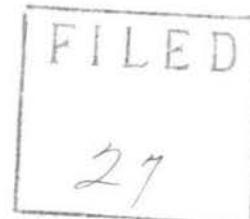


When surety bond for school fund  
loan is released.

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February 9, 1933



Mr. R oth H. Faubion,  
Prosecuting Attorney  
Lamar, Missouri.

Dear Sir:

Beg to acknowledge receipt of your letter with copy of bond therein. Assuming all blanks in form of bond sent by you properly filled out and that loan was made under Section 9243 R. S. Mo. 1929, I suggest it will be necessary to have exact knowledge of what occurred in the way of extension of time without consent of surety before it can be determined whether surety is liable or has been released by extension of time of payment.

In Harburg v. Kumpf, 151, Mo. l. c. 20, Supreme Court said:

"It has been uniformly held in this State that if a creditor for a valuable consideration makes an agreement with the principal debtor which suspends the right to sue on the demand for a definite period of time without the consent of the surety, it operates to discharge the surety."

And same volume and page, the court further said:

"And in that case (referring to 69 Mo. l.c. 542) it is also held that payment of interest in advance is a sufficient consideration to support the contract for extension."

And in West vs. Brison 99, Mo. l. c. 693, it is said:

"Where the surety claims to have been discharged by reason of an agreement between the creditor and the principal debtor, extending the time of payment, it must appear that the agreement was upon a

valuable consideration and that the extension was for a definite period of time."

And in Petty vs. Douglas, 76, Mo. 70, it was held:

"That payment of interest then due on a matured note and part payment of the principal was no valid consideration for an agreement to extend time and the surety was not thereby discharged."

And in Owings vs. McKenzie, 133 Mo. 323, it was held:

"That an agreement to extend for which there was no consideration, except the legal consequences of accruing interest, according to the tenor of the note, was not valid."

The principal underlying the cases is that mere agreement by principal to do what tenor of note or bond calls on him to do will not constitute sufficient consideration for contract to extend without consent of surety and will not release surety but contra a contract to pay interest in advance which tenor of note or bond does not require is a good and valuable consideration moving to the creditor and will if made without consent of surety discharge surety.

On account of above rule of commercial law the Supreme Court said in Harburg vs. Kumpf, 151, Mo. l.c. 22:

"We hold therefore that the promise of a holder to extend a note after maturity for a definite period, based on no other consideration than the promise of the maker to keep the money during that period and pay interest thereon according to the legal tenor and effect of the note is not based on a valid consideration, the promise to extend is not binding and if there is a surety on the note he is not discharged although the attempted agreement for extension was made without his knowledge or consent."

And in Investment Co. vs. Scales, 277, Mo. p.366 the court

division one said:

"The payment of interest by the maker, in advance or after due, although it tolls the Statute of Limitations, does not release indorsers."

And in 278, Mo. l.c. 518, in Baade v. Cramer, the court said:

"Although the maker of a negotiable note did not indorse or authorize the indorsement thereon of a memorandum extending the time of payment, yet if it was made at his solicitation and in accordance with his agreement with the payee, in good faith and based on a sufficient consideration, and stated the conditions of the extension, the agreement constituted a valid and subsisting contract."

And in same case on same page the court said:

"Extension of a negotiable note, absent a memorandum indorsed thereon, can be established by parol testimony; and an agreement to extend the time of payment may be made verbally, and independently of the deed of trust given to secure the note."

And in 83, Mo. p. 21 the court said:

"And extension of the time of payment of a promissory note, for a definite period, by agreement between the payee and maker, will, if based upon a sufficient consideration discharge the surety, if made without the latter's knowledge and consent. The payment of interest in advance in pursuance of such agreement is a good and valuable consideration."

And in the case of Jobe, Admx, v. Buck and Mosely, 224, M.A. 622, the court held:

standing alone, is insufficient to show extension of time so as to release surety."

And so if the right to sue is not suspended by agreement between the payee and principal debtor the payment of interest in advance or payment as it becomes due and after maturity note is allowed to continue unpaid with such payments of interest, without consent of surety he is not discharged.

And so in last above cited case, 224, M. A. l.c.629--Wherein court held the surety was not released although she had no knowledge of payments of interest, and giving its reason for such holding the court said:

"There is nothing in the facts to show that plaintiff ever divested itself of the power to sue at any time. There never was a time, during the long period of indulgence disclosed by this record, that the appellant as surety could not have paid off the amount due on the note, and then pursued her remedy against the principal debtor for the amount so paid."

The underlying principle that is the basis of release of the sureties on account of extension given principal without surety's consent is that to effect a release the extension must in some way materially affect the surety in his right of recourse against the principal.

From the forgoing citations of authorities you will I think agree that you should as far as you can do so write the Attorney General what facts exist and can be proven by surety to show a definite extension of time to principal for a fixed period, of time and just what consideration if any was paid by way of interest or otherwise by principal to payee and whether or not interest paid before maturity of obligation for extension or after maturity, and whether or not interest was paid in advance as a consideration for extension and whether agreement for extension was oral or in writing, or by way of a memorandum on the obligation or on some other piece of paper. Also, what proof if any, surety can produce to show he did not consent to the extension.

In short, write the Attorney General all the facts you can obtain bearing on the extension. When all the facts you can

unearth are submitted to this office, it will promptly give you its opinion based on the facts submitted .

In your letter of January 24th you say:

"I would be pleased to have an opinion from you on the following facts; to wit: whether or not in the school fund bond enclosed is the security liable in case the loan is continued or extended without the notification or consent of the security. The county court is beset with such a circumstance. A party who was security on a school fund bond is balking in the payment of a deficiency after the sale of a property on the ground that he is not liable because said loan was extended without his consent."

The foregoing authorities disclose a simple extension unless based on a legal consideration as outlined in above authorities would not release surety. For release must be based on extension agreement oral or written, definitely proven, and on a valid consideration, and extension must be for a fixed definite period of time, and without consent of surety.

The attorney General will be pleased to render you all the assistance within his power in this matter.

Very respectfully

Edward C. Crow.

APPROVED

ROY McKITTRICK  
Attorney General.

ECC:MM