I may also call your attention to Section 8623-134, General Code, also a part of the general corporation act, as follows:

> "A corporation heretofore formed to buy or sell real estate may at any time during its existence amend its articles so as to provide for perpetual succession, by a vote of three-fourths of all shares voted at a meeting of its shareholders called for that purpose, and upon filing with the secretary of state a certificate signed by its president or a vice-president, and its secretary or an assistant secretary, setting forth the amendment so made, such corporation shall have perpetual succession."

It is to be observed that a corporation formed to buy or sell real estate may, under the terms of this section, provide for perpetual succession *"at any time during its existence"*. The conclusion is obvious that the action must be taken during the existence of the corporation and not after it has ceased to exist.

You are accordingly advised that there is no authority to receive and file the certificate presented to you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3099.

SCHOOL PROPERTY—WHEN AND HOW SOLD WHEN SCHOOL SUSPENDED BY CENTRALIZATION—DEED OF CONVEYANCE TO BOARD OF EDUCATION—REVERSIONS—SPECIFIC DEEDS CONSTRUED.

SYLLABUS:

1. *When centralization of schools has been authorized in a school district, all schoolhouses and school lots owned by the board and not utilized in the plan of centralization adopted by the board may be sold at once, without waiting for the four-year period spoken of in Section 7730-1, General Code, to elapse.*

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.*

3. *Lands deeded to a board of education to be used for school purposes, with an express condition of reverter or a reserved right of re-entry by the grantor upon abandonment of such use, revert to the grantor or his heirs.*

4. *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.*

5. *The word "assigns" is without legal effect in a limitation to "one and his heirs" or to a corporation "and its successors," although it is customary to add the words "and assigns" or "and assigns forever."*

6. *Under the deeds considered in this opinion, the grantees, the Board of Education of Fairfield Township, Butler County, Ohio, may sell and convey a fee simple title to the premises therein described.*

COLUMBUS, OHIO, January 5, 1929.

HON. JOHN P. ROGERS, *Prosecuting Attorney, Hamilton, Ohio.*

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

> "The Board of Education of Fairfield Township, has requested that I obtain from you an opinion based on the following facts. I have rendered them my opinion in this matter but they also desire to have an opinion from the Attorney General on file. The facts are as follows:
>
> The voters of Fairfield Township, having determined to build a centralized school, are going to abandon the old district school houses next summer and the Board of Education of Fairfield Township desire to know whether they have the right to sell the schoolhouse and lot situated in Section 21, Town 2, Range 3 in said township under the following statement of facts.
>
> Robert Kennedy deeded a half acre comprising one-half of the present school lot to the Board of Education of Fairfield Township on December 6, 1855, which deed is recorded in Volume 26 at page 481 of the Butler County, Ohio, Deed Records, and in which deed the granting clause reads:
> 'grant, bargain, sell and convey to the Board of Education of Fairfield Township, Butler County, Ohio, and to their successors and assigns forever.'
>
> The habendum clause reads:
>
> 'To have and to hold to the only proper use of the said Board of Education of Fairfield Township, Butler County, Ohio, their successors, heirs and assigns for the use of said district school house purposes and no other use or purpose whatever.'
>
> The other half of the present lot was deeded by Robert Kennedy to the Board of Education on March 25, 1869, which deed is recorded in Volume 53 at page 367 of the Butler County, Ohio, Deed Records, and in this deed the granting clause reads:
>
> 'Bargain, sell, grant and convey to said Board of Education of Fairfield Township, Butler County, Ohio, their successors forever.'
> and the habendum clause reads:
>
> 'To have and to hold to the only proper use of said Board of Education of Fairfield Township, Butler County, Ohio, their successors.'
>
> Do these two deeds, or either of them, convey a fee simple title so that the board may sell this property at public auction and convey a clear fee simple title, or does this property, or either half of it, revert to the heirs of Robert Kennedy when the property ceases to be used for school purposes? This is valuable suburban property adjacent to the city of Hamilton and it is, therefore, important that the school board be advised definitely as to their rights under these circumstances."

I am advised that the recitals in the first deed mentioned, the deed of Robert Kennedy to the Board of Education of Fairfield Township dated December 6, 1855, showed the consideration for the conveyance to have been "One dollar and other valuable consideration." In the second deed, dated March 25, 1869, the consideration mentioned is $112.50.

Your inquiry involves consideration of two questions:

First, does the construction of a centralized school building to house all the pupils in a school district, and the subsequent assignment of the pupils to attend the school to be conducted in the new building, amount to such an abandonment of the school properties which had previously served the school purposes of the district, as to permit

the board of education to sell the school properties not to be thereafter used, or work a forfeiture of the schoolhouse lots, as the case may be.

