SCHOOL BOARDS:
STATUTE OF LIMITATIONS: School boards do not have discretion to waive the defense of the statute of limitations.

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September 13, 1954

Honorable Rex A. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion of this office, wherein you ask:

> "During the week of May 17, 1954, a school bond in the sum of $500.00 on the consolidated school district at Qulin, Missouri, in Butler County, was presented to the school board for payment. The bond was dated May 25, 1923, and became due on February 1, 1942. According to the information I have, the bond was never presented for payment until the week of May 17, 1954. I am advised that this bond is genuine and was never paid.
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> "The members of the school board . . . would like your opinion as to whether or not the school board should pay this bond out of the funds of the school district or whether they should refuse payment under the statute of limitations. In other words, they would like to know if it is discretionary with the board on the question of whether or not they pay an obligation of the school district on which the statute of limitations has run."

It appears that any action to collect on the bond in question would be covered by the general statute of limitations which bars such action in ten years after the right of action accrued. This

is provided in Section 516.110 RSMo 1949. See Pullum v. Consolidated School District No. 5, Stoddard County, 357 Mo. 858, 211 SW2d 30.

An extensive search of Missouri authorities reveals no case covering this question; however, it appears well established in Missouri law that public funds are in the nature of trust funds, and that officers holding and disbursing such funds act in the capacity of trustees; that they act as insurers in holding such funds and may disburse them only as authorized by law. Unless the law specifically provides that such public funds shall be disbursed in the manner proposed, such public officials do not have the power to so disburse such funds. Thus in State v. Weatherby, 344 Mo. 848, 129 SW2d 847, Division 1 of the Supreme Court of Missouri said:

> "The situation differs vastly from a controversy between private citizens involving the principle that one may do what he will with his own. Public officials are but the servants of the public. Public funds are but trust funds. Public officials performing a duty with respect thereto are not dealing with their own. All persons, State officials and employees included, are charged with knowledge of the laws enacted by the sovereign for the protection of its property and are required to take due notice thereof. A broad distinction exists between the acts of a public official and those of an agent of a citizen within the apparent scope of his authority. Public officials act in regard to public funds in a trust capacity. Their acts beyond the scope of their authority are, and are known to be, unauthorized, do not bind their principal, and their mistakes are their own and not the mistakes of the sovereign. * * * * * * * * * * The reasons underlying the rule permitting recovery of public moneys wrongfully disbursed to public officials applies with equal force to all citizens, and, with the added factors that public funds are trust funds and public officials are public servants acting in a restricted trust capacity,

> known to all, with respect to public funds, repels the reasons under which a recovery of payments made under a mistake of law is denied private individuals. * * *"

In City of Fayette v. Silvey, 290 SW 1019, the Kansas City Court of Appeals held that a public official who held public funds was an insurer thereof; that he was subject to a stricter accountability than a bailee or a trustee, and that he was liable for the loss of funds even though such loss occurred without his fault and through no negligence on his part; and in Kansas City v. Halvorson, 352 Mo. 280, 177 SW2d 495, Division 2 of the Missouri Supreme Court held that unless the disbursal of public funds by a public official was specifically authorized by law, such disbursal was beyond the power of such public official and the moneys so disbursed could be recovered in a suit against the person who received the same.

Even though the person who receives public funds has rendered service or delivered materials as a quid pro quo therefor, such funds may be recovered by the state or its subdivisions if the disbursal of such funds was not specifically authorized by statute. See Elkins-Swyers Office Equipment Co. v. Moniteau County, 357 Mo. 448, 209 SW2d 127. In reaching this decision, Division 2 of the Missouri Supreme Court said, l.c. 209 SW2d 131:

> "Public funds are trust funds and public officials act in a trust capacity with respect thereto, subject to all limitations of whatever nature upon their authority imposed by the public. All persons are charged with knowledge of the laws enacted by the sovereign for the protection of its property and are required to take due notice thereof."

Thus it appears that the funds in the hands of the board of education constitute moneys held in public trust and may be disbursed by the board only as specifically authorized by law. In your question, the board is not authorized to pay the bonds after the statute of limitations has run. On the contrary, the law provides that after the lapse of ten years, these moneys cannot be collected by the bond holder unless the statute of limitations has in some way been tolled.

