SCHOOL FUND LOANS: (1) County court must require personal security for all school loans whether made prior to or after passage of 1943 laws.
(2) Borrowers must comply with provisions of Sec. 10386, Laws of Mo., 1943, p. 883, whether the loan was made prior to or after the passage of this section.

February 14, 1944

FILED
29

Honorable James A. Finch
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of February 9, 1944, which is as follows:

> "The last Legislature repealed Sections 10378, 10384, 10385 and 10386, Article 2, Chapter 72, of the Revised Statutes of Missouri, 1939, and enacted six new sections in lieu thereof, one of them being Section 10386, which is found in the Session Acts of 1943, at page 883. I would like to have the opinion of your office on this question:
>
> "Prior to the amendment, the county courts were authorized to loan money on real estate security and were not required to take a bond but might do so. Some loans were perhaps made without the bond. Under section 10386 the county court must require the borrower and the parties who have signed the bond as personal sureties to produce and furnish evidence to the county court annually on the interest-paying date of the loan, or within thirty days thereafter, evidence showing that each of said sureties remained solvent, and that they are resident householders of the county and own property of the value of an amount equal to the amount of the loan, in addition to

> the debts for which the sureties are liable, and the section further provides that if the borrower and sureties fail to furnish satisfactory evidence the court shall proceed to enforce payment of principal and interest then due.
>
> "Under this section, is the county court required to take bonds where bonds have not been taken and loans have been made without bonds, or does this section apply only to loans made after the effective date of the amendment?
>
> "Would be pleased to have your opinion on this matter."

Your letter involves an interpretation of Sections 10376, 10384 and 10386, Laws of Missouri, 1943, pp. 880-883, repealing Sections 10376, 10384 and 10386, R. S. Missouri, 1939, and specifically inquires whether said sections apply to loans made out of school funds prior to the passage of these laws, inasmuch as the repealing sections by their terms make it mandatory:

(1) That personal security be given for all loans;

(2) That the parties who have signed as sureties furnish annually to the county court on the interest paying date of the loan or within thirty days thereafter, evidence showing that each of said sureties remain solvent, that they are resident householders of the county, and own property of the value of an amount equal to the amount due on the loan, in addition to all the debts for which said sureties are liable, and in addition to all property owned by said sureties that is exempted from execution, and further that if the borrower and sureties fail to furnish satisfactory evidence of the solvency of the sureties as herein provided, or if the borrower fails to furnish other solvent sureties, within ten days after an order to that effect shall have been made and served on the principal in the bond, the court shall proceed to enforce payment of both principal and interest due.

For these provisions to apply to prior acts and hence in a retrospective fashion, it must be found that they do not come within the inhibitions of Article II, Section 15, of the Missouri Constitution, which provides: "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly." In interpreting the meaning of this section, it has been held:

A statute is not retrospective in its operation unless it impairs some vested right. McManes v. Park, 287 Mo. 109, 229 S. W. 211; Gibson v. Chicago Great Western Ry. Co., 125 S. W. 453, 225 Mo. 473; Clark v. Kansas City, St. L. & Cincinnati Ry. Co., 118 S. W. 40.

Acts of the legislature which relate only to the remedy of existing causes of action are not obnoxious to said section of the Constitution. Gibson v. Ry., supra; Clark v. Ry., supra; State ex rel. v. Taylor, 123 S. W. 892.

A statute which is merely remedial, affording a remedy for the redress of an infringement of an already existing right, or the enforcement of an already existing obligation, may be retrospective in its action without violating the constitutional provision. Haarstick v. Gabriel, 98 S. W. 760.

In Crawford's Construction of Statutes, page 566, Section 278, it is stated: "The rule that statutes should not be given a construction which will give them a retroactive effect is, as already indicated, especially applicable where such a construction will either destroy or impair vested rights." In Section 296, page 599, it is stated: "Repealing acts, as a general rule, operate retroactively, and in the absence of legislative intention to the contrary should not be denied that effect. But even a repealing statute must not interfere with vested rights or impair the obligation of contracts."

In 59 C. J. 1185, Section 722, it is stated: "The general rule against the retrospective construction of statutes does not apply to repealing acts, and in the absence of a saving clause or other clear expression of intention, the repeal of a statute has the effect, except as

to transactions past and closed, of blotting it out as completely as if it had never existed."

It remains to apply these principles to the questions propounded in your letter.

1. Should personal security be now required in all cases whether the loan was made before the passage of the repealing act or not?

Section 10 of Article XI of the Missouri Constitution provides:

> "All county school funds shall be loaned only upon unencumbered real estate security of double the value of the loan, with personal security in addition thereto."

Section 10376, R. S. Missouri, 1939, provides that the county court " * * * may, in its discretion, require personal security in addition thereto, * * *." Section 10384 provides that the county court " * * * may, if they deem it necessary, also require personal security on such bond; * * *." Section 10386 provides:

> "The county court shall have power, from time to time, to require additional security to be given on said bond when they, in their judgment, deem it necessary for the better preservation of the fund. If such additional security be not given within ten days after an order to that effect shall be made and served on the principal in the bond, and in all cases of default in the payment of interest, the court shall proceed to enforce payment of both principal and interest by writ, or in a summary manner, as provided in this chapter."

