SCHOOL FUND MORTGAGE: Statute of Limitations will run against the county in a school fund mortgage after a period of twenty years has elapsed, but the obligation remains in force as against sureties.

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July 29, 1943

7/27

Mr. Roth H. Faubion
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Mr. Faubion:

This will acknowledge receipt of your letter of recent date, the exact nature of which, omitting caption and signature, is as follows:

> "I would appreciate an opinion on the following:
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> "'A' borrowed money from the capital school fund of the county. 'B' and 'C' are his bondsmen or security.
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> "The school fund mortgage running more than twenty years from the due date of the last payment on the face of the instrument thereby, becoming outlawed under the twenty years statute of limitations. Under such circumstances can the bondsmen or security be collected from, or is their obligation outlawed also. In this case no affidavit was filed prior to the running of the statutes of limitation."

At the outset it will be necessary to assume certain things because they were not touched upon in your letter. There is nothing to show that during the twenty years of the existence of this loan the surety did anything about

payment by principal to the creditor nor that he requested a foreclosure at that time. Your letter does not disclose whether the status between creditor, principal and surety has changed within this twenty years. Therefore, we are assuming that there was no interest payment, no extension, no alteration of the contract, and that no notice had been filed by surety with the creditor requesting the forclosure.

The general rule that the Statute of Limitations does not operate against a sovereign and that a county being a political subdivision of the State and the rule would therefore not apply is well established in this State. The decision in which the rule was established that the maxim, "Nullum tempus occurrit regi" did not apply to a political subdivision of this State is found in Emery v. Holt County, 132 S. W. 2d 970, l. c. 971, in which Judge Gantt has this to say:

> "Under the common law the maxim 'Nullum tempus occurrit regi' did not apply to political subdivisions of the state. It applied only to the state. County of St. Charles v. Powell, 22 Mo. 525, 66 Am. Dec. 637. In Callaway County v. Nolley, 31 Mo. 393, 397, we ruled as follows:
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> " *
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> "Furthermore, at an early date the maxim 'Nullum tempus occurrit regi' was abolished in this state. Sec. 10, Art. LL, p. 75, Laws of Mo. 1848-49. It is now Sec. 888, R. S. 1929, Mo. St. Ann. Sec. 888, p. 1171, which follows:
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> "'The limitations prescribed in articles 8 and 9 of this chapter shall apply to actions brought in the name of

> this state, or for its benefit, in the same manner as to actions by private parties.'
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> "In State ex.inf. Attorney General v. Arkansas Lumber Co., 260 Mo. 212, 285, 169 S. W. 145, 168, we ruled 'that this section makes applicable to the state every general limitation in our law'.
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> "Defendants argue that it should be against public policy to permit school funds to be lost by negligence or misfeasance of officers.
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> "The legislative enactments of this state and the decisions of the courts construing the same determine the public policy of the state. In this situation the argument here made as to public policy should be addressed to the legislature.
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> "The cases from other jurisdictions cited by defendants are ruled under the statutory and constitutional provisions of those states. For that reason they should not be followed in determining the question under consideration. We think the limitations provided in Sec. 865 apply to a county school fund mortgage. The judgment should be affirmed."

We, therefore, conclude that the Statute of Limitations would apply in actions brought on by creditor against the principal and that the political subdivision could no longer proceed against the principal, "A" in this instance.

The question now arises whether the Statute of Limi-

tations is available to the surety in the present instance. Article XI, Section 10, page 156c of the Constitution of Missouri, which we do not feel is necessary to be set out in detail, provides that in school fund mortgage loans, in addition to the note and mortgage given by the principal, additional surety may be required. See also Sec. 10384 R. S. Mo., 1939.

We have previously seen that the decisions hold that the Statute of Limitations does not refer to obligations given for public use. Authority for this rule may be found in Cedar County v. Johnson, 50 Mo. 225, Jasper County v. Shanks, 61 Mo. 332, Johnson County v. Gilkeson, 70 Mo. 645. In this latter case, one involving principal and surety on a school fund mortgage loan, the Court had the following to say:

> "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. * * * * * * 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 de-

> clared 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.'"

See also Section 1017 R. S. Mo., 1939, which cites the above case.

It is reasoned in these cases that no person has any specific interest in the collection of such a bond, and one who having become a surety in such a situation must hold himself ready to pay it if the principal fails. He will not be discharged on account of the neglect of public officers. The principle is well recognized that in the present instance the surety by application to a court of equity could compel the creditor county to foreclose because there was danger that the principal would not be able to pay this obligation. It is further the theory of the courts that county courts as such have a multitude of duties and are less likely to pay personal attention to all of the great volume of business transacted in such court. The surety is estopped to raise the point since by his own neglect he has failed to protect himself.

Looking now to some of the decisions we find in Marion County v. Moffett, 15 Mo. 604, l. c. 606, Scott, J., had this to say:

> "The school lands were vested in the State, in trust for the benefit of the inhabitants of the township in which they are respectively situated. The State vested in the County Courts

> the management of this trust. Those courts are the agents of the State for this purpose. The principle, that the State is not affected by the laches of her agents, was sanctioned by this court in the case of Park v. State, 7 Mo. R.
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> "The doctrine, that laches is not imputable to the government, is founded on considerations of policy. The State can only act through her officers, and her transactions are so multiplied and her agencies so numerous, that great losses must result from maintaining that she is liable for the laches of those to whom she is compelled to intrust the management of her pecuniary concerns. The provisions of the law above cited, were intended only for the regulation of the conduct of the officers to whom was confided the care of the school moneys, and to secure those moneys from loss. They are merely directory and form no part of the contract with the surety. The surety has the same means of forming a judgment of the fidelity of the public agents as the State, and if he reposes confidence in them and is deceived, he cannot expect that the consequences of their neglect shall be visited on the State. The case of the People v. Janson, 7 Johns. R., relied on by the plaintiff in error, has been overruled. (a) The other Judges concurring the judgment will be affirmed."

See also County of St. Charles v. Powell, 22 Mo. , l. c.

528, Ray County v. Bently, 49 Mo., l. c. 243, Washington County v. Boyd, 64 Mo., l. c. 183.

At 50 C. J. 188, paragraph 311, which touches upon the discharge of a surety, we find the following language:

> "The general rule that a surety is discharged when the liability of his principal is extinguished does not apply when the extinction is caused by operation of law, and not by the act of the creditor, and the defense is personal to the principal, but the surety remains liable. * * * * "

CONCLUSION

We conclude from a reading of the statutes and authorities quoted that in the present instance the Statute of Limitations will bar any action against the principal "A" on the note and mortgage but that the statute is inoperative as against the sureties "B" and "C". We further conclude that the county may proceed against sureties on the obligation even though the principal debt between "A" and creditor county has been extinguished.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
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