SCHOOLS: When school site is abandoned and land reverts to original grantor, school district in removal of
SCHOOL DISTRICTS: buildings not obligated to remove foundation stones, to fill basements, pump pits, etc. Board in six-director district without authority to lease lands or buildings for private purposes for gain.

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Honorable Donald P. Thomasson
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Marble Hill, Missouri

Dear Mr. Thomasson:

This is in response to your request for an opinion dated July 13, 1956, which reads as follows:

"Recently I have received a request from the Superintendent of Schools of Zalma, Missouri, for an answer to the following question:

Where an individual has conveyed certain land to a School District containing the following reversionary clause:

Provided however, that in the event said land should discontinue being used as a school house site and for school purposes, that then and in that event, the said land shall revert to and re-invest in the first parties, their heirs and legal representatives, it being the intention to convey same for the purposes of a school house site and for school purposes;

and once the land has reverted back to the original owner due to its non-use as a school, and after the school district has removed the school building proper, then what obligation does the School District have regarding the clearing or cleaning up of the grounds after the school building has been removed. That is, do all foundation stones or concrete have to be removed and holes have to be filled, such as basements, pump pits, toilet pits, etc.?

"In addition, can the Board of Education legally lease these buildings to private individuals on a temporary basis for private purposes?"

The case of Board v. Nevada School Dist., 363 Mo. 328, 251 SW2d 20, decided that a deed such as this one creates a determinable fee in the school district; that when the district ceases to use the district for a schoolhouse site or for school purposes, the land in its unimproved state reverts to its original grantor or his heirs and that the district may remove the buildings which it has placed thereon. In the course of the opinion the court made the following comment, SW2d l.c. 26:

"As stated, as long as the present estate in fee simple determinable continues, the respondent School District has all of the incidents of a fee simple title to the described premises. Respondent may remove the improvements thereon and construct other improvements at will. In this connection the general rule seems to be that the owner of an estate in fee simple determinable is not chargeable for waste within the general acceptation and meaning of the term, but that under some circumstances a court of equity may restrain him from committing equitable waste. Williams v. McKenzie, supra, 262 S.W. 598; Gannon v. Peterson, 193 Ill. 372, 62 N.E. 210, 213, 55 L.R.A. 701; 31 C.J.S., Estates, §10, page 24; 67 C.J. 622, Waste, Sec. 20; 56 Am. Jur. 457, Waste, Sec. 11; 19 Am. Jur. 491, Estates, Sec. 30; 27 R.C.L. 1037, Sec. 28; Ann. Cases, Vol. 35, 1915A, 229. Contra: A.L.I. Restatement of Property, Vol. 1, Sec. 49, p. 170, but see comment in 19 Am. Jur. 491 footnote 3.

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" * * * In view of the evidence we draw the inference that the improvements were made by School District No. 119 at its own expense and with public funds, at least, appellants offered no evidence tending to show that there were any improvements on the property when it was conveyed to School District No. 119, or that any of the improvements were made by the grantors or their heirs. We further imply from the terms of the grant that the construction of a school building and improvements at the expense of the School

> District was contemplated by the parties when the deed was executed and delivered. It was further contemplated by the parties that there was a possibility the property might not always be used for the purpose for which it was being conveyed. Accordingly, the deed further provided, 'whenever it is abandoned by the directors and ceases to be used for that purpose the title shall immediately revert to the grantors herein.' In such situation we hold that the improvements placed upon the property remained the personal property of School District No. 119 and that said district or its successor in interest would continue to own the school building and improvements, and only the land in its unimproved condition would revert to the grantors or their heirs in the event that the estate granted expired by reason of the limitations stated in the Board deed. In this connection it should be said that appellants who brought the ejectment suit and sought to recover possession of both the real estate and the improvements, offered no evidence tending to show that the improvements could not be removed from the premises without injury to the freehold estate."

In view of the first part of your opinion request, the question then becomes whether the school district would be chargeable with equitable waste if it removed the buildings from the premises and did not remove foundation stones, fill all holes such as basements, pump pits, etc.

