This is the only statutory provision which deals with the per diem of board members and is, in my opinion, controlling.

While it is true that the Reorganization Act of 1933 gives the governor large discretionary powers in changing the personnel and duties of the various boards and agencies of the state, I think it is not sufficiently broad to permit a change in per diem which has been fixed by statute. Your attention is directed to section 27 of chapter 4 of the Acts of the Indiana General Assembly of 1933, which provides that the governor "shall have full power to change or curtail or abolish the offices constituting the bureaus, commissions, boards or agencies created or designated by statute or otherwise for carrying out the functions or purposes of any such bureau, commission, board or agency; and to fix, modify or change the compensation of any officer, employee or servant subject to the limitations established by law."

It is my opinion that the last phrase precludes a change in the per diem of the board members, and the same should accordingly be allowed at the rate of $5.00 per day.

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PUBLIC INSTRUCTION, DEPARTMENT OF: School buildings, right of trustee to demolish school building on abandonment. Right to sell school buildings and property with reversionary provision or conditions of limitation based on exclusive school usage.

July 8, 1938.

Hon. Grover Van Duyn,
Assistant Superintendent of Public Instruction,
Indianapolis, Indiana.

Dear Mr. Van Duyn:

This will acknowledge receipt of your letter of July 2, 1938, in which you submit the following questions:

"1. Has a township trustee any authority to demolish a school building as such?

2. Has a township trustee any authority to sell a school building located on real estate owned by the township conditionally and with reversionary provision?"
“3. Can a township trustee legally sell a school building located on real estate conveyed with conditions either of limitation or subsequent based upon exclusive school usage?”

In answer to your first question, your attention is directed to an official opinion of this office addressed to you under date of April 15, 1938, which holds that there is no authority whereby a township trustee may demolish a public school building. This opinion is amplified and referred to in a later opinion under date of May 25, 1938, which holds that a township trustee can not sell real estate on which is located a public school building and stipulate for the immediate destruction of the school building by the purchaser. These two opinions, therefore, are in effect a negative answer to your first question.

Your second question is somewhat difficult to answer as almost every case is decided upon the particular language contained in the original deed of conveyance. There has been in the State of Indiana considerable litigation growing out of conveyances to townships of real estate to be used for school purposes. Some of these conveyances are with limitations upon the title; some upon a condition subsequent, and some with covenants as to use. It is important, therefore, to have in mind the particular language of the conveyance and the intention of the parties to be derived therefrom. As was said in the case of Fall Creek School Township of Madison County v. Shuman, 55 Ind. App. 232:

"In construing the instrument, it is to be taken as a whole, and the plain intent of the grantor will prevail over technical words of legal signification." (At p. 237.)

In the case above quoted, the conveyance was made to the township trustee of certain real estate "so long as the same shall be used for school purposes." After many years this school, upon which a thousand-dollar building had been erected, was abandoned. The appellee Shuman took possession of the building, locked the same, and continued in possession, claiming title to the building and real estate. The court held this conveyance to be one with a conditional limitation and held that the abandonment of the school by the township trustee terminated the estate held by the township and the appellee was entitled to the real estate and the building. This whole case turned,
however, on the particular construction of the language of the deed. And in passing upon this, the court stated the question as follows:

"If it be a deed conveying a title with a condition subsequent, appellee is not entitled to recover in this case, because the title would not vest in the grantees of Snell, upon the abandonment of the property, but in him or his heirs, upon proper reentry. *Higbee v. Rodeman* (1891), 129 Ind. 244, 28 N. E. 442; Tiedeman, Real Property, section 281. If it be construed to be a deed with a conditional limitation, and the state created has been determined, then the judgment of the lower court should be sustained, as the title then vests *ipso facto* upon the happening of the contingency stated in the deed, and the title in question passes to the holder of the title derived through the deed of the original grantor, held in this case by the appellee. 2 Washburn, Real Property (4th ed.) 24; *Miller v. Levi* (1871), 44 N. Y. 489."

