harbor, together with the privileges and appurtenances to the same belonging, and to hold the same to the said incorporated Village of Oak Harbor forever."

We would like your construction as to this condition, and your determination of the question as to whether or not the village would be violating the condition contained in the original grant, in now deeding enough of said park property to the Board of Education to allow construction of the building contemplated.

I would also appreciate your opinion (in the event you hold that a prohibition is placed on the village, to convey outright to the Board of Education) whether the language used as above indicated would permit the leasing of said premises to the Board, which of necessity would have to be a long time lease, perhaps ninety-nine years, renewable forever, in order to get the desired co-operation from the federal government."

Your question involves the quality of the title possessed by the Village of Oak Harbor in the lands conveyed to it by deed by A. Kraemer and Eliza Kraemer, which contains the following clause:

"For the purpose of a public square or park and to be used for the

location and erection of any public building or buildings which may be hereafter erected in the said Town of Oak Harbor, together with the privileges and appurtenances to the same belonging, and to hold the same to the said incorporated Village of Oak Harbor forever."

The immediate question is whether or not the Village of Oak Harbor may now convey and grant a fee simple title to this property or any portion of it to the Board of Education of the Oak Harbor School District for school purposes, thus abandoning the use of the property as a park or public square or for the erection thereon of public buildings by the municipality.

I do not have before me the entire deed given by the Kraemers in 1876 to the Village of Oak Harbor, conveying the lands in question. I note, however, that the conveyance is given for a valuable consideration, and am taking for granted, for the purpose of this opinion, that you have recited in your inquiry the only clause of the deed that would, by any construction, point to a limitation of the estate granted to something less than a fee simple estate, and that there are no clause or clauses in the deed expressly providing that the deed is to be void on the breach of the condition limiting the use of the property to park, or public square, or public building purposes or giving the grantors or their heirs the right of re-entry upon the abandoning of the use of the property for those purposes, by the grantee or its successors and assigns.

It has been generally held that where there is no restraining clause in the charter of a municipal corporation or in the general law, it may dispose of any property which it has the right to acquire. In Ohio, the sale or lease of municipal property is governed by statute. Municipal corporations have special power to sell or lease real estate not needed for any municipal purpose. Speaking generally, such power is to be exercised in the manner provided for by Section 3699 General Code. See also Sections 3631 and 3698 General Code. Said Section 3699 General Code provides that in the sale of real estate by a municipal corporation the sale shall be made to the highest bidder, after due advertising, as provided by the statute. An exception is made, however, where the sale is to a Board of Education, by Section 3713-1 General Code. It is there provided that such sales may be made "upon such lawful terms and conditions as agreed upon between the municipal corporation and the board of education".

It has also been held in this state that a deed by a municipal corporation for the conveyance of property owned by it, for a money consideration expressed in the deed, passes to the purchaser a legal title, although the consideration is far below the real value or merely nominal. *Newton* vs. *Mahoning County,* 26 O. S., 618, affirmed by the Supreme Court of the United States; 100 U. S. 548, 25 Law Ed. 710.

So far as appears, the deed here under consideration, given to the Village of Oak Harbor in 1876, contains no words of perpetuity other than the word

"forever". This is not material, however, in the light of the authorities, and does not in and of itself serve to limit the estate to anything less than a fee simple estate, the deed being a deed to a corporation. It is stated in Volume 2 of Blackstone's Commentaries, Page 109, that it is not necessary to a grant in fee simple of lands to a corporation aggregate, that the word "successors" be used, though such word is usually used. Strictly speaking, the failure to use the word "successors" or some other equivalent word of perpetuity, limits an estate granted to a life estate; yet, as a corporation never dies, such estate for life is perpetual, or equivalent to a fee simple, and therefore the law allows it to be one. The rule thus stated has been recognized by the authorities since it was originally stated by Blackstone.

Kent's Commentaries, Vol. 4, Page 7.

Tiffany on Real Property, 2nd Edition, Vol. 1, page 46.

Pittsburg C. C. & St. L. R. R. Co. vs. *Bosworth,* 46 O. S. 81; 2 L. R. A. 199.

Overseers of the Poor vs. *Sears,* 22 *Pickerington* 122.

Wilkes Barre vs. *Wyoming Historical Society;* 134 Pa. 616.

Halifax Cong. Society vs. *Stark,* 34 Vt. 243.

There is a clear distinction between an estate upon condition, one involving a conditional limitation or a base or qualified or determinable fee, and one created by an instrument which contains a mere declaration of purpose said to be a covenant rather than a condition. The distinction between the first two is stated by Washburn in his work on Real Property, Sections 164 and 165, as follows:

> "Base, qualified or determinable fees * * * embrace all fees which are liable to be determined by some act or event expressed in their limitations to circumscribe their continuance, or inferred by law as bounding their extent * * *
>
> The estate itself is now denominated 'a conditional limitation', as distinguished from an estate upon condition, the estate in one case determining ipso facto by the happening of the event by which its limitation is measured; in the other, though liable to be defeated, not being in fact determined until he who has a right to avail himself of the condition, enters and determines the estate."

