Opinion No. 46-4840

January 24, 1946

BY: C. C. McCULLOH, Attorney General

TO: Mrs. Georgia L. Lusk Supt. of Public Instruction Department of Education Santa Fe, New Mexico

*{*175}* We are in receipt of your letter of January 16, 1946, a letter from the Superintendent of Schools of San Juan County, and the original Deed *{*176}* from the Hutchins and the School District. This Deed contains the following clause:

"With reversion to parties of the first part whenever said land shall be used for any other than school purposes."

From the Superintendent's letter it appears that the premises are no longer used for school purposes, but that the building on the premises has been used as a community building and for dances, and that the County Board of Education agreed to deed the land to Mrs. Hutchin. The Deed, in my opinion, with the above quoted clause, created in the School District an estate in fee simple with a condition subsequent. Such conditions are not favored by the law, and would be strictly construed against the grantor. However, if the intention is clear and unambiguous, the Courts will enforce them. 18 C. J. 359.

As I read this clause, the condition is use for other than school purposes. Thus, a mere non-use would not be a breach of the condition, and so would not work a forfeiture. 18 C. J. 371. A mere temporary or occasional use for other than school purposes would not, in my opinion, work a forfeiture. 18 C. J. 371 (n) 15.

In view of the foregoing it is a very close question as to whether or not a forfeiture has, in fact, taken place. If, however, a forfeiture has taken place, some action is necessary upon the part of the grantor to effect a forfeiture, as the title conveyed is not void, but is only voidable by the action of the grantor, who must take advantage of the condition and repossess himself of the estate by actual re-entry, or by some action equivalent thereto, and manifest an intent to terminate the estate. 18 C. J. 381.

It is therefore my opinion that unless a re-entry had taken place, the forfeiture had not become effective, so that the title to the premises remained in the school district.

Turning now to the Deed executed by the County Board of Education, it appears to me that under no circumstances could the deed be affected. If the forfeiture had already taken place, the title reverted to the Hutchins. There was nothing for the deed to operate on, so that it could not add to the estate of the Hutchins. However, if the forfeiture had not taken place, no power existed in the County Board of Education to execute the deed. The only power of the County Board of Education to sell real property belonging

to a school district is that provided by Section 55-714 of the 1941 Compilation, which requires the sale to be for cash, with the written consent of the Superintendent of Public Instruction. This apparently was not done.

I realize that what has been said above is technical. However, the subject matter is technical itself. Before the clause creating the condition subsequent becomes effective, the property must be used for something other than school purposes, and such use must have been more than incidental or occasional. Further, a re-entry by the previous owner must have been made.

I note, in addition, that 8 persons are named as grantors. For this reason, a deed to Mrs. Hutchin alone would not be justified.

My advice to the School Board would be to have a suit filed if the land is valuable.

I am enclosing herewith the original deed.

By ROBERT W. WARD,

Asst. Atty. General