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# Abandonment of School Sites in Fee Simple Determinable Estates

Richard H. Breiner

# Comment

## ABANDONMENT OF SCHOOL SITES IN FEE SIMPLE DETERMINABLE ESTATES[1]

### I. HARRIS v. CONSOLIDATED SCHOOL DIST. STATED

In *Harris v. Consolidated School Dist.*,[2] plaintiff's predecessor in title had, in 1898, conveyed one acre by warranty deed to defendant's predecessor, "so long as they use it for a school site, and when they fail and cease using it it is to revert back. . . ." A frame schoolhouse, later replaced by one of brick, was built on the land and used continuously until classes were stopped in 1951.[3] After that date no classes were held, the building being used for storage of lumber, seats, and windows. The blackboards, some stoves, some seats, and a few desks remained in the building. The building had deteriorated, with windows out, "termites on the march [and] rats on the gallop."[4] There was testimony that the school board had discussed the possibility of using the building again for classes. In plaintiff's suit to quiet title, wherein he claimed that defendant had abandoned that land as a school site, the trial court found for defendant. On appeal to the Supreme Court, where the case was argued before division two and transferred to the court en banc, the lower court's judgment was affirmed. The court stated that the main issue was "whether the building has, with a reasonable prospect of permanency, ceased to be a school, in view of its continued use for school storage, and the considered possibility of its future use for classes," and that under this test, there was no reverter either at the filing of the suit or at the time of the trial. The court tempered its decision somewhat by stating that the use to which the land had been put for the seven years prior to the trial "cannot go on indefinitely. . . . A school district may not arbi-

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1. This comment does not cover the problem of the validity of a determinable fee. The scope of this comment will include the construction of deeds purporting to convey determinable fees to school districts, the determination of the event that calls for a cessation of the estate in the grantee, and the factual question of whether that event has occurred. While attempting to include herein the same problem as to churches, the author has been unable to find any Missouri cases on the subject.

2. 328 S.W.2d 646 (Mo. 1959) (en banc).

3. Defendant's claim of title through adverse possession of the north acre, the land having been used by defendant and its predecessor since 1922, was upheld by the court, three judges dissenting. The problem of adverse possession in this case is beyond the scope of this comment.

4. Brief for Appellant, p. 54, Harris v. Consolidated School Dist., *supra* note 2.

trarily retain title to property under such a conveyance unless it is done . . . with some reasonable purpose and intent."[5]

## II. General Formula for Determination of Abandonment

A fee simple determinable, sometimes called a qualified fee or a base fee,[6] is created by a conveyance including such words as "during," "so long as," or "until," its duration being limited to the continuation of a stated situation or until the occurrence of a designated event.[7] The reverter clause in the *Harris* case limited the estate to "when they fail and cease *using* it . . . ."[8]

In determining whether a "school site" has been abandoned, or whether land is no longer being used for "school purposes," we must look at the language contained in each particular deed or will, and note the exact limitation. No two limitations will be alike; accordingly, no general rule or exact principle can be applied to all situations where the abandonment of a school site is in issue.

> The determination of whether the event which terminates the preceding estate has occurred involves two separate questions. The first, to be answered by the court, is a question of construing the language of the instrument to determine precisely what event is called for. The second is a question of fact, to determine whether the prescribed event has occurred.[9]

## III. Missouri Cases on Abandonment of School Sites

There are few cases in Missouri that deal with abandonment of school sites. In *Tillman v. Melton*,[10] where the defendant school district's predecessor was the grantee, the deed provided: "The condition of this deed is such as to revert . . . when it ceases to be used for school purposes." Although no classes were held in the building from 1933 to 1940, some seats having been moved out, and the only use of the building having been for religious services and pie suppers, the court found no abandonment of the property for school purposes. "[T]he property was retained under the supervision and control of the school board, apparently pending the time when external circumstances or a change in policy or conditions might require an active utilization of the building and grounds for school purposes."[11]

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5. Harris v. Consolidated School Dist., *supra* note 2, at 651. The trial court did not consider the question of whether the use of one room of the building as a grocery store, during the period of cessation of classes, indicated an abandonment by defendant. The Supreme Court, however, passed on the merits of that question, holding that such temporary use did not affect the status.

6. 1 Simes & Smith, Future Interests § 281, at 327-28 (2d ed. 1956); Eckhardt & Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri*, 23 V.A.M.S. 1, 15 (1952).

7. Chouteau v. City of St. Louis, 331 Mo. 781, 790, 55 S.W.2d 299, 301 (1932) (en banc); 2 Powell, Real Property § 187 (1950).

8. *Supra* note 2, at 651. There was no express specification of purpose following this phrase, but the court inferred that the purpose intended was that one previously stated, viz., "school purposes."

9. 1 Simes & Smith, *op. cit. supra* note 6, § 293, at 352.

10. 350 Mo. 155, 158, 165 S.W.2d 684, 686 (1942).

11. *Id.* at 160, 165 S.W.2d at 687.

The fact that the board's intention was to conduct classes in the building in 1941[12] supported the court's holding that there had been no actual abandonment of the property.

