July 11, 1949.

MR. C. P. WILBER,
*State Forester,*
*Division of Forestry,*
*Dept. of Conservation and Economic Development,*
State House Annex.

FORMAL OPINION—1949. No. 74.

DEAR SIR:

Your letter of June 30, 1949, requesting an opinion as to whether your department has violated any agreement with Mr. Stephens, by authorizing use of a portion of the area by the National Guard, is herewith acknowledged.

The facts in question are as follows:

On November 12, 1936, the Stephens family made an offer to the State of New Jersey of 236 acres of land to be used for park recreation and conservation purposes. This acreage consisted of five tracts of land in the Township of Mt. Olive, Morris County, and partly in the Town of Hackettstown, Warren County. The State, through the proper authorities, advised the Stephens family that it could only accept a deed which had no conditions or restrictions or reservations, which was in pursuance of the State's policy. Accordingly, on May 20, 1937, a deed was executed by the Stephens family to the State of New Jersey completely free from any conditions or restrictions.

On January 9, 1940, an agreement was entered into between the Board of Conservation and Development and the Stephens family whereby the Board aforesaid recited the conveyance of 236 acres for a park known as Stephens State Park. In this instrument it was agreed that the Stephens family could use the dwelling house located on said premises during their lives and during the lifetime of the daughter of one of the donors. No restrictions or limitations were imposed by this agreement which was made gratuitously and without consideration. No restrictions were imposed upon the grant heretofore made.

Some time ago, at the request of the State Department of Defense, Commissioner Erdman, for the Department of Conservation and Economic Development, executed an agreement with the Department of Defense, authorizing the use of a portion of the area of Stephens State Park for National Guard use for the erection of an armory, equipment building and a tank training course. The construction of equipment building was begun before any protest was made by Mr. Stephens, and is now well under way. This building is being erected with Federal funds. To the foregoing, the Stephens family has objected, contending the use for the National Guard was in violation of park, recreation and conservation purposes.

The question presented is, has there been a violation of any agreement between the Stephens family and the State?

My reply is that the State has not violated any agreement with the Stephens family. Any preliminary discussion prior to the making of the deed became merged into the deed itself and as the deed contains no use restrictions or other covenant, no limitation exists. Prior to the acceptance of the gift, the grantors were advised that the deed would not be accepted if it contained any use restrictions or limitations, and accordingly an unconditional grant was made as appears by the deed itself. Even

if it be inferred that preliminary letters amounted to a contract, all of the conditions imposed were superseded by the deed.

In *McKelway* vs. *Seymour,* 29 N. J. L. 321, the Court held:

> "Land conveyed to be used for a certain purpose, and to be forfeited on the cessation of such use, if used for other purposes, is not ground for forfeiture of title, provided it also continues to be used for the purpose specified."

In *Crane* vs. *McMurtrie,* 77 N. J. E. 545, the Court stated:

> "A grantor cannot, by creating practical difficulties after he has made a grant that is free from them, defeat the grant or influence its legal construction."

In *Brownback* vs. *Spangler,* 101 N. J. E. 388, the Court stated:

> "Rights of parties to conveyance are to be determined by deed accepted and not by agreement to convey. The recognized rule is that the acceptance of a deed for land is to be deemed *prima facie* full execution of an executory agreement to convey and thenceforth the agreement becomes void, and the rights of the parties are to be determined by the deed and not by the agreement. The only exceptions to the rule appear to be in cases of covenants which are collateral to the deed and also cases in which the deed would be considered only a part execution of the executing contract."

In *Long* vs. *Hartwell,* 34 N. J. L. 116, the Court stated:

> "Where in a deed there is an absence of covenants against encumbrances, the vendee cannot resort to the contract. . . . In all cases, the deed, when accepted, is presumed to express the ultimate intent of the parties with regard to so much of the contract as it purports to execute."

It is interesting to note that the land conveyed by the Stephens family is and has been used as a park. The portion presently used by the National Guard in no way whatsoever diminishes the grant for park purposes. A study of the land encompassed by the gift shows that the lowest portion bordering on the D. L. & W. Railroad is that which is being used for National Guard purposes. This portion is so located and of such a character that it did not lend itself for development for use of public recreation. The placing of the National Guard in that area did in no way whatsoever eliminate any land from the Stephens Park for recreation as same could not and would not be used for that purpose. On the contrary, the use presently existing is of a tremendous value and protection to the remainder of the park as an added fire protection is being realized. Even at the outset the land in question was considered completely undesirable for recreation purposes and therefor the area was planted up for reforestation; a year or two later fire completely destroyed this area.

The land granted is and has been used as a park and will continue so to be. The presence of the National Guard in the lower undesirable area is without question a desirable asset to the park. The original grant provided for no forfeiture with respect to use of land, and even if it had so provided, the continued use of the land as a park, as well as use by the National Guard, would in no way result in forfeiture to the grantor. See *McKelnay* vs. *Seymour, supra.*

An analysis of R. S. 13:1-1 et seq. shows the powers and duties imposed upon members of the Board of the Department of Conservation and Development. It is incumbent on the Board to make a careful inspection and make surveys of land with respect to development, protection and management, R. S. 13:1-19. It is within the province of the Board when, in its judgment, it deems that the best interests of the State would be served, even to sell or exchange any portion of the land acquired by gift or purchase, R. S. 13:1-23. The Board in its administration of lands or property acquired, has the power to install permanent improvements for the protection, development, use, maintenance thereof . . . R. S. 13:1-24.

It can readily be seen from all of the foregoing that the Department of Conservation and Economic Development has exercised sound discretion in giving the added protection to the park as aforesaid and has faithfully and diligently fulfilled the duties imposed upon it pursuant to the statute made and provided.

From all of the foregoing it is my opinion that your Department has not violated any agreement with the Stephens family by permitting the National Guard to occupy the portion of the premises herein discussed.

Respectfully submitted,

THEODORE D. PARSONS,
*Attorney General,*

By: OSIE M. SILBER,
*Deputy Attorney General.*

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June 23, 1949.

HONORABLE WALTER T. MARGETTS,
*State Treasurer,*
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 75.

DEAR SIR:

You advise that a former patient at the New Jersey State Hospital at Trenton died in that institution on or about November 2, 1931, leaving the sum of approximately $200 on deposit in the institution.

After a year had elapsed following the death of the patient, this sum of money was turned over to the State Treasurer, pursuant to R. S. 30:4-132, which provides substantially that unclaimed personal property of deceased patients shall be held at the institution for a period of a year awaiting claim therefor and failing such claim shall be paid to the State Treasurer.

An administrator had been appointed to handle the estate of the decedent, but this fact seemed to be unknown to the institution officials; otherwise, we presume they would have paid the moneys to him. The original administrator died and a substituted administrator has recently qualified and has made claim upon you for payment to him of this sum of money. The decedent was supported partially at