JUDGMENT: (1) Statute of limitations applies for the reason that net proceeds go to the school funds in the county.

RECOGNIZANCE OR BAIL BOND: (2) The three-year lien upon the real estate of the defendant, as provided in Section 1270, R. S. Mo. 1939, immediately attaches upon rendition of judgment.

(3) Such judgments may be revived by scire facias or suit upon the judgment as in other civil cases.

October 30, 1941

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Honorable J. W. Mitchell
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

FILE

Dear Sir:

We are in receipt of your request for an official opinion, dated August 26, 1941, which is as follows:

> "We would appreciate it if you would let us have at your earliest convenience your opinion as to whether or not the lien of a judgment forfeiting a bail bond in a criminal case expires at the end of three years, as in the case of ordinary civil judgments.
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> "After further search, we have been unable to find any authorities on this question, except the one cited in our letter files, July 31."

From a reading of the request, we assume that Article VIII, Chapter 30, R. S. Mo. 1939, has been complied with and a final judgment has been duly taken on the bail bond referred to in your request, and we proceed with this opinion on that assumption.

It may be contended that the general rule is that statutes of limitations do not operate against the sovereign or the government, whether state or federal. In answer to this contention, we call attention to the case of Fayette v. Marshall County, 180 Iowa 660, in which the State of Iowa attempted to collect a judgment for fine and costs on a judgment wherein the defendant was convicted for maintaining a liquor nuisance. The court, in disposing of this contention, had this to say, l. c. 663:

> "It is true that the judgments were entered in actions prosecuted in the name of the State of Iowa, but a judgment in a case of that nature and the money collected thereon do not belong to the state, but to the county for the use of its temporary school fund. The state's interest, if any, is merely nominal, and it is settled in this jurisdiction that, where the state stands in a merely representative capacity and not in the exercise of its sovereignty, its exemption from the statute of limitations is not effectual. * * * "

Turning to the Missouri decisions which throw light upon the Missouri courts' disposition on the above contention, we cite the case of Gross v. Atchison County, 320 Mo. 332, wherein the court stated as follows, l. c. 339, 340:

> "If an action had been rendered necessary to enforce the payment of the surety's liability it would not have partaken of the nature of a criminal proceeding, although having its origin in a prosecution for a crime. It would simply have been an action by the State on a forfeited recognizance which did not involve the guilt, innocence, conviction or acquittal of any person. It would, in short, have been a suit to enforce the surety's contract with the State, executed by the former when the recognizance was entered into. Possessing this characteristic its determination must rest largely upon the principles of the law applicable to suits on contracts, rather than the laws in regard to criminal prosecutions. * * * "

* *

> "The Constitution (Sec. 8, Art. XI) prescribes that the 'clear proceeds of all penalties and forfeitures . . . shall belong to and be securely invested and sacredly preserved in the several counties as a public school fund.' The 'several counties' referred to must, in reason, mean the counties in which the proceedings were had out of which the funds originated. While suits for the recovery of penalties and forfeitures are required to be brought by the State because the obligation is made to the State, the amounts recovered belong to the counties, and it would involve an unnecessary formality upon their recovery to require them to be paid into the State Treasury and subsequently apportioned to the counties.
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> "Especially is this true where, as we have shown, whatever proceeding is had or action taken in the forfeiture of the recognizance at bar, is purely civil in its nature."

It will be noted from reading this case that our courts have held that in suits brought upon recognizance or bail bonds, the determination must rest largely upon the principles of the law applicable to suits on contracts rather than the laws in regard to criminal prosecutions, and the constitutional provision in Missouri obtains as pointed out in the Iowa case, supra, that the proceeds of all penalties and forfeitures must go to the school fund. It is further pointed out by our courts that proceedings on forfeitures are purely of a civil nature.

It will be observed from a reading of the case of Emery v. Holt County, 132 S. W. (2d) 970, that the common law maxim "nullum tempus occurrit regi" did not apply to political subdivisions of the state, and applied only to the state. Judge Gantt, in the Emery case, supra, has this to say in interpreting the effect of this maxim in Missouri, l. c. 971:

"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. (Cases cited) In Callaway County v. Nolley, 31 Mo. 393, 397, we ruled as follows:

"'Here then was a lot whose legal title was vested in Callaway county, in trust for the inhabitants of the town of Fulton. Callaway county was as competent twenty years ago to bring an action as it was at the time of the institution of this suit. In fact it is nothing more than a body politic, acting as trustee for the inhabitants of the town of Fulton. It is subject to the statute of limitations, as was held in the case of the County of St. Charles v. Powell, 22 Mo. 525 (66 Am. Dec. 637). Property held by individuals or bodies politic in trust is as much subject to the statute of limitations as that owned by individuals.' (Cases cited)

"Defendants cite State v. Fleming, 19 Mo. 607. That was an action by the state to recover school lands. We ruled that the maxim 'Nullum tempus occurrit regi' applied and that the statute of limitations did not apply to the state. We did not rule that the maxim applied to political subdivisions of the state.

