2608.

TITLE TO LANDS OWNED BY "THE TRUSTEES OF THE OHIO ASYLUM FOR EDUCATING THE DEAF AND DUMB"—FORFEITURE—REVERSIONARY CLAUSE—OPINION ATTORNEY GENERAL, 1888-1900, VOLUME 4, PAGE 807, OVERRULED.

SYLLABUS:

Title to lands owned by "The Trustees of the Ohio Asylum for educating the deaf and dumb" discussed. (Opinion of Attorney General found in Volume 4, *Opinions of the Attorney General,* 1888-1900, *page* 807, *overruled.)*

Columbus, Ohio, August 2, 1940.

Hon. E. R. Abernathy, Superintendent, State School for the Deaf, Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion, with which you enclose certified copies of certain deeds recorded in volume 7, pages 440, 441 and 442, and in Volume 108, page 559, also two deeds recorded in Volume 91, pages 357 and 358 of Franklin County Deed Records, the first three of which deeds, you inform me, are concerned with the land upon which the State School for the Deaf is now located, and the last three of which, you inform me, describe the land upon which is located the School for the Blind. You ask for my opinion as to the title to these properties and in your request you state:

> "Specifically, I wish to be informed whether or not these properties are held in fee simple, and whether or not such properties can be sold or conveyed by legislative enactment or otherwise. Also, I wish to be informed whether or not these properties can legally be directly used by the State of Ohio for purposes other than for a school for the deaf."

In determining the quantum of an estate conveyed by a deed, it is necessary to refer not only to the granting clause but also to the habendum and redendum clause and covenants of warranty and seizin.

The granting clause in the first three of such mentioned deeds reads:

> " * * * in consideration of the sum of one hundred dollars to us in hand paid the receipt whereof is hereby acknowledged have given, granted, bargained, sold, released, and conveyed, and do by these presents give, grant, bargain, sell, release, convey, and confirm unto the Trustees of the Ohio Asylum for educating the deaf and Dumb and unto their successors forever, * * * "

The granting clause of the fourth mentioned deed reads:

> " * * * in consideration of the sum of Three Thousand Seven Hundred and Fifty Dollars to them paid by the State of Ohio the receipt whereof is hereby acknowledged do hereby grant bargain sell and convey to the said State of Ohio for the use and occupation of the Institution for the Education of the Deaf and Dumb forever * * * "

The fifth of such deeds contains the following granting clause:

> " * * * in consideration of the sum of Twenty-four Hundred Dollars, to him in hand paid by Samuel Galloway, Kent Jarvis & Henry F. Booth, Trustees of the Ohio Institution for the Education of Deaf and Dumb at the City of Columbus, State of Ohio and County of Franklin & their Successors have Bargained and Sold, and do hereby GRANT, BARGAIN, SELL AND CONVEY unto the said Samuel Galloway, Kent Jarvis & Henry F. Booth, Trustees as aforesaid and unto their successors and assigns, forever, * * * "

The sixth of such deeds has the same granting clause with the execption of the rental consideration, which is stated to be "Thirty-six Hundred Dollars."

The habendum and redendum clause, as well as the covenants of seizin and warranty, in the first three of such deeds is to "said the Trustees of the Ohio Asylum for educating the Deaf and Dumb and unto their successors forever." It is to be noted that these deeds were dated February 14, 1829.

