FOR OPINION 158 (1964)
(Answered by Letter-C.B. Burns

April 22, 1964

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Honorable John B. Mitchell
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Mr. Mitchell:

This is in answer to your recent letter in which you pose several questions regarding ten general obligation bonds that were issued by the County of Buchanan, which were dated March 15, 1938, and which matured January 15, 1949. Your questions are as follows:

> "1. May an action be maintained at this time for the collection of the principal of these bonds and interest coupons attached in view of the provisions of Section 516.110 R.S.Mo. 1949, or any other Statute of Limitations?
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> "2. If such an action has been barred by the Statute of Limitations, may the County Court, or the Prosecuting Attorney, or any other County officer waive the Statute of Limitations as a defense to such an action, and authorize the payment of said principal and interest?
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> "3. If an action is brought to collect said principal and interest, is it discretionary, on the part of either the County Court, or the Prosecuting Attorney, as to whether or not the Statute of Limitations should be set up as a defense to such an action?

"4. If said principal and interest may now be paid, out of what funds may such payment be made, in the absence of any provision in this year's County Budget for such payment?

"5. Did the inclusion of items in the County Budget for 1961 and 1962 designated as a reserve for unpaid obligations amount to an acknowledgment or promise to pay these bonds, within the meaning of Section 516.320 R.S.Mo. 1949, so that the Statute of Limitations is no longer a bar or defense to an action brought for their collection?

"6. Assuming that the Statute of Limitations is now a bar to an action for the collection of said bonds and interest, would the individual members of the County Court be subject to the penalties provided in Section 558.260 if they, as members of the County Court, voted in favor of making an order by the County Court having the purpose and effect of authorizing and procuring the payment of said bonds and coupons?"

In answer to your first three questions, we are enclosing an official opinion rendered by the Attorney General under date of September 13, 1954, to Rex A. Henson. You will note that the opinion holds that a public body does not have discretion to waive the statute of limitations running in favor of the public. It is, therefore, our view that an action cannot be maintained at this time to collect the principal and interest on such bonds when the ten-year statute of limitations expired in 1959.

It is further our view, as pointed out in the enclosed opinion, that public officials do not have discretion to determine whether the statute of limitations shall be waived, but are bound as a part of their public duties to interpose the statute of limitations in defense, if the holders of such bonds file suit to collect for such bonds.

In view of the above holding, it is unnecessary to answer question number four.

You state that in the county budgets for 1961 and 1962, there was set aside the sum of Ten Thousand Dollars as "a reserve for unliquidated obligations" but state that such obligations were not further or otherwise identified, and you ask whether such budgetary designation would constitute an acknowledgment or promise which would make the statute of limitations inapplicable under the provisions of Section 516.320, RSMo, which provides that in actions founded on contract no acknowledgment or promise shall be evidence of a new or continuing contract which will take the case out of the operation of the statute of limitations unless the acknowledgment or promise be in writing, subscribed by the party chargeable thereby.

It is our view that the designation in the county budget for the years involved would not be a promise or acknowledgment in writing which is required by Section 516.320.

In the case of Green v. Boothe, 188 S.W. 2d 84, the Kansas City Court of Appeals, in quoting from Corpus Juris, said at l.c. 88:

> " * * * A part payment to be effectual to interrupt the statute must be voluntary on account of the debt in suit, and free from any uncertainty as to the identification of the debt on which it is made, and in this behalf it is said that no distinction can be made on principle between a written acknowledgment and part payment. * * *"
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> (Second emphasis ours.)

It can be seen that the written acknowledgment or promise must be clear and specific as to the identification of the alleged debt upon which the new or continuing contract is to be based. We believe it to be evident that a mere reference to "reserve for unpaid obligations" is not a clear, distinct, unequivocal and certain identification of the ten bonds about which you inquire.

Your question assumes that the county court has the right, power and authority, after the statute of limitations has run, to revive an obligation which has been barred by limitation. This underlying assumption would appear to be incorrect in view of our holding that the county court is obligated to interpose the

defense of the statute of limitations in all cases in which the statute has run. However, it is unnecessary to rule this issue, inasmuch as there has been no acknowledgment or promise in writing subscribed by the party chargeable insofar as payment of the ten bonds in question is concerned.

Question number six inquires whether the members of the county court would be subject to the penalties provided in Section 558.260 if they directed by order of the court the payment of such bonds out of county funds. It is our view that a court might well hold that the members of the county court who vote for the payment from county funds of such bonds would be subject to the penalties provided in such section. It might well be that such a payment would be held to be for a purpose not directed and warranted by law, and, therefore, illegal and such as would come within the provisions of Section 558.260. Even if a court held that the provisions of Section 558.260 are not applicable in the present situation, the Supreme Court of Missouri has nevertheless held that public officials may be personally liable for illegal expenditures they authorize, and that the prosecuting attorney may bring an action to recover from such officials such illegal expenditures. State To Use of Consolidated School District No. 42, Scott County, v. Powell, 221 S.W. 2d 508.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CBB/fh
Enclosure