"Furthermore, at an early date the maxim 'Nullum tempus occurrit regi' was abolished in this state. Sec. 10, Art. II, p. 75, Laws of Mo. 1848-49. It is now Sec. 888, R. S. 1929, Mo. St. Ann., Sec. 888, p. 1171, which follows:

"'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.'
>
> "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.'
>
> "Defendants argue that it should be against public policy to permit school funds to be lost by negligence or misfeasance of officers.
>
> "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.
>
> "It is so ordered."

It will be noted from this case that maxim does not apply in Missouri to actions brought in the name of the state for the use and benefit of political subdivisions.

We must therefore conclude that the statute of limitations would apply in actions brought upon recognizance or bail bonds in Missouri.

Now, passing to the effect of the three-year statute of limitations upon a judgment or a bail bond or recognizance, we call attention to the following sections of the Revised Statutes of Missouri, 1939, which we set out in full and which we think are applicable upon this contention.

> "Sec. 1236. Judgment defined. -- A judgment is the final determination of the right of the parties in the action."
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> "Sec. 1269. Lien of judgment in court of record. -- Judgments and decrees rendered by the supreme court, by any United States district or circuit court held within this state, by the Kansas City court of appeals, the St. Louis court of appeals, the Springfield court of appeals, and by any court of record, shall be liens on the real estate of the person against whom they are rendered, situate in the county for which or in which the court is held."
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> "Sec. 1270. The commencement, extent and duration of lien. -- The lien of a judgment or decree shall extend as well to the real estate acquired after the rendition thereof, as to that which was owned when the judgment or decree was rendered. Such liens shall commence on the day of the rendition of the judgment, and shall continue for three years, subject to be revived as hereinafter provided; but when two or more judgments or decrees are rendered at the same term, as between the parties entitled to such judgments or decrees, the lien shall commence on the last day of the term at which they are rendered."
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> "Sec. 1271. Scire facias to revive, may issue, when. -- The plaintiff or his legal representative may, at any time

> within ten years, sue out a scire facias to revive a judgment and lien; but after the expiration of ten years from the rendition of the judgment, no scire facias shall issue."
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> "Sec. 1277. Judgment of revival, when. -- If upon the service of the scire facias or publication as aforesaid, the defendant, or any of his creditors, do not appear and show cause against reviving the judgment or decree, the same shall be revived, and the lien continued for another period of three years; and so on, from time to time, as often as may be necessary."

In the case of Vitale v. Duerbeck, 92 S. W. (2d) 691, l. c. 696, the court had this to say:

> "A judgment is a debt, a property right which goes, upon the owner's death, to his personal representative, regardless of what may have been the cause of action upon which it was obtained. (Cases cited) It has been well stated that, 'after the giving of the judgment, the controversy is over the judgment, and not over the original wrong.' Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 P. 178, 179."

In this case it will be noted that the court emphatically held that after the giving of the judgment, the controversy is over the judgment and not over the original wrong. Therefore, everything is merged in the judgment. Of course, the judgment can only be obtained after a hearing is had in a court of record wherein the rights of the parties are fully adjudicated.

In the case of State ex rel. National Lead Co. v. Smith 134 S. W. (2d) 1061, the court said, l. c. 1069:

> "And, a judgment can be lawfully rendered only after hearing and trial. All judicial proceedings without such hearings are invalid and without binding force and effect. Ex parte Irwin, 320 Mo. 20, 6 S. W. 2d 597, 600."

Having determined that the statute of limitations does operate upon judgments obtained on recognizance and bail bonds, we now turn to the application of Sections 1269, 1270, 1271 and 1277, supra.

We find that the court said in the case of State v. Murmann, 124 Mo. 502, l. c. 507:

> "But recognizances are a part of the proceedings in the exercise of a criminal jurisdiction and it is a fundamental rule of law that where jurisdiction of the main question attaches, every incident necessary to enforce that jurisdiction follows as a matter of law. A recognizance is a matter of record and the scire facias is the process for carrying it into execution. And while it is sometimes denominated a suit, it is only so to the extent that the defendant may plead to it. It is judicial rather than original in its nature, for when final judgment is rendered the whole record is considered as one.
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> "A scire facias upon a recognizance in a criminal prosecution is not a civil proceeding, so as to entitle a party to remove such a cause to a federal court under the judiciary act and the constitution of the United States. Respublica

> v. Cobbet, 3 Dallas (Penn.) 467. The universal rule at common law was that recognizances must be prosecuted in the courts in which they were taken. The cognizors by entering into a recognizance submitted themselves to the jurisdiction of the court, and a forfeiture was a conditional judgment."