In the absence of Missouri cases on this specific problem, we look to the law of other states. While it is generally held that the state, that is the legislature acting for the state, may by a general statute waive the statutes of limitations that have already barred action by its citizens, it seems to be the general rule that governmental officials may not themselves waive such defense of limitations unless such action is specifically authorized by statute. Corpus Juris Secundum, Volume 53, page 960, Limitation of Action, Section 24, states this general rule as follows:

> "In the absence of statutory authorities, however, a governmental official ordinarily lacks power to waive either general limitations, or those enacted specifically for the protection of the governmental body which he represents."

A very similar question was presented to the Supreme Court of Oklahoma in the case of Nordman v. School District No. 43 of Choctaw County, 121 Pac.2d, 290. In that case, suit was brought on a bond after the statute of limitations had run. The plaintiff secured a default judgment and later the board moved to set aside such default judgment on the ground that it was irregularly issued since the defense of the statute of limitations appeared upon the face of plaintiff's petition. The Supreme Court of Oklahoma held that the board was without power to waive the defense of the statute of limitations, and that, consequently, the default judgment could be set aside. In reaching this conclusion, the court said:

> "A school district is a political subdivision of the state. Its powers, and those of its officers, are only such as are specifically granted by the Constitution and statutes, and such as are reasonably or necessarily incident to the specific grant. Our Constitution and statutes have carefully restricted the incurring of debt and the expenditure of the public funds. Prior decisions of this court are many and uniform to the effect that a claimant to public funds of a subdivision of the state must point to a statutory authority in support of the claim. The ultimate object of plaintiff's suit is to recover a part of the public funds of the defendant school district. Those funds are by

law entrusted to the care of the directors of the school district under careful legal restrictions as to disposition thereof. The statute grants permission to sue the district, and section 101 O.S.1931, 12 Okl.St.Ann. Sec. 95, restricts the time in which suit may be brought. Nowhere in the statute has it been pointed out that there has been given authority to the director or officers of a school district to waive any provision of law, which waiver will operate directly to charge the district either with debt or liability or result in divesting it of any part of its public funds.

"It is generally true that a private person may voluntarily waive a substantial right and may, if he chooses, voluntarily dispose of his funds as he desires and at his discretion, but that rule does not apply to an agent unless he has been authorized so to do. The authority given the agents of the school district is statutory and therefore open for all to know, and in view of the well known fiscal policy of our laws, to the effect that the municipal agents may expend such funds, or incur financial liability, only as they are specifically or by reasonable implication so authorized, we must conclude that the school directors have been given no specific or implied authority to acknowledge by waiver, a debt which otherwise the school district is not unequivocally bound by law to pay.

"To hold otherwise than as here indicated would result in permitting school directors at their will to pay, or bring about the payment of certain claims, and to deny others of equal station, which would seem to result in unsound public policy and which nowhere appears to have been intended from the powers granted to the directors. Such powers might tend to induce fraud, collusion and oppression, and result in additional burdens upon taxpayers without their consent and in a manner not provided for by law."

This case was followed in the later case of Lowden v. Stevens County Excise Board, 191 Okla. 5, 126 Pac.2d, 1023, where the Supreme Court of Oklahoma held that a judgment secured against a school board, when the claim was barred by the statute of limitations, was void since the school board did not have power to waive statute of limitations, and that such waiver could not be executed by the school board's failing to set up the defense of the statute of limitations, or by the school board's failure to plead to the defendant's cause of action, or by the school board's admitting the claim of plaintiff.

The same result concerning the power of public officials to waive the defense of the statute of limitations was reached by the Supreme Court of Utah in the case of Spring Canyon Coal Co. v. Industrial Commission of Utah, 58 Utah 608, 201 Pac. 173, l.c. 178, where the court said:

> "It is also elementary that, unless pleaded or relied on, the statute is waived. No doubt any person who has the right to interpose the statute of limitations may waive such right. To do that, however, ordinarily at least, implies that the right to waive is personal, and that in waiving it the person doing so acts in a personal capacity and in his own right. In this case, for example, the company, one of the plaintiffs, could waive the right to interpose the statute of limitations as a defense if it chose to do so. It could, however, only waive the right so far as it affected its own rights. Whether the State Insurance Fund could waive the benefit of the statute of limitations presents a different question. That fund is administered by the Industrial Commission as public officials, and hence is administered by them as trustees and not in their own right. The question therefore arises, May the statute of limitations be waived by those officials? It manifestly is their duty to administer the fund in accordance with law, and so as to treat all alike who have a right to participate in that fund. The people in their sovereign capacity have an interest in the State Insurance Fund, and they are entitled to have the same distributed to those only who are legally entitled thereto. To permit the Commission, or any other person having control of that fund, to waive the statute of limitations at