In *Anson v. Tietze*,[13] where the land was to revert upon a "cessation of the use of the buildings and land for educational purposes," no classes were held for nineteen years after the building was destroyed by fire; and the only use to which the land was put was for general farming purposes. The court held that "mere nondevotion to a use, while a fact for consideration, will not constitute an abandonment of that use,"[14] but that the acts and conduct were consistent with an intention to abandon, and that this intent, accompanied by the nondevotion, constituted an abandonment. The *Anson* case, cited by several later Missouri cases[15] to show the requirements of abandonment, states:

> Abandonment is a question of fact, being a mixed question of intention and act—the intention to abandon permanently and the physical act of nonuser . . . .[16]

These same requirements were enforced in Missouri even under the Spanish Law,[17] in effect in this state until 1816.[18]

*School Dist. No. 24 v. Mease*[19] involved five acres given to the school district "to be used . . . for school purposes only, and should such use discontinue and said lands be no longer used for school purposes, [they] shall revert. . . ." School was carried on in the building from 1922 to 1944, when the school district ceased holding classes in the building and transported the pupils to a nearby school. One month after the cessation of classes the grantor took possession of the land and building, claiming that the district had abandoned the premises. Desks, books, an organ, chairs, and a victrola were kept in the locked building. In affirming the lower court's finding that there was no abandonment, the court emphasized that "no schoolhouse or school site shall be abandoned or sold until another site and house are provided. . . ."[20]

The deed in *Board v. Nevada School Dist.*[21] provided: "[T]he grantors herein convey the above for a school house site and whenever it is abandoned . . . and ceases to be used for that purpose the title shall immediately revert. . . ." Plaintiffs in this case claimed that the school district had abandoned the land for school purposes by a cessation of classes for one year, by removing the back steps and

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12. *Id.* at 158, 165 S.W.2d at 686.
13. 354 Mo. 552, 190 S.W.2d 193 (1945).
14. *Id.* at 560, 190 S.W.2d at 197.
15. *E.g.*, Harris v. Consolidated School Dist., *supra* note 2, at 650; Board v. Nevada School Dist., 363 Mo. 328, 337, 251 S.W.2d 20, 26 (1952).
16. Anson v. Tietze, *supra* note 13, at 558, 190 S.W.2d at 196.
17. Clark v. Hammerle, 36 Mo. 620, 639-40 (1865) ("[M]ere inaction . . . is not enough, without some . . . fact . . . showing a positive intention to abandon all claims of ownership.").
18. § 1.010, RSMo 1949.
19. 205 S.W.2d 146 (Spr. Ct. App. 1947).
20. § 10403, RSMo 1939 [now § 166.010, RSMo 1949]. See note 94 *infra* and related text material.
21. 363 Mo. 328, 330, 251 S.W.2d 20, 21 (1952).

porch from the building, and by not occupying the building except for community meetings. In holding that there was no abandonment, the court found that the school district had kept insurance on the building, that the superintendent of schools carried the key and had inspected the building many times, and that no affirmative action to abandon was ever taken by the school board. In fact, the superintendent had recommended to the board that the school *not* be permanently closed.[22] The court said: "We do not construe the words, 'ceases to be used for that purpose,' to mean a mere temporary cessation of the school district to conduct a school on the property . . . . The matter involves intention as does the matter of abandonment."[23]

## IV. Strict Construction of Conditions That Defeat Estates

Forfeitures are not favored in the law and therefore an often repeated rule of construction is that conditions that defeat estates should be strictly construed.[24] In other words, it appears that the law looks with disfavor upon provisions in deeds calling for forfeiture, and that courts will be slow to seize upon a misuse or neglect of the property to declare a forfeiture.

The court in *Shuster v. Board of Educ.*[25] stated:

> It is well settled that when a condition in a deed is relied upon to defeat an estate it should be strictly construed and its violation must be clearly established.

In this case, no classes had been held for five years due to lack of a teacher and dwindling enrollment; but meetings of the board of education and of the local 4-H Club were held in the building, school elections were conducted therein, and the building was kept in good repair. The court, in declaring that the land had not been abandoned, held that the school board meetings, school elections, and 4-H Club meetings all fell within the uses contemplated by the deed, as for the "advancement of education." Here, it is obvious that the condition that would have defeated the estate—the cessation of use for the advancement of education—was strictly construed so as to prevent a forfeiture of the property.

In an earlier New Jersey case,[26] the court was called upon to interpret a deed conveying land to a school district "for the use of having erected thereon and main-

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22. *Id.* at 332, 251 S.W.2d at 22.
23. *Id.* at 336-37, 251 S.W.2d at 25.
24. Chouteau v. City of St. Louis, 331 Mo. 781, 792, 55 S.W.2d 299, 301 (1932) (en banc); 19 Am. Jur. *Estates* § 65 (1939); 47 Am. Jur. *Schools* § 69, at 347 (1943); 2 Powell, Real Property § 188 (1950); Eckhardt & Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri*, 23 V.A.M.S. 1, 17 (1952).
25. 17 N.J. Super. 357, 359, 86 A.2d 16, 17 (Super. Ct. 1952) ("for all such time as the same shall be used for School purposes for the advancement of any or all branches of Education and during such time for the purpose of holding all Religious Meetings, Sunday School and all charitable purposes.").
26. Board of Educ. v. Brophy, 90 N.J. Eq. 57, 106 Atl. 32 (Ch. 1919) ("for the use of having erected thereon and maintained for the use of said district a schoolhouse and for playground for the scholars . . . and for no other purpose whatsoever.").

tained . . . a school house and for playground . . . and for no other purposes whatsoever." In holding that this language did not create a fee simple with a condition or limitation, the court quoted from Shepard: " 'Conditions, when they tend to defeat estates, are *stricti juris* and to be construed strictly.' "[27] In addition to not having held classes for six years and allowing the building to be in need of repairs, the board of education erected a new school only fifteen hundred yards from the site in question. There was testimony that the new school was likely to remain ample for the nearby children for a considerable time. Although the court did not construe the deed as conveying a fee simple determinable, it considered the strong evidence of abandonment here, indicating that even if the estate were subject to a conditional limitation, still there would have been no abandonment.[28]

In *Mills v. Evansville Seminary*,[29] the court went quite far in preventing the reversion of land conveyed to the defendants "to be used as a site for seminary grounds and buildings only, and [to] revert . . . when they ceased to be used for such purposes." Not having conducted classes for six years because of a lack of funds, the defendants conveyed the land by deed to a third party, who reconveyed to defendants three years later. In holding that a forfeiture was not clearly established in that the defendants "retraced their steps" by repurchasing the land, the court stated that "these conditions are strictly construed so as to avoid a breach." The court admitted that had the third party not reconveyed, the sale of the land by defendants would have constituted a breach, but since the defendants regained title and possession by the time of trial, there was no "total" abandonment. How much time might elapse between the conveyance out by the defendants and a reconveyance to them before it would be considered an abandonment, the court did not say. This case demonstrates how far a court can go in "strictly construing" special limitations to avoid causing a forfeiture.