Sections 10376 and 10384, Laws of Missouri, 1943, pp. 880-881, provide:

> Section 10376: "It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than three per cent per annum on unencumbered real estate security, worth at all times at least double the sum loaned, with personal security in addition thereto, * * * *."

> Section 10384: "When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, with personal security in addition thereto; * * *."

There seems to be a conflict with the Constitution in the former sections of the statutes since the Constitution by its terms seems to make personal security mandatory where school funds are loaned, whereas the 1939 statutes make it discretionary with the county court. However, in any event, it is clearly seen that personal security was contemplated before the passage of the repealing acts and could have been required at any time under Section 10386, R. S. Missouri, 1939, where it had not been obtained upon the original making of the loan. Borrowers, prior to the passage of the repealing acts, clearly, therefore, could not be said to have had a vested right or any right whatsoever that they would not have to give security for the loans they had obtained; nor would requiring them to give personal security impose any new or uncontemplated obligation upon them. Therefore, there appears to be no reason why the laws of 1943, as far as their provisions making it mandatory that personal security be obtained on all loans is concerned, should not come under the general rule as to repealing acts heretofore mentioned, and be held to apply to loans made prior to the passage of these repealing acts.

2. Should the provisions of Section 10386, Laws of Missouri, 1943, p. 883, relative to annual reports, etc., of the personal sureties be held to apply to loans made prior to the passage of this section?

Section 10386, R. S. Missouri, 1939, provided:

> "The county court shall have power, from time to time, to require additional security to be given on said bond when they, in their judgment, deem it necessary for the better preservation of the fund. If such additional security be not given within ten days after an order to that effect shall be made and served on the principal in the bond, and in all cases of default in the payment of interest, the court shall proceed to enforce payment of both principal and interest by writ, or in a summary manner, as provided in this chapter."

Therefore, the law prior to the repealing act contemplated that the court could investigate and if it found the personal security lacking or insufficient, could require additional security to be given within ten days, and foreclose upon failure. This new section merely provides that a report be made by the sureties so that the court may have evidence before it as to whether additional security is needed or not.

In McManus v. Park, 229 S. W. 211, it was held that the Laws of 1911, page 430, providing that the court appointing a trustee to succeed one disqualified, resigned, or dead shall have jurisdiction over the trust estate, and that every trustee shall make annual reports to the court appointing him, apply to all trustees appointed before or after the enactment of such law. The court held, l. c. 213:

> "A law which does not impair any vested right is not retrospective in the constitutional sense, although it may change

> the remedy or provide new remedies for enforcing or defining such a right.
> * * * *
>
> "The act of 1911, under the authorities cited, requiring trustees appointed by the court in any trust estate to make an annual report only applies to procedure, is entirely remedial in operation, and affects nobody's existing right. Such trustee has no vested right in the manner of accounting for his trust. The statute may be construed to affect trust estates and trustees created before its passage without being contrary to the section of the Constitution."

In State v. Eaton, 292 S. W. 71, l. c. 74, it is stated:

> "Appellants complained that the court only qualified 30 jurors, while they were entitled to 40 qualified jurors. By Laws of 1925, p. 194, sections 4017 and 4019, R. S. 1919, were repealed, and at page 196, Laws of 1925, new section 4017 was enacted in lieu of said two old sections. New section 4017 provides for 12 peremptory challenges by defendant and 6 by the state in capital cases, instead of 20 peremptory challenges by the defendant and 8 by the state, authorized by sections 4017 and 4019, R. S. 1919. * * * * *
>
> "The contention that, if section 4017, Laws of 1925, p. 197, is applied to cases where the alleged crime was committed before the act took effect, the law violates provisions of our Constitution against ex post facto laws, is equally without merit. The number of challenges to which the defendant on trial is entitled is purely a procedural matter, and does not constitute a substantial right. In 12 Corpus Juris, 1105, it is said:

> "'Where a law relates to matters of procedure merely, and does not deprive the accused of any substantial protection, it is not ex post facto. Thus a law changing qualifications, method of selection, and method of impaneling jurors, a law changing the number of peremptory challenges allowed the accused or the prosecution, * * * is not ex post facto as to offenses committed before its passage.'"

Under the 1939 statute the court had the right to investigate the personal sureties in school loans. The new law merely provides a new remedy for enforcing or defining this right. It provides a new means for investigating sureties under these loans. Section 10386, Laws of Missouri, 1943, p. 883, as far as the requirements of an annual report of sureties are concerned, is merely remedial and would apply to loans made prior to the passage of the act.

CONCLUSION

1. It is, therefore, the opinion of this office that the county court must require personal security for all school loans, whether made prior to or after the passage of the 1943 laws.

2. It is further the opinion of this office that all borrowers must comply with the provisions of Section 10386, Laws of Missouri, 1943, p. 883, whether the loan was made prior to or after the passage of this section.

Respectfully submitted

ROBERT J. FLANAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RJF:HR