COUNTY COURT: May maintain action against surety on school bond without foreclosure of mortgage.

February 11, 1933

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Honorable Roth H. Faubion
Prosecuting Attorney
Lamar, Missouri

Dear Mr. Faubion:

We acknowledge receipt of your letter dated February 6, 1933, which letter is as follows:

"In 1926, A and B, husband and wife, borrowed $1900.00 from the common schoolfund of Barton County and executed to the county their school fund bond with C and D as sureties on this bond.

They also undertook to secure the same by a school fund mortgage on a piece of property in Golden City, Mo., but the scrivener in drawing this mortgage, by mistake located the property in Lamar,Mo,which of course,failed to convey the legal title to the property.

Default has been made in the payment of this loan and it now becomes necessary to either feform this mortgage, sell the property and then sue on the bond for a deficit as the property will not sell for enough to satisfy the loan.

The courts seem to hold that if default be made in the payment of a school fund loan it becomes the duty of the sureties to pay this debt and then look to their principle and the property mortgaged for their satisfaction 70 Mo. 645, 61 Mo. 332, 52 A,351,and 13 A. 99.

It would require one term of court to correct the mortgage, another to sell the property and a third to sue on the bond. This would occasion considerable delay and expense. I am unable to see any reason why the county cannot sue directly on the bond. This would facilitate matters a great deal. I mean a direct suit without foreclosing the mortgage.

I would like your opinion on this question. I hate to ask haste, but we must have this for our April Term of Circuit Court, so if possible please do this quickly".

The law governing the situation presented by your letter has been determined by the Supreme Court of this state in Johnson County v. Gilkeson, 70 Mo. 645, the court saying:

> "This was a suit against Gilkeson and Brammer, securities for one Swan on a bond given the county for the use of school township number 44, Range 28, in 1866. The defense on the part of Brammer was, that he gave notice to the plaintiff to sue or to foreclose a mortgage on Swan's property, and by reason of the neglect of the county to do either within the thirty days after the notice, the debt was lost so far as the principal was concerned by his insolvency after the notice. Another defense was, that the name of Eads, another security on the bond when it was signed, had been erased. In regard to this last defense the court found, as a matter of fact, that it was not true, and the evidence authorized the finding. And the only question here is as to the first defense. As this court has already decided this question in two cases, (Cedar Co.v Johnson, 50 Mo. 225, and Jasper Co.v.Shanks, 61 Mo.332.) it is useless to look into the long list of authorities elsewhere cited by the counsel for appellant. Whether this right claimed here is under our statute or at common law, the result is the same, since the court has declared that "one who becomes a surety on such public bonds must hold himself ready to pay it, if the principal fails; and if he fears his insolvency, he should pay the obligation and collect it, if he can, of his principal; but he will not be discharged on account of the neglect of public officers. Judgment affirmed". (cases cited)

There is no legal obstacle to the county maintaining an independent action on the bond, however, the court could as properly maintain an action to correct the mutual mistake made in the drawing of the mortgage if it was a mutual mistake, and in the same action ask for a foreclosure of the county mortgage and get a deficiency judgment against the sureties, having made the sureties a party to the action, the sureties would doubtless be subrogated to the rights of the county so far as the correction and foreclosure of the mortgage is concerned. See State ex rel v.Davidson, 315 Mo. 549.

Very truly yours,

GILBERT LAMB,
Assistant Attorney General.

APPROVED:

Attorney General.