SCHOOLS: Two directors cannot function legally without proper notice to the third director. Injunction is the proper remedy to prevent two members from acting illegally.

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51

Honorable Charles F. Lamkin, Jr.,
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Sir:

This Department is in receipt of your letter of May 12th, wherein you make the following inquiry:

> "Two of the directors of a common school district in this county hold meetings without notifying the third director of the time, place or purpose of such meetings. At such meetings warrants are issued to pay the various debts of the district. I will appreciate an opinion from you touching the question whether such behavior on the part of the two directors is such a neglect of duty as will justify an attempt to remove them from office, and if so, what the correct procedure would be for such a move."

Section 9289, R. S. Mo. 1929, provides for the organization of the school board. Said section reads as follows:

> "The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall

> enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. A majority of the board shall constitute a quorum for the transaction of business: Provided, each member shall have due notice of the time, place and purpose of such meeting; and in case of the absence of the clerk, one of the directors may act temporarily in his place. The clerk shall keep a correct record of the proceedings of all the meetings of the board. No member of the board shall receive any compensation for performing the duties of a director."

In the decision of School District v. Smalley, 58 Mo. App. 658, it was held to the effect that if two directors meet and without keeping a record of their proceedings and without notice to the third member, issue warrants, the warrants will be illegal, but if paid no action can be maintained against the directors who issued them, provided they were issued for a valid indebtedness of the district.

Section 9289, quoted supra, contains a provision relative to notice to the individual members. The effect of failure to follow the statute, and a decision which indicates that the terms of such a statute are mandatory, is contained in the case of Johnson v. Dye, 142 Mo. App., l. c. 427, as follows:

> "If the statute is mandatory, then in as much as the president did not call this meeting and refused to attend it, it was irregular, and the plaintiff would not be entitled to recover, as a teacher cannot be legally employed except at a regular or special board meeting. (Pugh v. School District, 114 Mo. App. 688, 91 S. W. 471.)

> "The statute authorizes a majority of the board to hire a teacher. This means that a majority acting at a legal meeting, and does not mean that directors acting separately, although a majority of the board, can make a binding contract. (Kane & Co. v. School District, 48 Mo. App. 408; Johnson v. School District, 67 Mo. 321.)
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> "It is the general rule that where the charter, statute, or by-law of a corporation, provides a method by which the notice shall be given of a special meeting, its provisions must be obeyed."

The general rule on failure to give proper notice is contained in 56 Corpus Juris, 337, Par. 210, as follows:

> "As a general rule, which, in some jurisdictions, has been enacted into an express statutory requirement, a proper call for a notice of a meeting of a board of education, or of directors, trustees, or the like, of a school district or other local school organization, must be given or communicated to each member of such board in advance of such meeting, in order to render proceedings had thereat valid, and a want of such notice to any member who does not attend the meeting will invalidate the action taken, except that in the case of regular meetings, the time and place of which are fixed by statute or by a rule of the board, all must take notice thereof, and no express notice is required; but the general rule has been qualified in some cases, which hold that want of notice to a member will not invalidate action taken by the board where he is absent from the state and would not have been

> able to attend the meeting even if notice had been given him."

Further rules bearing on the question are to be found in Corpus Juris, supra, page 334, Par. 205, as follows:

> "A board of education, or of directors, trustees, or the like, of a school district or other local school organization can exercise its powers in no other mode than that prescribed or authorized by statute. As a general rule, and under most statutes, such a board can act only as a body, at a meeting duly and regularly called or held; and, except as power may validly have been delegated to him or them by the board, or it may subsequently ratify his or their action, no act of a member of the board, or even of a majority or all of its members, when not assembled in a meeting and acting as a board, is valid or effectual, or can bind the district."

From the above decisions and authorities it would appear that the acts of the two directors, assuming that the third director was not notified or that he did not refuse to attend, are illegal and could not bind the district if appropriate proceedings were had contesting the same. But as to Section 9290, R. S. Mo. 1929, which we assume is the section you refer to in your letter, it is very questionable whether said section will apply to their acts; the pertinent part of this section being:

> "If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business * * *"

The only phrase that has any possible reference to the conduct of the two directors would be, "repeated neglect of duty." It does not appear that the directors are neglecting their duties but that they are exercising or attempting to carry out their duties in an illegal or wrongful manner.

As to the question of the remedy or the procedure, we are of the opinion that quo warranto would not be the proper remedy. In the decision of State v. Thatcher, 102 S. W. (2d) l. c. 938, the Missouri Supreme Court seems to have adopted the rule of the Supreme Court of Wisconsin as follows:

> "'In considering the nature and purpose of the information in the nature of a quo warranto, it is to be premised that it does not * * * command the performance of his official functions by any officer to whom it may run, since it is not directed to the officer as such, but always to the person holding the office or exercising the franchise, and then not for the purpose of dictating or prescribing his official duties, but only to ascertain whether he is rightfully entitled to exercise the functions claimed.' High Extraordinary Remedies (3d Ed.) p. 557."

Another remedy which might be applicable is that of injunction. The following authorities appear to make this remedy available.

In School District v. Smith, 90 Mo. App. 215, the court states as follows:

> "Quo warranto would be the appropriate remedy to attack the legality of the organization of a school district; but where the petition does not raise the legality of the organization of a district, but instead calls in question the proceedings which are about to result in attaching new territory to the district as theretofore organized,

> injunction is the appropriate remedy."
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> "Under Rev. St. 1899, Section 3649, providing that a remedy by injunction shall exist 'to prevent the doing of any legal wrong whatever whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages,' injunction is the proper remedy to restrain the county commissioner from proceeding to change the boundaries of school districts where there has been no valid election in such districts to authorize such change."

Also, in the decision of Black v. Ross, 37 Mo. App. 250, the court said the following:

> "Where the directors of a school district are about to make an unlawful and unauthorized disposition of the public school fund, individual taxpayers are entitled to an injunction to prevent such disposition, and the fact that the directors are solvent, so that damages could be recovered in an action at law against them, does not render that remedy adequate."

We are, therefore, of the opinion that if any remedy is available against the directors of the school district in question, it would be by injunction.

Respectfully submitted,

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APPROVED:

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