It may be pertinent at this point to refer to the Act which created your institution. This Act was enacted January 30, 1827, and is found in 25 O. L., 87. The first two sections of such Act read:

> "Sec. 1. *Be it enacted by the General Assembly of the state of Ohio,* That there shall be, and hereby is established, an Asylum for educating deaf and dumb persons, in this state, and that Gustavus Swan, Esq. and the Rev. James Hoge, of Franklin county; Thomas Ewing, Esq. of Fairfield county; Rev. William Graham, of Ross county; the Rev. William Burton, of Pickaway county; John James, Esq. of Champaign county; and Thomas D. Webb, Esq. of Trumbull county; and Samson Mason, Esq. of the county of Clark, and their successors in office, be, and they are hereby, constituted a body corporate and politic, with perpetual succession, by the name and style of 'The trustees of the Ohio Asylum, for educating the deaf and dumb,' in which name they shall be capable of contracting and being contracted with, of sueing and being sued, of pleading and being impleaded, of answering and being answered unto, of defending and being defended, in any court of competent jurisiction; and they shall have a common seal which they may break or alter at pleasure, and they shall have power to make, ordain, and enforce such by-laws and ordinances for the general government and regulation of the said Asylum, as they or a majority of them may deem expedient: *Provided,* Such by-laws and ordinances be not incompatible with the constitution and laws of the United States or of this state."
>
> "Sec. 2. That the said trustees and their successors in office, be, and they are hereby, authorized to receive by gift, grant, devise, legacy or otherwise, moneys, lands and other property, and the same to hold, use and apply, to and for the education of the deaf and dumb within this state, in such manner as they may deem most ben-

> eficial for that purpose: *Provided,* That the clear annual income of such moneys, lands and other property, does not exceed thirty thousand dollars: *And provided also,* That no part thereof shall be applied to any other purpose than that of furnishing the necessary buildings, accommodations and teachers, for such deaf and dumb persons, and for maintaining and educating them."

You will note that in such Act the official corporate name of your institution was "The trustees of the Ohio Asylum, for educating the deaf and dumb." Section 9 of such Act further provides:

> "That the body hereby incorporated, shall be and forever remain under the control and direction of the General Assembly, who may, from time to time and at all times, alter, modify, limit, extend or repeal the rights, privileges and franchises hereby created and conferred."

The fourth of such deeds is dated May 11, 1872. The habendum and redendum clause, as well as the covenants of warranty and seizin therein, run to the State of Ohio "for the uses aforesaid forever." Such clauses and covenants in the fifth and sixth mentioned deeds are similar to those in the first three mentioned deeds. Such deeds were dated May 13, 1867.

On March 3, 1831, the legislature enacted an Act (29 O. L., 427), the first section of which reads:

> *"Be it enacted by the General Assembly of the State of Ohio,* That the trustees of the Ohio asylum for the education of the deaf and dumb, be, and they are hereby, created a corporation, by the name of 'The Trustees of Ohio Asylum for Educating the Deaf and Dumb', with all the powers usually incident to such corporations; and by that name, may have, hold and possess property, real, personal and mixed: *Provided,* The annual income thereof shall not exceed twenty thousand dollars: *And provided also,* The same shall only be employed and used in and about the preparations for, and in the education of, (the) deaf and dumb."

This Act repealed the former Act, mentioned above, and superseded it. I have examined amendments of this law in 32 O. L., 39; 35 O. L., 118; 42 O. L., 8; 44 O. L., 111; 50 O. L., 194; 52 O. L., 71; 52 O. L., 106; 53 O. L., 96; 53 O. L., 196; 59 O. L., 93; 61 O. L., 105; 63 O. L., 116; 64 O. L., 124; 70 O. L., 15; 70 O. L., 20; and 75 O. L., 507, but have failed to find where the legislature had changed the corporate name of your institution prior to the dates of the various deeds, copies of which you have enclosed, although you informed me that such name had been changed. It would, therefore, seem that the holder of the title to the property con-

veyed by the deeds referred to above as the first, second, third, fifth and sixth, was to the corporation "The Trustees of the Ohio Asylum for educating the Deaf and Dumb".

From your discussion, I have formed the impression that you have some suspicion that the grantors in the three deeds first above mentioned may have some right of reversion or reverter. In considering the effect of the language contained in such deeds, we must keep in mind that we must construe such language in the light of the then existing laws; that Section 8510-1, General Code, had not then been enacted. At the time of the execution and delivery of such deeds, there was no presumption that the grantor intended to create a fee simple estate. It therefore becomes necessary to determine whether the language contained in such deeds was sufficient to divest the grantor of all interest which he possessed in the lands at the time of the conveyance.