The Supreme Court of Illinois, in construing a deed giving land to a church "so long as the . . . premises shall be used as place of public divine worship," held that the use of the land for a driveway and church lawn, the church building having been moved to an adjacent lot, did not constitute an abandonment of the land for "public divine worship."[30] In strictly construing the limitation which could have brought about forfeiture of the estate, the court said:

> To hold the contrary would be to impair the means of ingress and egress connected with the new church, to deface its beauty and accessibility and deprive the congregation of parking facilities, lawn for church meetings . . . and be . . . contrary to the obvious intention of the original grantor.[31]

In *Crane v. Hyde Park*,[32] where the land given to a school district was to revert when the district "shall cease to improve the . . . land for [the benefit of

27. *Id.* at 62, 106 Atl. at 34 (quoting from 1 Shep. Touch. 133 § 8; Roll. Rep. 70).

28. See Brophy v. Board of Educ., 12 N.J. Misc. 460, 172 Atl. 910 (Ch. 1934) (same judge affirming his dictum in the previous Brophy case).

29. 58 Wis. 135, 15 N.W. 133 (1883).

30. Carlsen v. Carter, 377 Ill. 484, 485, 36 N.E.2d 740 (1941).

31. *Id.* at 488, 36 N.E.2d at 741-42.

32. 135 Mass. 147 (1883).

schools] . . . for two years in succession," and the district, after having conducted classes for sixty-eight years, failed to have classes in the schoolhouse for more than nine years before suit, the court refused to declare a forfeiture of the estate based on the above limitation in the deed. The court stated that the plaintiff's claim was "*strictissimi juris*," and when such a condition would work a forfeiture, the court would construe the condition "with great strictness." Even though the court assumed that the deed here conveyed an estate defeasible upon a condition subsequent, the court would, a fortiori, apply its strict construction to a deed conveying a fee simple determinable. The latter estate would more easily be subject to a forfeiture, hence a greater need for strict construction of any condition that would terminate the estate.

*Clark v. Jones*[33] involved a determinable fee, with the special limitation being "so long as . . . used for school purposes." The grantee failed to hold classes for one school year following a continuous user for fifty-four years. Some furniture, a blackboard, and a fountain were removed from the building; however, the electricity and water were not disconnected, the insurance was maintained, and inspections were regularly made. The court, in finding no abandonment, said that the grantee must have a willful plan to disregard the limitation before it would declare a breach of the special limitation.[34] It also reiterated the principle that when a condition is relied upon to work a forfeiture, it will be construed very strictly.

## V. Sale and Attempted Sale of School Property

### A. *Held Not to Constitute Abandonment*

A mere attempt to sell the land, the sale not consummated, has been held not to constitute an abandonment of the land.[35] In *Swink v. City of Dallas*,[36] the grantee school district attempted to sell a school building to a third person, but subsequently, before a contract was made, revoked the offer of sale. The court said that if the sale to the third person had been consummated, there would have been no question to give to the jury as to abandonment; but, since the sale was not yet completed, there was no evidence of actual abandonment, and therefore nothing for the jury to decide—as a matter of law there had been no abandonment.

In *Bernard v. Bowen*,[37] the board of education offered the land for sale, received bids, but did not accept any of the bids. Shortly after the advertisement of

33. 173 Ore. 106, 144 P.2d 498 (1943).

34. See also 26 C.J.S. *Deeds* § 154, at 1063 (1956) ("When maintenance or use is part of the condition, there must be such neglect to maintain as to indicate an intention not to comply, in order to constitute a breach of condition; it must be shown that the spirit and purpose of the condition have been willfully disregarded by the grantee. . . .").

35. 78 C.J.S. *Schools and School Districts* § 254, at 1228 (1952).

36. 36 S.W.2d 222 (Comm. of App. of Tex. 1931).

37. 214 N.C. 121, 198 S.E. 584 (1938) ("so long as church is kept up on said lot and not to be used for any other purpose, and if at any time they should be discontinued or fail, the title to revert"). No question was raised as to the use of the land for school purposes rather than for church purposes, for the grantor's heirs acquiesced in such use.

sale, nearly all of the school furniture was removed from the school building to a new building erected on an adjoining lot. Several months later the board found it necessary to use the old school building again and abandoned its plan to sell the property. The court found that there was no abandonment by reason of the defendant's unconsummated plan to sell the property.

In *Koonz v. Joint School Dist. No. 4*,[38] the Wisconsin supreme court found that the defendant did not abandon its school property by passing a resolution to sell the property, advertising the land and buildings for sale, receiving bids thereon, and rejecting all bids. At the school board meeting at which the bids were rejected, a motion was passed to retain the land for a playground. The court relied on the *Mills* case[39] in not allowing a forfeiture for the attempted conveyance, for in both these cases the defendants had "retraced their steps." Certainly, if the court in the *Mills* case would not declare a forfeiture when the grantee actually conveyed the land out, and later repurchased, it would not allow the grantee to lose its property by a mere attempt to sell the land.[40]

In *Gage v. School Dist. No. 7*,[41] the grantee, a school corporation, actually conveyed the land to defendant with no restrictions as to its use, and quitclaimed all its right, title, and interest in the property. No attempt was made to reclaim the land by the original grantee. Defendant continued to operate a school on the property, thereby fulfilling the objects of the grant to the original grantee. The broad educational purpose of the grant, and the word "assigns" was held to allow the original grantee to convey the land to defendant without the effect of the land's reverting to the grantor or his heirs, even though the original grantee's deed to defendant imposed no such limitation and purported to convey a clear fee.

