October 31, 1951

To Peter M. MacDonald, Esquire
Re: Reversion of Schoolhouse Lot

Your letters of September 5 and 26, 1951, to the Department of Education have been referred to this office for consideration.

You state that on November 7, 1857, one Moses Mason gave a warranty deed to Kelsey O. Bean, deeding certain property in the town of Mason and right at the bottom of the description was inserted the following sentence:

> "excepting and reserving the school house situated on said land and a reasonable amount of land to be used as a yard, so long as the said house shall be occupied as a school house."

You state also that subsequently the property was transferred several times, but that the above quoted exception was not contained in the subsequent instruments. (This last item is of no consequence, because a search of title would show the exception in the original deed and a subsequent purchaser would have, at least, constructive notice of the exception.)

You then allege that the property was abandoned approximately twelve years ago, that no care had been taken of it since that time, the windows are all out and the building half torn down (none of which statements do we conceded to be accurate), and as a result you have informed Mr. McKenzie that the land and buildings now belong to the McKenzies and have advised him to take possession of the land and buildings.

Please be advised that we are of the opinion that the land and property do not belong to Mr. McKenzie, and we will here set forth a few reasons why we are inclined to so believe.

The above quoted clause attempts to exclude from the conveyance to Kelsey O. Bean a portion of land on which a school house was situated at the time of the conveyance.

Before discussing the effect of such a sentence a legal descriptive term must be applied to it in order to determine its effect. It might, with justification, be termed an exception, or perhaps a reservation, or again a base of determinable fee with a possibility of reverter. And we can conceive of no other meaning to be attached to that sentence.

If, then, you consider the sentence to be any one of the three: exception, reservation, or determinable fee, then in no case would your Mr. McKenzie be the owner.

This reasoning is based on the fact that the operation of an exception is to retain in the grantor some portion of his former

estate, and whatever is thus excepted or taken out of the grant remains in him as of his former title. Thus the grantee of the original deed could never grant to a subsequent grantee that land title to which still remains in the original grantor. 85 Maine 448, 453-454.

A reservation, too, must always be for the grantor and it is never to a stranger; Engel v. Ayer, 85 Maine 448. It is

> "the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant."

Thus, if A. reserves to himself a portion of land from a larger plot deeded to B., B. has no claim to that smaller portion so reserved, but title to it remains in A. By a subsequent transfer B. could not grant to C. land title to which still remains in A.

This exception or reservation contained in the deed to Kelsey Bean was undoubtedly contained in that prior instrument conveying the land to X, or to the Town of Mason "so long as the said house shall be occupied as a school house"; and in the later conveyance to Bean that condition was recited in the form we now see.

Assuming, then, that to X, or the Town of Mason, that property was so granted, then you have a base or determinable fee, with a possibility of reverter. Reverter to whom, then, is the question here. Such possibility of reverter is only in the grantor, and, according to the later Maine cases (see Pond v. Douglass, 106 Me. 85) is descendible, but incapable of alienation or devise.

To pursue this issue a bit further, assume that in addition to the above mentioned exception there was the added phrase, "Should the land revert back by reason of non-occupation for that purpose, then the land shall be considered to belong to the original, and shall pass with it to Bean." What effect would this have in passing that portion to Bean? Pond v. Douglass, 106 Me. 85, holds that the possibility of reverter would not transfer that land to Bean. After death, the qualified fee determined, the reversion descended to the heirs of the grantor.

Attacking this problem from still another angle, we might assume, there being no way we can immediately think of to follow your reasoning, that you believe that there was created an executory interest, and that by virtue of a "springing use", there was created a freehold to commence in future by an executory limitation.

Here again, we contend, your client fails to establish a bona fide claim in that the estate reverted to the original grantor or his successors in interest. This, of course, follows because of our rule of perpetuities. While the original determinable fee was not void because of the rule, still, if an executory interest designed to follow a determinable fee upon expiration will not vest within

the period sanctioned by the rule against perpetuities, such executory interest is void; and since the preceding estate is unaffected by a void executory limitation, but has already expired, the property reverts to the original grantor or his heirs. See 19 Am. Jur. on Executory Interests.

Other than by way of springing or shifting uses (executory limitation) there appears to be no way in which an estate in freehold can commence in the future. We do not think that such a devise was attempted here, and, if it had been, then for the reason cited above, it would be void.

For these three reasons we assert that the property does not belong to the McKenzies - the only possible claimants would be the original grantor or his heirs - and then only in the event that the school house had been abandoned.

We do not admit such abandonment, but to the contrary urge that there has been no abandonment. An abandonment is a voluntary relinquishment. Our understanding is that the school is not "half town down", but in fact is in good condition, desks and other equipment being in the building and ready at any time for re-opening.

For these reasons, giving the conventional designation to the quoted phrase, we are of the opinion that the State still owns the school house and lot, and more particularly so as against your client, who has no claim of right by virtue of either title or color of title.

James G. Frost
Assistant Attorney General

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See February 25, 1958.