It is to be noted that the language purports to convey to the corporation "The Trustees of the Ohio Asylum for educating the Deaf and Dumb" and unto their successors forever. No limitations of any kind are contained in the other clauses or covenants of the deed upon the quantum of estate conveyed. At that time the usual method of conveying an estate in fee simple to an individual was by the use of the language "to ——— and his heirs forever" or "to ——— and his heirs and assigns forever." Louis v. Baldwin, 11 Ohio, 352. By reason of the rule in Shelley's Case (1 Coke, 104), it was mandatory that the word "heirs" be used in order to convey a fee simple estate. At the time of the adoption of such rule, corporations were few, if known. Such rule was never applied to deeds to corporations; that is, in the case of deeds to corporations, if the estate was conveyed to a corporation absolutely and perpetually or without any limitation as to the duration of the estate, a fee simple estate was created, and whether or not the conveyance was to the corporation, "its successors and assigns." See Railway v. Bosworth, 46 O. S., 81. Words of perpetuity were not deemed necessary to convey a fee simple estate to a corporation, which had perpetual existence. 2 Blackstone Commentaries, 109; Overseers of the Poor v. Sears, 22 Pick, (Mass.), 122.

It therefore seems that the language in the deeds was sufficient at the time of the delivery thereof to convey a fee simple estate to the corporation.

You have called my attention to an opinion of one of my predecessors in office, which is found in Opinions of the Attorney General, 1888-1900,

Vol. 4, page 801, wherein, under date of January 31, 1898, such Attorney General construed the language contained in the habendum clause and covenants of warranty and seizin

> "Unto the said trustees of the Ohio Asylum for Educating the Deaf and Dumb, and unto their successors in office forever."

as conveying an estate upon an express trust. He reasons:

> "It will be observed in each case that the term 'trustees' is used for a specific purpose."

With this statement I must agree, for the word "trustees" is the first word of the corporate name of the institution which is recited to be the purchaser and of the grantee; however, I am unable to follow his reasoning that if the word "trustee" happens to be a part of a corporate name, such fact would indicate that a conveyance to the corporation under its statutory name would engraft a trust upon the deed. Nor am I able, in view of the holding of the court in Railway v. Bosworth, supra, which followed the rulings of other courts as far back as Blackstone's time, to force myself to be of the opinion that the failure to use the term "and assigns" would indicate that a fee simple estate was not conveyed.

However, even if my predecessor was correct in such deduction that the failure to use the phrase "and assigns" limited the estate conveyed, its greatest effect could be to restrict the grantees in the deed from conveying the estate conveyed to them—which would be a fee simple estate. If his deduction is valid, then the effect of the use of such words would be to restrict the alienation of the fee conveyed by the deed. Such a restrictive provision is void when contained in a deed conveying a fee. Anderson v. Gary, 36 O. S., 506; Hobbs v. Smith, 15 O. S., 419; Green Bay and Mississippi Canal Company v. Hewett, 55 Wis., 96; Barter v. Bowyer, 19 O. S., 490; Persinger v. Britton, 10 O. App., 164; Toledo Loan Company v. Larkin, 1 O. C. C. (N. S.), 473, 25 O. C. C. (N. S.), 209.