### B. *Held to Constitute Abandonment*

There are some cases, however, where a sale or even an attempted sale of land given to a school district "for school purposes only" has been held to cause the land to revert. The deed in *Board of Educ. v. Hollingsworth*[42] was held to have conveyed a fee simple determinable, which estate was terminated when the grantee sold the property to a third person. The court upheld the third person's contention that the original grantee had a right to the land only so long as it was used for school purposes. Since the grantee passed a resolution that the lot was no longer

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38. 256 Wis. 456, 41 N.W.2d 616 (1950) ("to be used . . . for school purposes only, . . . a schoolhouse [to be erected] thereon, and in the event that the said school district shall cease to use the . . . land for the purpose above named, then . . . the . . . land shall revert").

39. Mills v. Evansville Seminary, *supra* note 29.

40. The court in the *Mills* case noted, however, that although the school district had conveyed the land out, it remained in possession throughout the three years in which the third person had title. The court inferred that if the defendants had lost possession, there would have been a total abandonment.

41. 64 N.H. 232, 9 Atl. 387 (1887) ("Provided said corporation and its assigns shall . . . build a school-house on said land, and said land . . . shall [never] be devoted to any other use than a location for a school-house . . . and when said land shall . . . cease to be used for such purposes, said land shall revert").

42. 56 Ohio App. 95, 10 N.E.2d 25 (1937) ("so long as . . . occupied as a site for a school house and no longer").

needed for school purposes, and ordered the lot sold, it would seem that the lot was abandoned even before the actual sale.

In *Malone v. Kitchen*[43] the plaintiff sought an injunction to prevent the school district from selling property which plaintiff claimed had reverted to him when the district advertised the school building for sale to the highest bidder. The court upheld the injunction, holding that the land reverted when no longer used for school purposes. Although the defendant averred that his intent was not to abandon until the building was sold, it seems that the intent of the district to abandon the land became clear when it advertised for bids.

In a Kentucky case[44] the board of education had authorized the sale of its school building and thereafter sold it to a third party. The board contended that it sold the building so as to facilitate the erection of another one on the land, but the court, because of lack of affirmative action on the part of the board to erect the new building within a reasonable time, denied this contention. The court held that the "acquiescence and affirmative action of the Board in *ordering the sale* of the building constituted an abandonment or cessation of the use of the property for school purposes."[45] The forfeiture here was worked, not on completion of the sale, but upon the board's ordering the sale to be made.

In a recent Arkansas case,[46] after non-use of the school building for three years, the school board offered the building for sale, but did not complete the sale because no bids were received. The court held that this evidence made it clear that the school board had no intention to use the building "as school property" or "for school purposes," even though some school furniture and desks were stored in the building.

In the *Harris* case[47] there was some evidence of negotiations for the sale of the school property between the plaintiff and the president of the school board.[48] These negotiations obviously were not considered to be evidence of an intent to abandon the land, for neither the trial court nor the Supreme Court referred to the negotiations for the sale of the land in controversy.

## VI. Uses of School Property Broadly Related to Community Needs and Uses of Church Property Broadly Related to "Church Purposes"

### A. *Uses Held to Be Within "School Uses" and "Church Purposes"*

Relying on the principle advocating strict construction of conditions that defeat estates, many courts hold that the use of land held in fee simple determinable

43. 79 Ind. App. 119, 137 N.E. 562 (1922) ("so long as the foregoing land shall be used for a public school.").

44. Webster County Bd. of Educ. v. Wynn, 303 Ky. 110, 196 S.W.2d 983 (1946) ("as long as . . . used for school purposes").

45. *Id.* at 111, 196 S.W.2d at 983-84. (Emphasis added.)

46. McCrory School Dist. v. Brogden, 333 S.W.2d 246, 250 (Ark. 1960) ("to revert . . . if discontinued as School *property*"; "so long as this property is used for school purposes").

47. Harris v. Consolidated School Dist., 328 S.W.2d 646 (Mo. 1959) (en banc).

48. Record, pp. 37, 39, 72-73.

for purposes broadly related to the community's public educational system or needs does not constitute an abandonment of the land.[49]

In the *Shuster* case,[50] due to a dwindling enrollment and difficulty in hiring a teacher, the school district ceased having classes in the school building, but used the building for monthly meetings of the board of education, 4-H Club meetings, public elections, and meetings of civic organizations. In upholding the lower court's ruling that there was no abandonment of the land because of the cessation of classes, the court described the public elections, 4-H Club meetings, and school board meetings as purposes for the "advancement of all branches of education," so as to come within the "school purpose" condition in the deed.[51]

Although in the *Brophy* case[52] the school building was not being used at all, the court pointed out some of the uses to which it could be put, which uses would be within the meaning of "school purposes." The court mentioned, *inter alia,* a manual training shop, a kindergarten, a public playground, a community center, and a school library. Any of these, said the court, might "reasonably" be construed to be a school purpose.

The school board in the *Koonz* case[53] passed a resolution to use the land as a district park and playground, which use, held the court, was within the meaning of the term "school purposes." The operating school nearest the proposed playground was six miles distant; thus the court used a very broad interpretation of "school purposes" to arrive at this decision.[54]

The court in *Board of Educ. v. Hunter*[55] very broadly interpreted the term "school purposes," or "educational purposes," to include *any* activity necessary to the proper maintenance and operation of a school. Here, although no classes were being held, the building was used for the home of several teachers of the school. Under its broad view of "school purposes," the court refused to declare an abandonment.