Second, what is the quality of the estates held by the board of education in the lots in question? Otherwise stated, is the title of the board of educaton to the lots in question such that it terminates as upon a condition subsequent when they are no longer used for school purposes, and do they thereupon revert to the board's immediate predecessor in title or does the board hold therein estates in fee simple absolute, such that upon the sale of the lots the board may convey a fee simple title thereto?

As pertinent to the consideration of the first question, it becomes necessary to note the provisions of Sections 7730 and 7730-1, General Code. By force of the terms of Section 7730, General Code, any school in a school district may be suspended and the pupils residing in the vicinity of such suspended school assigned to other schools. This may be accomplished in either of two ways. The local board of education may on its own initiative, because of disadvantageous location or for any other cause, suspend a school either temporarily or permanently. Whenever the average daily attendance of any school in a school district for the preceding year has been below ten, the county board of education may before the first day of August of any year direct the suspension of such school and thereupon the board of education of the village or rural school district shall suspend the school. It further provides:

> "Upon petition filed with a local board of education between May 1 and August 1 of any year signed by the parents or guardians of twelve children between seven and fifteen years of age, living in the district and enrolled in school, whose residences are nearer to a certain school which has been suspended than to any other school of the district, asking that such suspended school be reopened, the local board of education shall reopen such school for the ensuing school year; provided there is a suitable school building in the territory of such suspended school as it existed prior to suspension."

Section 7730-1, General Code, provides in part as follows:

> "In order to protect the rights of the petitioners mentioned in Section 7730 where a school has been suspended through either or any of the proceedings mentioned in such section, the school building and real estate located in the territory of such suspended school and in which property the board of education has legal title, shall not be sold by the board of education of the district until after four years from such date of suspension of said school unless the said building has been condemned for school use by the Director of Industrial Relations of Ohio; * * *
>
> In any case failure to use the school building for school purposes within the four years following the resolution of suspension of such school shall be considered a legal abandonment of such school and the school building and real estate in which the board of education has legal title may be disposed of by such board of education according to law."

In 1922, the Common Pleas Court of Seneca County had before it the precise question with which we are here concerned. See *Feasel* vs. *The Board of Education,* 24 O. N. P. N. S. 329. In the Feasel case it was held that centralization of schools did not in and of itself suspend or abandon any particular schools for the reason that even after centralization had been directed by vote of the people, as provided by Section 4726, General Code, the board of education might in its discretion effect that centralization by the use of one advantageously located school building or by the use of one or more school buildings. If, however, the board adopted a plan of centralization,

which plan dispensed with the use of certain buildings theretofore used, the buildings and lots of land upon which said buildings stand, not utilized in the plan of centralization, might lawfully be disposed of by sale at any time thereafter before the four year period had elapsed. The syllabus of the Feasel case reads as follows:

> "Centralization does not of its own force suspend a school, and where none of the schools of the centralized district have been suspended in the manner provided by Section 7730, and the four year period provided by statute has not elapsed action does not lie to prevent the sale of the properties in disuse."

This case was not carried higher, and seems to have been generally accepted as having been correctly decided.

I am therefore of the opinion that so far as the question of abandonment is concerned, the Board of Education of Fairfield Township need not wait for four years after the date of centralization to dispose of the schoolhouses and schoolhouse lots formerly used by the board for school purposes but not now needed under its plan of centralization. If it should be determined that the board is possessed of a fee simple title to the lots in question, with power of alienation, and it is not desired to use these lots under the plan of centralization adopted by the board, sales of the lots may be effected at once, after it is determined that they are to be no longer used for school purposes in carrying out the board's plan of centralization.

This brings us to a consideration of the second question suggested by your inquiry. The deeds in question purport to convey to the grantees therein named certain lands in Fairfield Township, Butler County, Ohio. The first deed above mentioned contains a covenant as to the use to which the lands are to be put by the grantee in these words: "for the use of said district schoolhouse purposes, and no other use or purpose whatever." The other deed conveys to "the only proper use of said Board of Education of Fairfield Township, Butler County, Ohio, their successors." This latter deed does not contain the words "assigns" or "assigns forever" as is customary in deeds of this kind. Neither of the deeds contains any words of forfeiture in the event the lands are put to some other use by the immediate grantee or in case the lands are sold or assigned; nor are there words contained in the deeds purporting to reserve to the grantors the right to re-enter and take possession of the premises in the event the grantees put the property to some other use than "school purposes" or sell or assign the property. Both expressly state that the conveyance is made upon a valuable consideration, and contain words of perpetuity, to-wit: "Their successors and assigns" in the one case, and "their successors" in the other. In short, each deed conveys a fee simple title, unless the words: "For the use of said district schoolhouse purposes and no other use or purpose whatever" in the first deed may be construed as a condition subsequent or conditional limitation, upon the happening of which or upon the fulfillment of the limitation the estate so conveyed is caused to terminate.