The definitions of equitable waste are rather nebulous and extremely difficult to apply to given factual situations. For example, the case of Gannon v. Peterson, 193 Ill. 372, 62 NE 210, cited in the Board case, supra, which involved a situation where the executory devisees, the holders of the reversionary interest, sought to enjoin the owner of the determinable fee from mining coal as constituting equitable waste, contains the following discussion of equitable waste at NE l.c. 213:

> "The authorities are uniform as to the definition, duration, and extent of a base or determinable fee. They are agreed that it is a fee-simple estate; not absolute, but qualified. Upon the death of the donee his widow has dower, although the contingency may have happened that defeats the estate, and that within the general

acceptation and meaning of the term the person seised of such an estate is not chargeable with waste. But there has been ingrafted into equity a form of waste not recognized at common law, which is termed 'equitable waste,' and of which courts of chancery take cognizance, and under the theory of which they grant relief to the holders of contingent and executory estates. Equitable waste is defined by Mr. Justice Story to consist of 'such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them.' 2 Story, Eq. Jur. § 915. And the learned jurist gives as instances of this class of interference where the mortgagor fells timber on the mortgaged premises to the extent that the security becomes insufficient; where a tenant for life, without impeachment for waste, pulls down houses, or does other waste, wantonly and maliciously; and he adds: 'For it is said a court of equity ought to moderate the exercise of such a power, and, pro bono publico, restrain extravagant, humorous waste.' And he concludes: 'In all such cases the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other parties.' The definition given above is accepted by most of the text writers, and quoted with approval by the courts, and it is this principle the appellees (complainants below) invoke, and insist that under it the decree of the circuit court should be affirmed. It will be observed that no certain criteria are set forth in the definition by which courts may determine when the rule of equitable waste applies, but it is said that extravagant and humorous waste will be enjoined pro bono publico, and in that class of cases where the writ is allowed the party will be deemed guilty of a wanton and unconscientious abuse of his rights. In Turner v. Wright, 6 Jur. (N.S.) 809, 29 Law J. Ch. 598, Lord Chancellor Campbell defines equitable waste to be ' that which a prudent man would

> not do with his own property.' This latter statement of the rule is the most comprehensive we have been able to find, and seems to us to be a safe guide in our consideration of the case before us."

The Gannon case was cited in Williams v. McKenzie, 203 Ky. 376, 262 SW 598, which was also cited by the Missouri court in the Board case. The Williams case held that the leasing of premises deeded for school purposes and containing a reversionary clause for the purpose of removing gas and oil would not constitute equitable waste and since the district continued to maintain schools on the premises would not constitute such a use of the land as would work an abandonment causing title to revert to the grantor.

See, however, Skipper v. Davis, Texas Civil Appeals, 59 SW2d 454, where, under similar circumstances, the Texas court held that the removal of gas and oil would constitute equitable waste on the part of the holder of the determinable fee.

Other definitions of equitable waste cited in the Board case are as follows:

> 67 C.J., Waste, Section 20, page 622:
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> "A tenant of a base or qualified fee cannot be held liable for waste, except for equitable waste or waste committed in violation of an express stipulation, and, in the case of equitable waste, only where the contingency which is to determine the estate is reasonably certain to happen, and the waste is of a character to charge the owner with a wanton and unconscientious abuse of his rights; but where the happening of the contingency is remote, so that the reversioner has only an expectancy, a mere possibility of reverter, equity will not enjoin the owner of the base or determinable fee. So a person holding a vested estate for life, coupled with a contingent interest in the fee, is not liable in an action for waste, although he may be enjoined in a proper case from further despoiling and injuring the inheritance. A tenant in tail is not punishable for waste, but a tenant in tail after possibility of issue extinct may be enjoined from committing waste."

19 Am. Jur. 491, Estates, Section 30, page 491:

"It has been held that the owner of a determinable fee is not chargeable with waste, although equity will sometimes restrain him from committing equitable waste."