The use of school premises as a bus waiting station was held by the Arkansas court to be a "school purpose."[56] After the district was consolidated, and the pupils had been transferred to another school, the original schoolhouse, having been partly torn down in preparation for construction of a waiting station, was used by the pupils as a bus station. But the court strictly construed the deed, say-

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49. Shuster v. Board of Educ., 17 N.J. Super. 357, 359-360, 86 A.2d 16, 17 (Super. Ct. 1952).

50. *Id.* at 357, 86 A.2d at 16.

51. *Accord,* Board v. Nevada School Dist., 363 Mo. 328, 251 S.W.2d 20 (1952); Carnino v. Simon, 203 Okla. 234, 219 P.2d 1018 (1950) (board meetings, trustee elections, women's club meetings.)

52. Board of Educ. v. Brophy, 90 N.J. Eq. 57, 106 Atl. 32 (Ch. 1919).

53. Koonz v. Joint School Dist. No. 4, 256 Wis. 456, 41 N.W.2d 616 (1950).

54. *Accord,* Board of Supervisors v. Newell, 213 Miss. 274, 56 So.2d 689 (1952).

55. 190 Ga. 767, 10 S.E.2d 749 (1940) ("for school purposes;" "as long as . . . used for educational purposes").

56. McCullough v. Swifton Consol. School Dist., 202 Ark. 1074, 155 S.W.2d 353 (1941) ("for school purposes only"). *Accord,* Rose v. Marshall Special School Dist. No. 17, 210 Ark. 211, 195 S.W.2d 49 (1946) (bus station).

ing that the grantee did not abandon the land for "school purposes," even if it did, "as a school."

In the *Gage* case[57] the deed provided that when the land shall, "for the space of two years together cease to be used for such purposes," it shall revert. For more than two years no classes were held in the building, but it was not used for any other purpose. The court held that the above provision did not require the grantee to hold classes every two years, and so long as the premises were kept in good condition and ready for educational use, the condition was fulfilled.

The use of a school building solely for religious meetings and pie suppers has been held in Missouri not to constitute an abandonment of land deeded to the school "for school purposes."[58] The court emphasized, however, that the building remained under the control and supervision of the school board while it was used for such purposes.

Two cases involving church property deserve mention here as examples of a court's broad interpretation of "church purposes" and of "place of divine worship." In *Regular Predestinarian Baptist Church v. Parker*,[59] although church services were being held, the grantee had executed an oil and gas lease of part of its one-half acre, with power in the lessee to lay pipelines and erect storage tanks. The court held that the limitation upon the use "for church purposes" did not prevent the church from drilling for oil and gas. The court, in effect, said that the church could use or dispose of its property in any way, so long as it does not defeat the condition expressed in the deed. In *Carlsen v. Carter*,[60] the land given to the church was used solely as a driveway, lawn, parking lot, and oilwell site; the church originally on the land had been rebuilt on an adjoining lot. The court held that the lawn, driveway, and parking lot were as much devoted to religious uses as is the "soil which is actually covered by the roof of the church building itself." The court cited the *Parker* case to dispose of the question of whether the church could drill for oil on its land. The Illinois court's broad interpretation of "church use" is a good example of the reluctance of a court to declare a forfeiture, even where the use is but vaguely connected with the purpose originally intended by the grantor.

### B. *Uses Held Not to Be Within "School Uses"*

Some courts have interpreted "school purposes" narrowly so as to find a forfeiture of the property. In a Kentucky case[61] the deed provided: "To have and to hold for . . . school purposes and to revert . . . when it ceases to be used for public school purposes, which will be determined when the [school] district . . . shall, by its lawful, proper authorities select, locate and establish a public school house elsewhere." Upon consolidation with another school district in 1915, the pupils (all white) were transferred to another school, the original schoolhouse being used as

57. Gage v. School-Dist. No. 7, 64 N.H. 232, 233, 9 Atl. 387 (1886).
58. Tillman v. Melton, 350 Mo. 155, 165 S.W.2d 684 (1942).
59. 373 Ill. 607, 27 N.E.2d 522 (1940) ("for church purposes as long as . . . used . . . as a place of meeting").
60. 377 Ill. 484, 36 N.E.2d 740 (1941) ("so long as . . . used as place of public divine worship").
61. County Bd. of Educ. v. Littrell, 173 Ky. 78, 190 S.W. 465 (1917).

a school for colored children, as a storage place for school materials for the white children, and as a meeting place for the board of education acting for the white children. As to the last two uses, the court held that the "school purposes" in the deed included neither storage use nor board meetings, so that the use of the property for these purposes would not prevent a reversion. As to the use as a school for colored children, the court said that at the time of the conveyance, the law provided for a complete separation of white and colored schools, and the grantees being white, were prohibited from controlling colored schools. The court concluded that since the grantor and grantees were white, the intention of the grantor was to convey the site to be used only for white school purposes. This construction made mandatory a reversion when the school was used for colored children.

It has been held that the use of a schoolhouse for storage of books of a public library and for unfit furniture belonging to the school district does not come within the meaning of "school purposes."[62] The case also held that the school board's permitting a teacher of an adjoining Oriental school to use the building intermittently to display her art work to her pupils was not a "school purpose,"[63] because the teacher and pupils were from another district, thus not pertaining to the school purposes of the defendant school district. This court has taken an extremely and seemingly unwarranted narrow view of "school purposes"; yet this case has been cited with approval by a later California case.[64]

A Pennsylvania case,[65] although involving a lease, also illustrates the tendency of some courts to define "school purposes" narrowly. There the court held that even though a school district found it advantageously remunerative to sublease its building to a lodge for social functions, such use of the property was not "for school purposes." But this decision was partly based on a state statute which forbade school buildings to be used for other than public purposes.