There is a distinction between a conditional limitation and an estate upon condition. This distinction is stated in Washburn 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 limitation 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."

Illustrations by Washburn, Section 167:

"so long as St. Paul's shall stand."
"until a minor shall attain the age of twenty-one years."
"A grant to a canal corporation as long as used for a canal."

A grant to "A", provided she continue unmarried, is said to be an estate upon condition, while a grant to "A" so long as she continue unmarried, is a conditional limitation. A further illustration of a conditional limitation in a deed, called by Blackstone "a base or qualified fee", and generally denominated in modern judicial literature as "a determinable fee", is the deed which was under consideration in the case of *Phillips* vs. *Board of Education,* 12 O. A. 456-459. The granting clause in this deed was "unto the said board of education of Pickaway Township, its successors and assigns, as long as they are used for schoolhouse purposes." The habendum clause was: "To have and to hold said premises with the appurtenances unto the said board of education, its successors and assigns, as long as the same is used for schoolhouse purposes." The court said:

"We think the form of the Phillips deed is a conditional limitation and that the title taken under the deed is what is called by Blackstone: 'A base or qualified fee.' * * * We are therefore of the opinion that the title ended when the board of education abandoned the use of the site for schoolhouse and school purposes and that the heirs of the grantor then acquired the right to enter and possess the property."

See also *Lessee of Sperry* vs. *Pond,* 5 O. 388.

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. 1228n; 48 A. L. R. 1112; 47 A. L. R. 1172. A similar holding was made by a former Attorney General in an Opinion reported in Opinions of the Attorney General for 1920, Volume 2, page 1206.

In the second deed noted in your inquiry, conveyance is made to the board of education and its successors, instead of "successors and assigns" or "successors and assigns forever" as in the customary form. In Thompson on Real Estate, Section 3345, it is said:

"The word 'assigns' is without legal effect in a limitation to 'one and his heirs' though it is customary to add the words 'and assigns forever'. These words add nothing to the legal effect of the instrument, and are in fact superfluous. The use of the word simply imports an intention to give the grantee the power to convey the property. A grant to one and his heirs carries with it the estate to his assigns by operation of law, and the use of the words 'assigns' or 'assigns forever' has no effect to convey land or enlarge the grant. A fee may pass to the grantee without the use of the word 'assigns'."

The same is true in my opinion, when a conveyance is made to a corporation and its successors. A grant to a corporation and its successors carries with it the estate of the grantor to its assigns. The use of the words "assigns" or "assigns forever" has no effect so far as enlarging the estate conveyed is concerned. A fee may pass without the use of the words "assigns" or "assigns forever."

I am therefore of the opinion in specific answer to your question, that the Board of Education of Fairfield Township, Butler County, Ohio, is possessed of a fee simple title in both the lots mentioned in your inquiry, and has full power to sell and convey a fee simple title to the same as soon as it is determined that they will not be needed for school purposes under the plan of centralization adopted by the board in effecting the centralization of the schools of the district as authorized by vote of the people.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3100.

COUNTY SURVEYOR—EMPLOYMENT OF ASSISTANTS DISCUSSED.

SYLLABUS:

1. *County surveyors are authorized by Section 2981, General Code, to appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices.*

COLUMBUS, OHIO, January 5, 1929.

HON. H. E. CULBERTSON, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—I am in receipt of your recent communication which reads as follows:

> "Am writing you in regard to the practical meaning of Section 2411 of the General Code of Ohio, upon request of our Board of County Commissioners.
>
> Heretofore, the County Surveyor has been employing engineers, rod-men, inspectors, road superintendent, clerks, and whoever he desired to hire without any consultation with the County Commissioners whatever. We desire to know whether Section 2411 gives the County Commissioners the power to hire the engineers, rod-men, road superintendent, inspectors and clerks of the County Surveyor's office, or whether Section 2411 simply means that, upon request for extra services in cases of emergency, the Commissioners do this.
>
> In looking under the heading of 'County Surveyors', I fail to find any Section authorizing the Surveyor to appoint these different members of his official family and so it looked to me as if the County Commissioners had this power, although they have never exercised it in this county."

Section 2411, General Code, concerning which you inquire, reads as follows:

> "When the services of an engineer are required with respect to roads, turnpikes, ditches or bridges, or with respect to any other matter, and when, on account of the amount of work to be performed, the board deems it necessary, upon the written request of the county surveyor, the board may employ a competent engineer and as many assistant engineers, rod-men and inspectors as may be needed, and shall furnish suitable offices, necessary books, stationery, instruments and implements for the proper performance of the duties imposed on them by such board."