19 Am. Jur. 491, Estates, Section 30, page 491, footnote 3:

"See Am. Law Inst. Restatement, Property, Vol. 1, § 49, in which it is said that the broad privilege of ownership of a holder of a determinable fee is limited by a duty not to commit waste. The examples cited, however, show that only in extreme cases will action by the holder of such an estate be considered waste within the rule that it may be enjoinable by the owner of the possibility of reverter, whose future interest is so tenuous that any substantial restriction on the owner of the determinable fee would be unreasonable."

In addition, see the following:

Tiffany Real Property, Third Edition, Vol. 2, Section 645, page 659:

"The doctrine of 'equitable waste,' by which waste of a character which is not recognized at law as illegal, is relieved against in equity by an injunction to prevent it, and, when possible, by compelling the restoration of the thing wasted, has been very fully developed in England. In this country there are but few decisions in which waste has been considered as of such a character as to be cognizable in equity, and not at law, and the extent to which there is such a thing as equitable waste, as distinct from legal waste, appears doubtful."

Equity, de Funiak, Section 23, page 55, footnote 8:

"'8. Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court.' Kane v. Vanderburgh, (1814) 1 Johns. Ch. (N.Y.) 11."

From the cases, this latter statement is obviously true, i.e., that the application of the doctrine of equitable waste depends on much latitude of discretion in the court. It would seem also that the injury complained of must be such as is recognized by equity as irreparable. Other definitions above incorporate the principle that the damage done must be malicious, wanton or extravagant, that the use to which the land is being put is not such as an ordinary prudent man would make of his own property.

The Missouri court, in the Board case, recognized that in a deed of this type the parties contemplated that buildings and other improvements would be constructed on the land, that there was a possibility that the land might not always be used for school purposes and by contemplation of law that upon abandonment the school district would be privileged to remove the buildings and other improvements that it had placed upon the land. Under those circumstances we believe it was further contemplated that upon removal of the buildings and other improvements there would be some injury to the freehold estate and in the absence of an express agreement to do so the land would not be returned in its original unsullied state.

Therefore, we are of the opinion that although in the removal of the buildings and other improvements the school district may not extravagantly, maliciously and imprudently injure the freehold estate, it is not obligated to remove foundation stones, fill basements, pump pits, etc., which were reasonable and necessary incidents of the construction and removal of the buildings and other improvements on the land placed there in order to make it useable for the purpose for which it was conveyed, i.e., school purposes.

By your second question, we take it that the board of education may not be certain whether it intends to abandon this land as a school site and desires to know whether it may lease the land temporarily until it is able to make this determination. Under those circumstances, the question might arise as to whether the use of the land for other than school purposes would cause a reverter to the original grantor or his heirs, but in view of the broader question, i.e., the authority of the board to make such a lease and our conclusion thereon, we do not deem it necessary to rule on that question.

It has been said by the appellate courts of this state on many occasions that a school district is merely a creature of the Legislature, having only such powers as have been expressly conferred upon it or such as arise therefrom by necessary implication. State v. Kessler, 136 Mo. App. 236, 240, 117 SW 85; Consol. School

Dist. No. 6 of Jackson County v. Shawhan, Mo. App., 273 SW 182, 184; Wright v. Board of Education of St. Louis, 295 Mo. 466, 476, 246 SW 43; 56 C.J., Schools and School Districts, p. 193, Section 46, p. 294, Section 152. Although under Section 166.010, RSMo 1949, the title to schoolhouse sites is vested in the district, the Supreme Court has held that the district is merely the statutory trustee thereof for the state. School Dist. of Oakland v. School Dist. of Joplin, 340 Mo. 779, 102 SW2d 909.