## VII. Mere Non-Use of School Building

The closing of school, in and of itself, will not constitute an abandonment of school property so as to cause it to revert.[66] The Missouri Supreme Court has followed the test for abandonments as announced in the *Anson* case,[67] requiring more

62. Richey v. Corralitos Union School Dist., 67 Cal. App. 708, 228 Pac. 348 (Dist. Ct. App. 1924) ("to be 'used for school purposes only and if at any time not so used . . . shall be forfeited and revert' ").

63. *Id.* at 710, 228 Pac. at 349. *But see,* Board of Educ. v. Hunter, *supra* note 55 (school district's teachers lived in schoolhouse.).

64. Los Angeles City School Dist. v. Odell, 200 Cal. 637, 643, 254 Pac. 570, 573 (1927).

65. Schneider v. South Fayette School Dist., 100 Pitts. Leg. J. 313 (Pa. C.P. 1952) ("as long as . . . used for the establishment and maintenance of schools according to the law therein.").

66. 78 C.J.S. *Schools and School Districts* § 254, at 1228 (1952); Board v. Nevada School Dist., 363 Mo. 328, 336, 251 S.W.2d 20, 25 (1952); Board of Supervisors v. Newell, 213 Miss. 274, 56 So.2d 689 (1952).

67. Anson v. Tietze, 354 Mo. 552, 190 S.W.2d 193 (1945); see text accompanying note 16 *supra.*

than a mere cessation of classes. *Tillman v. Melton*,[68] decided before the *Anson* case, said that an abandonment of the premises for school purposes would depend upon whether there was an *intention to abandon*, and that non-use of the schoolhouse for over seven years was not sufficient evidence of an intention to abandon so as to cause a reversion.

The *Anson* case declared that the mere nondevotion to a use will not constitute an abandonment of the use; the intention to abandon must accompany the non-use. An intention to abandon was easily found here because of the non-use of the land for nineteen years after a fire had destroyed the only building on the land.

The *Anson* test was also used in the *Board* case,[69] where the non-use of the school building for almost two years was held not to have caused an abandonment. The evidence showed no affirmative action to abandon the property by the school board, other than that the district had been annexed to another and that no classes were held for a period of slightly less than two years.

The *Harris* case,[70] after citing the *Anson* case and quoting its abandonment test, found no abandonment where classes had not been held for seven years. "No one could . . . claim that a cessation of classes for a day, a week, a month, or even for a term, would effect a reverter, if they were to be resumed thereafter."[71]

In a Massachusetts case,[72] where the school building was vacant and unused for nine years, and the only action taken by the school board having been to fence the land, the court did not declare an abandonment. The only evidence of an intention not to abandon was the fencing of the land; the keeping of the property on the town records as school property; and the secret intentions in the minds of different school board members to keep the land for school purposes.[73]

A test for abandonment slightly different from the *Anson* test was applied in *Rowe v. City of Minneapolis*:[74]

> Temporarily ceasing to use . . . the building for a school would be competent evidence of a design to abandon and abandonment; but . . . a failure to use . . . for a certain period of time [does not] conclusively establish the design to abandon, as well as complete abandonment.

Although in the *Newell* case[75] there was evidence of acts which indicated an

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68. *Supra* note 58.

69. Board v. Nevada School Dist., *supra* note 66. See also text accompanying note 21 *supra*.

70. Harris v. Consolidated School Dist., 328 S.W.2d 646 (Mo. 1959) (en banc). *Cf.* Estes v. Muskegon County Agricultural & Driving Park Ass'n, 181 Mich. 71, 147 N.W. 553 (1914) ("for purposes of fair grounds and driving park") (abandoned on eight years' non-use).

71. Harris v. Consolidated School Dist., *supra* note 70, at 651.

72. Crane v. Hyde Park, 135 Mass. 147 (1883).

73. *But see* Dvorak v. School Dist., 237 Iowa 442, 22 N.W.2d 238 (1946) (non-use for six years) (no evidence of affirmative intention to abandon).

74. 49 Minn. 148, 157, 51 N.W. 907, 908 (1892) ("for the purpose of erecting the district school house . . . and for holding school").

75. Board of Supervisors v. Newell, *supra* note 66 ("shall revert . . . when it fails to be used for school purposes").

abandonment,[76] the court required an intent to abandon to accompany such acts before it would declare a forfeiture. Here, there was not only no such intent, but there was shown an intent not to abandon. The court held that there was shown an affirmative intent to keep the land, and a "mere non-use with nothing more is not sufficient evidence of complete abandonment."[77]

A lack of continuous use, with sporadic cessations of classes, has been held not to constitute an abandonment unless there is shown clearly and unmistakably an intent to abandon, or a permanent cessation of the use of the school site.[78]

## VIII. Determination of Intention to Abandon

### A. *Objective Manifestation of Intention*

Several jurisdictions have refused to look at the secret intentions of the school boards to keep the property for "school purposes," but have considered only the objective manifestations of the intent to abandon. In *Steele v. Rural Special School Dist. No. 15*,[79] although the chairman of the school board testified that the board "conceived the idea of using the building later," the court relied entirely on the objective evidence presented, giving little, if any, weight to the chairman's testimony.[80]

The Pennsylvania court[81] also relied solely on objective evidence of intention, and, in justification of this reliance, said that allowing mental intention to be considered by the court would lead to fraud, for then any school district could close a schoolhouse and when a reversion was sought to be established for non-user, set up in their minds the intention to keep the buildings for future "school use." The basis, then, of the court's justification was that it is difficult to ascertain the mental intentions of any person. In this case the intentions of the school board were merely to re-open the school at some indefinite time in the future, if it might be required for school purposes. Even if the court had relied on the board's intentions here, the "mere possibility of future use" would not be sufficient to prevent a reverter.[82]

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76. School board resolution to consolidate, actual consolidation, and transfer of all students.