will must, in the long run, result in injustice and favoritism, since the statute can be enforced as against A., B., and C., and as easily waived in favor of D., E., and F. A person or corporation distributing his or its own money may elect to waive the benefit of the statute of limitations in favor of A. while he or it may insist upon it as against B. without abusing any trust or disregarding a public duty. A public official may, however, not indulge in such a practice without abusing a trust and without bestowing a favor on one which he denies to another. In our judgment, where, as here, a fund is to be administered and distributed by public officials, it should be administered and distributed strictly in accordance with law, and to those only who are legally entitled thereto without favor to anyone. Under such circumstances the language of the Supreme Court of Mississippi in the case of Trowbridge v. Schmidt, 82 Miss. 475, 34 South. 84, is applicable. In referring to the duty of a municipal board to interpose the plea of the statute of limitations, the court, in the course of the opinion, said:

> 'It is indisputable that a municipal board cannot lawfully give away public money.'

"In the course of the opinion it is further said:

> 'It is the plain duty of a county or municipal board to plead the statute of limitations when it can under the facts. Such boards are the people's trustees.'

"If it is the duty of municipal or county officers to interpose the defense of the statute of limitations where public funds are in question, it certainly is the duty of a state official who is entrusted with

> public funds to do likewise. If he fails in doing so he must either disregard the statute of limitations entirely, and thus ignore the law, or he must practice favoritism by enforcing it as against one claimant while he waives it in favor of another. It needs no argument to show that such a practice would be intolerable."

This case was approved and followed as controlling authority by the Utah Supreme Court in the case of Taslich v. Industrial Commission of Utah, 71 Utah 33, 262 Pac. 281. Likewise, it is pointed out by the Utah Supreme Court in Odgen v. Industrial Commission, 92 Utah 423, 69 Pac.2d 261, that were a public official to waive the defense of the statute of limitations, he would be in violation of his public trust and such action would open the door to favoritism and discrimination. In this case, the Utah Supreme Court again approved the Spring Canyon Coal Co. case, quoted from and cited supra.

The Supreme Court of the State of Washington, in the case of Nagel v. Department of Labor and Industry, 189 Wash. 631, 66 Pac.2d 318, reached the same conclusion in considering the matter of the power of a public official to waive the defense of the statute of limitations when it said, l.c. 322:

> "Generally speaking, no officer or agency of the state has the right to waive the defense of the statute of limitations."

Likewise, the Supreme Court of Mississippi, in the case of Trowbridge v. Schmidt, 82 Miss. 475, 34 SE 84, concluded that public officials, in this case the municipal board of the City of Vicksberg, did not have discretion to waive the defense of the statute of limitations, and that it was their duty to plead such statute whenever they can under the facts of the particular case.

While a contrary view has been reached by the Supreme Court of Michigan in the case of Moden v. Superintendent of the Poor of Van Buren County, 183 Mich. 120, 149 NW 1064, and by the Court of Civil Appeals of Texas in the case of Travis County v. Matthews, 235 SW2d 691, and Frost v. Fowlerton Consolidated School District No. 11, 111 SW2d 745, these decisions were reached primarily on the basis of matters of pleading and of preserving points for review by the

appellate courts and do not represent a considered opinion of these courts based upon the public policy of their respective states as to the legality of a deliberate waiver of the statute of limitations by a public official when the question of paying out public funds is presented to him. For this reason, it is believed that these cases should not be controlling of the present question since no pleading or appellate review is here involved, and since it appears that public policy of Missouri, as expressed by our Supreme Court, is that public funds are trust funds and public officials holding and disbursing such funds are acting in a fiduciary capacity and have strict liability for such funds and may disburse them only when authorized specifically by statute.

CONCLUSION

It is, therefore, the conclusion of this office that the school board of the consolidated district at Qulin, Butler County, Missouri, does not have discretion to waive the statute of limitations and pay an obligation of the school district which is presently barred by said statute of limitations.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Very truly yours,

John M. Dalton
Attorney General

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