By statute, the board of education is vested with the government and control of the school district. Section 165.317, RSMo 1949. Yet, Section 166.030, RSMo 1949, specifies what additional use may be made of school property other than the conduct of schools and does not include leasing for private purposes for gain. Section 165.370, RSMo 1949, provides specifically that if in a six-director district there is property no longer required for the use of the district, the board may advertise, sell and convey the same, the proceeds thereof to be placed to the credit of the building fund. The question then is whether, having this narrow and limited grant of authority, the board may dispose of its property in any other manner.

There are no Missouri cases directly in point. However, the West Virginia court, in Herald v. Board of Education, 65 SE 102, faced a similar problem and under similar statutory authority and judicial declaration of the limited powers of school districts generally concluded that the district could not lease its lands for private purposes and for gain.

Quotations from that case will demonstrate the similarity between the reasoning of the court therein and that exemplified by the Missouri courts in construing the powers of school districts generally. For example, at SE l.c. 104 the court said:

> " * * * 'The board of education of a school district is a corporation created by statute with functions of a public nature expressly given and no other; and it can exercise no power not expressly conferred or fairly arising from necessary implication, and in no other mode than that prescribed or authorized by the statute.' * * *
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> " * * * But counsel say that among those powers under the statute is one which would justify this lease in the language: 'Said board shall

> receive, hold and dispose of according to the rules of law and intent of the instrument conferring title, any gift, grant, devise or bequest made for the use of any free school.' That clause uses the words 'according to * * * the rules of law and the intent of the instrument conferring title.' * * *. In connection with the words relied on by counsel for such power in the board, we must not forget section 33, c. 45, Code 1906 (section 1621). It provides that the president of the board shall examine the schoolhouses and sites, and report their condition to the board. Such as are in their judgment properly located and sufficient, or can be rendered so, shall be retained and the remainder, with the consent of the county superintendent, be sold by the board, but the statute provides carefully that the proceeds shall be added to the building fund. There is a limitation upon the power of disposition. The sale must be for money, and the money go into the building fund. That does not contemplate a lease for oil. * * * Did the Legislature ever intend to vest any such power in a school board? If such boards may wield such powers, where is the limit, and how far may it not frustrate the whole purpose of the ownership of the board? We are told that the board has the legal title in fee simple. So it has, but it is not a private owner, because it holds such title in trust for these plaintiffs and their children, and for those that may come after them. * * *"

The court held the lease void.

A similar result was reached in Presley v. Vernon Parish School Board (La.), 139 So. 692. In that case the court quoted from R.C.L., Volume 24, Schools, page 585, Section 34, as follows:

> " * * * Unimproved school lands are subject to the same restrictions as schoolhouses, and the school board cannot permit them to be used for collateral purposes, even though profitable. This is on the ground that school boards have power only over educational matters, and so have no power to lease or grant school property for other purposes. School officers will not be

> permitted to use school money to erect a building to be leased for collateral purposes, no matter how remunerative the undertaking promises to be. Nor will they be permitted to include in the plans for a schoolhouse features of no educational advantage and intended primarily to facilitate the leasing of the property during nonschool hours for collateral purposes. Illegal collateral uses may be enjoined at the suit of residents or taxpayers of the district."

A contrary result was reached in Atlas Life Ins. Co. v. Board of Education (Okla.), 200 P. 171, and the Gannon case, supra, but on totally different statutory and constitutional authorization.

We conclude therefore that because of the Missouri judicial decisions confining the powers of school boards to that expressly granted them by legislative enactment or those arising therefrom by necessary implication, and the reasoning of the West Virginia case, supra, a school board in a six-director school district does not have the authority to lease its buildings or lands for private purposes. If they are no longer needed for school purposes, it may only "advertise, sell or convey" same in conformity with the statutes.

CONCLUSION

It is the opinion of this office that when a school removes buildings and other improvements from land which, under a reversionary clause, has reverted to the original grantor or his heirs, it is not obligated to remove therefrom foundation stones or fill holes such as basements, pump pits, etc., which were reasonably incident to the use of the land for school purposes.

It is the further opinion of this office that the board of education of a six-director school district does not have the authority to lease its buildings or lands to private persons for private purposes for gain.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON
Attorney General

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