This same proposition appears in the case of Carter v. School Township of Liberty, et al., 70 Ind. App. 604. The real estate in question was conveyed to the township trustee with the following provision contained in the deed:

"‘Whenever this property ceases to be used for school purposes it is to revert to the grantors herein, their heirs or assigns’." (At p. 605.)

This conveyance was executed in 1897 and prior to the abandonment of the school in 1913, a three-thousand-dollar building had been erected upon the premises. Appellee Carter took possession of the building and real estate and filed suit to quiet title to the same. The court held that the appellant was entitled to the property involved and that the rights of the parties were fixed by the conditions mentioned in the deed.

A discussion of the difference between estates upon a condition subsequent, or a limitation, or a covenant, is found in the case of Sheets et al v. Vandalia Railway Company, 74 Ind. App. 597, and Jordan v. Hendricks, 173 N. E. 288. The general conclusion reached in these cases seems to be that if the estate is one upon a condition subsequent, the title to the property terminates upon the happening of the condition and the town-
ship has no longer any right, title or interest therein. Conditions subsequent are not favored in the law, however, and in doubtful cases the duty of the court is to construct the language to create trusts or covenants rather than a condition. When such is the case, the township is usually held to have been vested with a fee simple title. Having determined, therefore, the character of the title conveyed, the only other question is whether or not such title carries with it buildings erected on said real estate during the period it was held by the township. This question involves nothing more than the law of fixtures. As a general rule "When permanent structures are erected on land, ordinarily they are considered part of the real estate." National Manufacturing & Engineering Company et al v. Farmers Trust & Savings Bank of Kokomo et al, 204 Ind. 535, at p. 541.

As was said by the Supreme Court in Ochs v. Tilton, 181 Ind. 81, at p. 85:

"A general rule, recognized by the weight of authority, is that the true test of a fixture requires the united application of the following requisites: (1) annexation of the article, which may be either actual or constructive; (2) adaptation to the use of the realty, or part thereof, with which the article is connected; (3) the party annexing must have intended thereby to make the article a permanent accession to the freehold."

Applying this test to the question of whether or not a school building is a fixture, no question is presented by the first two items. The matter of intention may be inferred by the acts and conduct of the party making the improvement. In discussing this question, the rule is stated in 26 C. J. 657 as follows:

"In the requirement of an intention to make the article annexed a permanent accession to the land the expression 'permanent' does not, it seems, imply that the annexation must be intended to be perpetual, but rather that the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished or until the article is superseded by another article more suitable for the purpose. And it appears to be sufficient that it is intended to remain where placed so long as the land or building to which it is annexed may be used for
the same purpose. The intention of the annexer that the article shall remain 'indefinitely' has also been referred to as the criterion."

I think school buildings are usually erected with the idea that they shall remain until the purpose to which the real estate has been devoted is accomplished. If such is the intention, unquestionably the buildings are fixtures. The building being a fixture accordingly is a part of the land. This rule has been announced by the Supreme Court of Kentucky in the case of Board of Education for Jefferson County et al v. Littrell et al, in which the following language appears:

"The estate which the grantor and his heirs had in the property conveyed, and which was to become effective on the happening of the condition expressed in the deed, was a present vested interest of the nature of a reversion. 2 Washburn (6th Ed.) Section 968. Under the law as it stood when the deed was executed, the right of reversion retained in the deed carried with it the right to the improvements erected on the land, in the absence of an agreement to the contrary. Union Bethel Church v. Thomas G. Gaylord, 1 Ky. Law. Rep. 403."

Board of Education v. Littrell, 190 S. W. 465, at p. 466.

It is my opinion, therefore, that where property is conveyed to a township with conditions, either of limitation or subsequent, based upon exclusive school usage, that the abandonment of the premises for school purposes terminates the estate held by the township; that upon the happening of such condition, title to the ground and the improvements thereon vests in the heirs of the original grantor, and the township trustee has no right to sell or remove the building erected on such premises.