A grant to A, provided she continues unmarried, is said to be an estate upon condition, while a grant to A so long as she continues unmarried, has been generally regarded as a conditional limitation. For an illustration of a deed involving estates upon conditional limitation, called by Blackstone "base or qualified fees" and usually spoken of in modern legal literature as "determinable fees", see *Lessee of Sperry* vs. *Pond,* 5 Ohio 388. See also *Phillips* vs. *Board of Education,* 12 O. App. 456 and In Re Copps Chapel Methodist

Church, 120 O. S. 309. In the latter case, in the majority opinion, the Sperry case is distinguished and perhaps somewhat modified.

A mere recital in a deed of a declaration of purpose for which the conveyance is made, in the absence of an expressed intention otherwise or a clause providing for forfeiture or re-entry by the grantor if the purpose be not carried out, will generally be construed as a covenant rather than a condition. Courts are loath to engraft conditions on estates if by reasonable construction conveyances may be said to contain covenants rather than conditions. As stated by Washburn in his work on Real Property, Sixth Edition, Section 938:

> "Among the forms of expression which imply a condition in a grant, the writers give the following: 'on condition' 'provided always' 'if it shall so happen' or 'so that he the grantee pay, etc., within a specified time;' and grants made upon any of these terms vest a conditional estate in the grantee. And it is said other words make a condition, if there be added a conclusion with a clause of re-entry, or without such clause, if they declare that, if the feoffee does or does not do such an act, his estate shall cease or be void. If a covenant be followed by a clause of forfeiture, and it is broken, it will be construed to be a condition. But courts always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so."

In Thompson on Real Property, Section 1990, it is said:

> "A declaration of the purpose for which a conveyance is made, or for which the granted land is to be used, does not render the grant conditional. Thus a grant of land 'for a burying place forever' 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."

In *May* vs. *Board of Education,* 12 O. A. 456, it is said:

> "Lands deeded to a board of education to be used for school purposes, with an express condition of reverter upon abandonment of such use revert to the grantor or his heirs."

Words in a deed directing the use to be made of the premises conveyed, not followed by words of forfeiture or right of re-entry in the event some other use of the property is made, have been generally held by the courts of Ohio to not engraft a condition on the estate conveyed. Thus, in *Taylor* vs. *Binford,* 37 O. S. 262, it is held as stated in the syllabus:

"C, being the owner of land, conveyed it, for a valuable consideration, to a township board of education, its successors and assigns for the use of school purposes only. Afterward the board, wishing to change the schoolhouse site, sold the land at public outcry to T.C., having conveyed to B., entered- - -under his permission- - -as upon conditions broken. In an action of trespass by T. against C.: HELD, that the entry of C. was unlawful, the sale to T. not being in violation of the terms of the grant to the board of education by which the estate was expressly made assignable."

In *Village of Ashland* vs. *Greiner et al.,* 58 O. S. 67, a similar conclusion was reached. To the same effect is *Larwell et al* vs. *Farrelly,* 8 O. A. 356; *Waterson* vs. *Ury et al.,* 3 C. D. 171; *Methodist Protestant Church of Cincinnati* vs. *Laws et al.,* 4 C. D. 562. See also 44 L. R. A. 1228 n; 48 A. L. R. 1112; 47 A. L. R. 1172."

Deeds containing covenants similar to the one in the deed here under consideration, have been considered by former attorneys general. In an opinion, which will be found in the Opinions of the Attorney General for 1928 at page 2984, it was held:

Syllabus 2:

"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."

Again in 1931 a similar question was considered by this office and it was held in an opinion, which will be found in the reported opinions of the Attorney General for 1931 at page 100:

"Where lands are conveyed to a Board of Education of a school district by a general warranty deed for a valuable consideration, recited in such deed 'in trust for school purposes forever', the title to such land does not revert to the grantor or his heirs upon the abandonment of such lands for school purposes, in the absence from said deed of appropriate words of forfeiture or re-entry."

I am of the opinion that the clause in the deed to the Village of Oak Harbor, given by the Kraemers, whereby it is recited that the lands conveyed are for park or public square or public building purposes, is nothing more than a covenant and cannot be construed as a condition, and if the deed contains no

further condition with respect to the matter and does not provide for forfeiture or re-entry by the grantees if the lands in question are abandoned for the purposes mentioned, the Village of Oak Harbor may grant a fee simple title to said lands to the Board of Education of the Oak Harbor School District, and the same may be done without competitive bidding and for a nominal consideration.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4483.

APPROVAL, NOTES OF PIERCE TOWNSHIP RURAL SCHOOL DISTRICT, CLERMONT COUNTY, OHIO, $2,288.00.

COLUMBUS, OHIO, July 31, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4484.

APPROVAL, PAPERS IN CONNECTION WITH CONVERSION OF THE KNOX SAVINGS AND LOAN ASSOCIATION, MT. VERNON, OHIO, INTO FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF MT. VERNON.

COLUMBUS, OHIO, August 1, 1935.

HON. WILLIAM H. KROEGER, *Superintendent of Building and Loan Associations of Ohio, Columbus, Ohio.*

DEAR SIR:—I have examined the various papers submitted by you in connection with the conversion of The Knox Savings and Loan Association, Mt. Vernon, Ohio, into First Federal Savings and Loan Association of Mt. Vernon and find the papers submitted and the proceedings of said The Knox Savings and Loan Association as disclosed thereby, to be regular and in conformity with the provisions of section 9660-2 of the General Code.

All papers, including two copies of the charter issued to the said First Federal Savings and Loan Association of Mt. Vernon, are returned herewith to be filed by you as part of the permanent records of your department, except one copy of the charter which the law provides shall be filed by