77. Board of Supervisors v. Newell, *supra* note 66, at 288-89, 56 So.2d at 696; *accord*, Wheaton v. Fernenbaugh, 8 Ohio App. 182 (1917) (facts omitted). *See also* Town of East Greenwich v. Gimmons, 34 R.I. 526, 84 Atl. 1008 (1912) ("for school purposes") (six years' non-use).

78. Locke v. Union Graded School Dist., 185 Okla. 471, 94 P.2d 547 (1939) ("so long as . . . used for the purpose of a school site and campus ground"); *accord*, Krieger v. Consolidated Dist. No. 2, 205 Okla. 18, 234 P.2d 389 (1951) ("for school purposes").

79. 180 Ark. 36, 20 S.W.2d 316 (1929). *Accord*, James v. Gulf Ref. Co., 206 Miss. 781, 41 So.2d 2 (1949) ("attitude of dominion" is not enough).

80. The fact that the defendant re-entered the premises and expended a great deal of money in repairing the schoolhouse seems to have "helped" the court in reaching its decision.

81. Schneider v. South Fayette School Dist., 100 Pitts. Leg. J. 313, 324-25 (Pa. C.P. 1952).

82. *Id.* at 321.

One case has clearly held that the question of abandonment depends on the use to which the property is put, and not the intention.[83] The Wisconsin supreme court stated, "If . . . the property should be owned by the district as long as the district wanted it, the grant would be unconditional." This decision, in disregarding entirely the intention of the school board, seems unsound. It runs counter to well-settled principles of law[84] which require an *intention to abandon* as well as acts carrying the intention into effect. A later Wisconsin case,[85] although attempting to distinguish the *Putney* case, relied on the traditional method of finding an abandonment—determining the existence of an intent to abandon. Although the *Putney* case has not yet been expressly overruled, it has not been cited by any other Wisconsin case; its effect may fortunately have died in Wisconsin.

### B. *Non-use for Statute of Limitations*

It has been held, apparently in an attempt to standardize the length of time of non-use required to constitute an abandonment, that non-use alone for the period of the statute of limitations may constitute an abandonment.[86] A basis for this reasonable rule seems to be that non-use for the period of limitations would be so unreasonable in duration as to defeat the purpose of the grant. Such a rule coincides with the law regarding abandonment of easements, which is well settled, in that non-use of an easement for the statute of limitations, accompanied by some act of the owner of land inconsistent with the existence of the easement, will raise a presumption of its extinguishment;[87] but mere non-use for a period short of the statute will not constitute an abandonment.[88]

## IX. Effect of Legislation on Determination of Abandonment

Legislation may determine when non-use of land given for a specific purpose will amount to an abandonment of that land. Pennsylvania has had, since 1911, a special statute applying expressly to abandonment of school lands acquired for school purposes:

> No property that has heretofore been acquired by, conveyed or granted to, any school district . . . for school purposes . . . shall be considered as abandoned until the board of school directors of such district shall pass, by a vote of the majority of members of the board, a resolution declaring it to be the intention of such district to vacate and abandon the same . . . .[89]

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83. Putney v. School Dist. No. 4, 215 Wis. 539, 540, 255 N.W. 76, 77 (1934).
84. 1 Am. Jur. *Abandonment* § 4, at 4 (1936); 1 C.J.S. *Abandonment* § 1, at 5 (1936).
85. Koonz v. Joint School Dist. No. 4, 256 Wis. 456, 41 N.W.2d 616 (1950).
86. Wheaton v. Fernenbaugh, 8 Ohio App. 182 (1917) (*semble*).
87. Miller v. Garlock, 8 Barb. 153, 155 (N.Y. Sup. Ct. 1850).
88. Robie v. Sedgwick, 35 Barb. 319, 329 (N.Y. Sup. Ct. 1861); *accord,* Hatton v. Kansas City, C. & S. Ry., 253 Mo. 660, 162 S.W. 227 (1913) (en banc). Missouri cases on abandonment of school sites have relied on cases involving the abandonment of easements. See, *e.g.,* Hatton v. Kansas City, C. & S. Ry., *supra* (right of way); Gibson v. Sharp, 277 S.W.2d 672 (Spr. Ct. App. 1955) (drainage ditch); Campbell v. City of Kansas, 102 Mo. 326, 13 S.W. 897 (1890) (cemetery).
89. Pa. Stat. Ann. tit. 24, § 708 (1949).

The Pennsylvania court has interpreted this statute strictly, thus allowing only one legal method of abandoning school property. A resolution to close a school permanently followed by non-use of the property for three years, except as a bus waiting stand, did not constitute an abandonment.[90] In the *Robinson* case the court, in interpreting the abandonment statute,[91] stated that there is "but *one way* to abandon the property, and that is for the school directors . . . to pass, by a vote of the majority . . . a resolution 'declaring it to be the intention of such district to vacate and abandon the same.'"[92] The minutes of the school board showed a unanimous vote to "close the school permanently"; yet this was not sufficient under the Pennsylvania statute to constitute an abandonment of the school.

An offering of the school property for sale was held not to constitute an abandonment.[93] Land not used since 1927 for the purposes for which it was conveyed was held not abandoned until the school board complied with the statute by formally passing a resolution in 1941.[94] The non-use of a school building because of the transfer of the students to a consolidated school, absent a resolution of the school board, did not constitute an abandonment.[95]

Following the Pennsylvania statute, the courts of that state have placed the matter of abandonment of school land entirely in the hands of the school boards. It is they who have the knowledge and first-hand information as to when school property should be abandoned. School districts in Pennsylvania have great freedom in using their property as they deem necessary and expedient without fearing that the property will be held to be abandoned.

