

CONSERVATION, DIVISION OF: Grantor to not entitled to put reserved orchard land to other uses. RESERVATION IN DEED for orchard, no right to make other uses of land.

January 20, 1937.

Mr. E. P. Wilson,
Assistant State Forester,
Conservation Department, State of Indiana,
Indianapolis, Indiana.

Dear Sir:

I have your letter requesting an opinion concerning a tract of land in Jackson County purchased from Emil Heller, which land is now a part of the Jackson County State Forest.

You state that "Mr. Heller had a peach orchard located reasonably close to our fire tower. During the winters of 1935 and 1936 the trees were killed by the cold weather," and "Mr. Heller is removing these dead trees at the present time and is starting to plant blackberries in the old orchard."

Your request is as follows:

"We would like an opinion from you, first as to whether Mr. Heller has a right to remove the peach trees and use this land for a blackberry patch until his agreement expires, and second is the State entirely within its legal rights to step in and stop Mr. Heller from removing the peach trees and planting blackberries?"

The rights of the parties are controlled by the memorandum agreement of March 17, 1932, subject to which the tract of land was conveyed by the Hellers. This agreement is captioned: "Memorandum as to Reservation of Orchards on lands to which Emil V. Heller has granted option to the State of Indiana this 17th day of March, 1932, specifically described in said option" and contains the following provision:

"The said party (Heller) shall reserve and does hereby reserve the right to the use and control of the portions of said lands described in said option which are now planted to orchard, together with lands bordering said orchard not to exceed 40 feet in width beyond the growing orchard trees except such land as shall be

selected by the party of the First Part (State) for a tower site and parking ground and such other area as may be necessary for other buildings, structures, and improvements.

“The party of the First Part shall also have the right to locate, build, and maintain such roads, structures, and other improvements for use of itself and the public generally through and on this reserved orchard land as they shall deem necessary. Said Second Party shall have the right to replace orchard trees within the acreage of where the orchards are now growing within the period of said respective reservations but he shall not have the right to plant any orchard trees beyond the limits on said acreage where orchard trees are now growing.

“Said Second Party shall have the right of free ingress and egress to said orchards so reserved during the respective periods of said reservation.”

It is apparent that the intention of the parties in making the agreement of March 17, 1932, was to reserve to the grantor the use and control of orchards occupying the real estate conveyed to the State and not to reserve to the grantor the sole and exclusive use and occupancy of any certain real estate for a fixed or determinable period.

The use of the words “does hereby reserve the right to the use and control of the portions of said lands” is to be considered together with the use of the words “reservation of orchard on lands” and “said Second Party * * * shall have the right of free ingress and egress to said orchards so reserved. * * *”

The reservation contained in the language “shall reserve and does hereby reserve the right to the use and control of the portion of said lands” describes in general terms the subject of the agreement, whereas the words “said Second Party shall have the right to replace orchard trees within the acreage of where the orchards are now growing” are specific and particular terms describing the subject of the agreement.

The last quoted words would be rendered meaningless if the agreement were construed to reserve unto the grantor the full and complete “use and control of the portions of said lands.”

The rule that specific and particular descriptions in contracts and deeds will control over more general terms where both cannot stand together, and the rule that every part of an instrument will be given some meaning, if possible, necessitates the conclusion that the agreement constituted a reservation of land for orchard purposes.

An orchard is defined as "a plantation of fruit trees; an inclosure containing fruit trees; also, the trees collectively; used especially of apples, peaches, pears, cherries, plums, or the like, less often of nut bearing trees or sugar maples" and a fruit tree is defined as "a tree cultivated for its edible fruit."

In the light of these definitions, I do not believe that the cultivation of blackberries comes within the scope of the reservation contained in the agreement of March 17, 1932.

Therefore, the answer to your first question is in the negative. However, Mr. Heller has the right during the continuance of this agreement to replace with orchard trees, any trees within the acreage reserved which have been killed, and the state has the right to enjoin Mr. Heller from planting blackberries in any acreage reserved by the agreement for orchard purposes.

**TEACHERS' RETIREMENT FUND, INDIANA STATE:
Authority of State Auditor over department boards and
commissions within the department.**

January 21, 1937.

Hon. Robert D. Hougham,
Executive Secretary,
Teachers' Retirement Fund Board,
Indianapolis, Indiana.

Dear Sir:

Your letter of January 16, 1937, submits the question as to what authority the Auditor of State has in reference to the purchasing of securities from the State Teachers' Retirement Fund.

In answer to this question your attention is directed to the State Executive Administrative Act, the same being chapter 4 of the Acts of 1933.