It is thus evident from the deeds submitted that the grantors therein intended to convey the entire estate which they possessed at the time of the execution of the deeds and that at the time the first three mentioned deeds were executed there was no limitation upon the power of the corporation to receive the title. I am not unmindful of the language contained in Section 2 of the Act of January 30, 1827, quoted above, wherein the legislature granted to the trustees of the institution the authority to accept title to lands

by means of gift, grant, devise, legacy or otherwise, and to hold, use and apply the same to and for the education of the deaf and dumb within the State. However, when we read the Act which created the corporation, we find that such is the sole purpose of the corporation. Prior to 1851, the legislature was not limited in the creation of the corporations to incorporating them by means of general laws, but in fact did create practically all of the corporations by the enactment of a special act which became the charter of the corporation. It is fundamental that a corporation has such powers and such only as are granted it by the express language of its charter which is composed of its articles of incorporation and the statute under authority of which it is created. Such Section 2 above quoted grants to the corporation the right to receive title to lands by grant or otherwise and to use the same for the corporate purposes for which the corporation was created. It is therefore my opinion that such first three mentioned deeds conveyed the absolute estate or fee simple title to the corporation known as "The Trustees of the Ohio Asylum for Educating the Deaf and Dumb"; that such corporation had the full right and power to sell or otherwise dispose of such properties in the furtherance of its corporate purposes; and that upon delivery of such deeds the grantors had no interest whatsoever in such properties.

Similar reasoning with reference to the fifth and sixth mentioned deeds would lead to a like conclusion. However, you will note from the granting clause in the fourth mentioned deed, that recorded in Volume 108, page 559, that the grantee is the State of Ohio for the use and occupation of the institution for the education of the deaf and dumb. Such language at common law was that which would create what was known as a use. However, since the statute of uses has never been in effect in Ohio (Helfenstine v. Gerrard, 7 Ohio, 275), it could not be said that such deed under Ohio law created a use. Such language in those states wherein the statute of uses was not adopted as part of the common law has been held to create a trust estate in the grantee (see Tiffany Real Property, Section 91); that is, the trustee under such a conveyance is the holder of the legal title but has no other duties to perform than to hold the legal title in trust for the sole use and benefit of the beneficiary, or, in other words, holds such title on what is technically known as an inactive or dry trust. Since such deed conveys the fee simple estate to the State of Ohio without restriction for such purposes, it is apparent that the State of Ohio could convey such title when, as and

if it should become necessary in the furtherance of the trust and that no right of reverter or reversion remains with the grantor.

There has been considerable litigation concerning language in a deed which conveys property for a specified purpose. The majority of the jurisdictions, including Ohio, have taken the position that where by deed of purchase lands are conveyed for a specific purpose and in such deed there is contained no conditions of forfeiture or reversionary clauses, such deeds convey the absolute title to the grantee and that, if the lands cease to be used for the purpose specified in the deed, such neglect or failure to so use the property does not cause a forfeiture of estate. In re Copps Chapel Methodist Episcopal Church, 120 O. S., 309; Babb v. City of Cincinnati, 55 O. S., 637; Ury v. Watterson, Trustee, 52 O. S., 637; Village of Ashland v. Griner, 58 O. S., 67; Cleveland Terminal and Valley Railroad Company v. State, ex rel., 85 O. S., 251; City of Cleveland v. Herron, 102 O. S., 218; Sperry v. Pond, 5 Ohio, 387. Such courts take the position that unless the deed contains a right of reentry upon non-performance or non-use for the purpose specified, such a deed does not create an estate upon condition, but that the language specifying the purpose for which the conveyance is made is at most a covenant which, if enforceable, must be enforced by means of an injunction.

It is therefore my opinion that the first, second, third, fifth and sixth deeds above mentioned conveyed to your institution a good and indefeasible estate in fee simple with full right to sell and convey title to the premises therein described when necessary or convenient for the corporate purposes of the state institution for the education of the deaf and dumb, and that the State of Ohio received a good and indefeasible estate in fee simple to the premises described in the fourth deed above mentioned in trust for the benefit of such institution, and that the State of Ohio has the right to convey good title to such premises when in so doing it is furthering the purposes of such state agency.

In view of the foregoing, it becomes necessary that I overrule the opinion of my predecessor rendered under date of January 31, 1898, found in Volume 4, Opinions of the Attorney General, 1888-1900, page 807.

Respectfully,

THOMAS J. HERBERT,
Attorney General.