Missouri's statute on abandonment of school sites provides that "no schoolhouse or school site shall be abandoned or sold until another site and house are provided for such school district."[96] Although the law has been in effect since 1889,[97] only one case in Missouri dealing with abandonment of school property has based its decision on the statute. In *School Dist. No. 24 v. Mease*,[98] where no classes were held for most of one school year, the court relied on Section 10403, RSMo 1939 [now Section 166.010, RSMo 1949] in declaring that there was no abandonment.

Since the law in Missouri makes it incumbent upon school boards not to

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90. East Lackawannock School Dist. v. Robinson, 18 D. & C. 531 (Mercer County Ct. 1932).

91. The statute then in force was the Act of May 18, 1911, P.L. 309, Art. VI, § 603, which was superseded by § 708, *supra* note 89, without material change.

92. East Lackawannock School Dist. v. Robinson, *supra* note 90, at 532. (Emphasis added.)

93. Miller v. School Dist., 26 Berks 215, 21 Pa. D. & C. 479 (Berks County C.P. 1934). See note 91 *supra*, for statute then in force.

94. Calhoun v. Hays, 155 Pa. Super. 519, 39 A.2d 307 (1944) ("for the establishment and maintenance of the common schools . . . only . . . and for no other purpose") (used for church purposes). See note 91 *supra*, for statute then in force.

95. Deaven v. School Dist., 66 Dauph. 169, 1 Pa. D. & C.2d 293 (Dauphin County C.P. 1954) (construing present statue, *supra* note 89).

96. § 166.010, RSMo 1949.

97. Mo. Laws 1889, at 246.

98. 205 S.W.2d 146 (Spr. Ct. App. 1947).

abandon or sell school property until another building is provided, there should be a strong presumption that there is no abandonment unless and until the board provides a new "site and house." If the court finds an abandonment before the school board acquires a new schoolhouse, the court is thereby presuming that the board violated a valid statute—section 166.010—which presumption should not be made by the courts. As a matter of public policy the courts should presume that a school board has *not* violated the statute, thereby presuming that the board has not abandoned the school property until a new site and building are acquired.

Another statute in Missouri that can be used as evidence of a non-abandonment provides for state aid for abandoned schoolhouses.[99] It provides, in part, that one thousand dollars shall be paid for each rural school building abandoned on account of a new building having been erected. The defendant in the *Harris* case[100] testified that the board had never applied for the one thousand dollars, which fact, although not conclusive, was some evidence that the board had no intention to abandon the property. It is reasonable to assume that the board would have applied for the one thousand dollar "gift" had it any intention to abandon the property.

## X. Conclusion

As the urbanization of the countryside and rural areas continues, more and more school districts will consolidate and reorganize. As small farm communities expand, with the resulting greater number of school children, larger schools will be needed. The consequential rebuilding of schools, and their consolidation and reorganization, will necessarily result in more and more small school sites' being abandoned, or not being used. Therefore the litigation concerning the status of the title of school property allegedly abandoned will increase as the educational system enlarges and improves.

Were it not for the fact that most land given to school districts in determinable fee simple amounts to only one or two acres, the number of cases in our courts seeking a determination of the question of abandonment would be quite great. The expense and loss of time caused by prosecuting a claim in the courts preclude many holders of a possibility of reverter from taking their cases to court.

Probably a greater deterrent to court action in Missouri on a claim of a reversion of allegedly abandoned land conveyed in determinable fee simple is the strict construction given by the Missouri Supreme Court of conditions that would defeat the estate, and the trend towards even greater liberality in favor of grantee school districts. In the *Tillman*,[101] *Mease*,[102] *Board*,[103] and finally, in the *Harris* case,[104] the court found no abandonment of the school property. The Supreme Court of Missouri in the *Harris* case seems to have been as liberal as they ever had been to school districts. The evidence of abandonment there was much stronger than

99. § 161.110, RSMo 1949.
100. Harris v. Consolidated School Dist., 328 S.W.2d 646, 649 (Mo. 1959) (en banc); Record, p. 86.
101. Tillman v. Melton, 350 Mo. 155, 165 S.W.2d 684 (1942).
102. School Dist. No. 24 v. Mease, 205 S.W.2d 146 (Spr. Ct. App. 1947).
103. Board v. Nevada School Dist., 363 Mo. 328, 251 S.W.2d 20 (1952).
104. Harris v. Consolidated School Dist., *supra* note 100.

that in the *Board* case; yet, even though the trial court held that the building had deteriorated and no classes were held for more than six years, it found no intent on the part of the school board to abandon the premises.

As the Missouri cases indicate, it is difficult to prove in the school cases an intent to abandon the property. It would be injudicious to adopt the view taken in the *Putney* case,[105] that of refusing to consider the intention of the school board at all. Yet the opposite attitude, the advantage given to the school board by the Pennsylvania school statute,[106] seems to allow the board an unfair opportunity to capitalize on the non-use of its property to the detriment of the holder of the possibility of reverter. A clear advantage to this statute is that it at least establishes a definite moment at which the property becomes legally abandoned, and precludes any other method of abandoning school property.

Perhaps a solution to the landowner's problem may be found by legislation combining the better ingredients of each of the two extremes. Such legislation should perhaps consider the grantee's intention as subjectively as possible, yet not permit him to take undue advantage of his position. Only if a definite moment of abandonment can be formulated, or at least more definite standards to be utilized in determining such moment can be established, will the growing number of school abandonment cases be diminished. And only with these standards will school boards and landowners be able to deal with their land with confidence and safety.

RICHARD H. BREINER

105. Putney v. School Dist. No. 4, 215 Wis. 539, 255 N.W. 76 (1934). See text accompanying note 83 *supra.*

106. PA. STAT. ANN. tit. 24, § 708 (1949). See text accompanying note 89 *supra.*