In the case of City of St. Louis v. Wall, 124 S. W. (2d) 616, the court had this to say, l. c. 618:

> "Of course it is the judgment itself, and not the execution (as in the case of an execution to be levied upon personal property), that constitutes the lien upon real estate."

In the case of State v. Streutker, 288 Mo. 156, the court said, l. c. 158:

> "The reason why this court has assumed jurisdiction of proceedings by scire facias to forfeit bail bonds and recognizances where the amount is less than seven thousand five hundred dollars, is stated in the case of State v. Hoeffner, 137 Mo. 612, l. c. 614-615, where the court said:
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> "'If the charge was a felony then the proceedings in that case would be a continuation of the prosecution for felony, and this court would have jurisdiction to make effective, that charge, on the familiar principle of law that where jurisdiction of the main question attaches, every incident necessary to make that jurisdiction effectual follows as a matter of law.'

> "In the case of State v. Epstein, 186 Mo. 89, Judge Gantt expressed it in this way, l. c. 98:
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> "'As an appeal upon the main charge of felony must be heard in this court, so also must the auxiliary proceeding thereon be heard in this court on appeal.'
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> "The above cited cases were approved in the late case of State v. Wilson, 265 Mo. l. c. 10. It will be noticed that the reasons given by this court for retaining jurisdiction of such cases is because it is auxiliary to a felony of which it had jurisdiction, not because the case in itself confers jurisdiction. The court which has jurisdiction of the felony case must retain authority to enforce any judgment which is rendered in that felony case.
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> "The judgment fixes no punishment and requires no appearance of the judgment defendant. In form it is a money judgment for which execution may issue, not against the person of the defendant but against his property. In effect and form it is a civil case."

From a reading of the cases, supra, we must conclude that a judgment obtained upon a recognizance or bail bond is a money judgment for which execution may issue, not against the person but against his property. In effect and form, it is a civil case. Therefore, upon obtaining the judgment, a lien would immediately attach to the real estate owned by the defendant, as is provided in Section 1270, supra, which lien would be effective for a period of three years, as is provided for in said section, and the judgment would be good for a period of ten years. (See Section 1038, R. S. Mo. 1939, which section we do not include for the sake of brevity.) However, such judgment would be subject to revival either through scire facias or a direct suit upon the judgment.

In the case of Excelsior Steel Furnace Co. v. Smith, 17 S. W. (2d) 378, the court had this to say, l. c. 379, 380:

> "Defendants are mistaken in supposing that the only way in which a judgment may be saved from the destructive effect of the statutes of limitations is by revival on scire facias.
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> "In the cases of Houck v. Swartz, Parry v. Walser, and Wood v. Newberry, it was stated that there was good reason why the second action should be maintained, thus intimating that the limitation exists in Missouri. Whether the limitation exists or not, it certainly is a good excuse for maintaining the second action that the former judgment is about to become barred by the statute of limitations. In this case the action was instituted on May 22, 1928, and the judgment would have been barred on May 31st of the same year."

We also call attention to the case of Goddard to use v. Delaney, 181 Mo. 569, wherein the court stated, l. c. 575, 577, 578:

> "Thus the writ as affecting personal judgments accomplishes under our statute two objects, the revival of the judgment and the continuation of the lien, and it is of proceedings under that writ, prosecuted with those two purposes, that our statute says the judgment 'shall be revived, and the lien continued for another three years; and so on, from time to time, as often as

may be necessary.' The natural meaning of that language is that the process may be repeated as often as may be necessary to keep the judgment alive and the lien in force. The words 'continued for another period of three years' refer to the lien only, not to the judgment. The life of the judgment is ten years, the life of the lien three years; the judgment is revived, the lien continued. Therefore, when the statute says the judgment is revived and the lien continued it means that a new life of ten years is given to the one and of three years to the other, and the words 'and so on from time to time as often as may be necessary' apply as well to one as to the other.

"We hold, therefore, that a scire facias may issue to revive a judgment at any time within ten years from the date of its rendition or that of its last revival.

* *

"The suing out of the writ of scire facias is not considered in all jurisdictions in the same light. In 18 Ency. Pl. and Pr., 1059, it is said: 'While a scire facias has been called an action for some purposes, and by some decisions has been apparently treated as a new action, even where its object is the revival of a judgment, the better opinion, and that supported by the weight of authority, is to the effect that a proceeding by scire facias to revive a judgment is not an original proceeding, but a mere continuance of the former suit. It is merely a supplementary remedy to aid in the recovery of the debt evidenced by the original judgment, and upon such proceeding the merits of the original judgment can not be inquired into, and a judgment rendered in such a proceeding is not

a new one for the debt and damages but merely an order that execution shall issue. It may be said, however, that in all cases it is in the nature of an action, in that the defendant may plead thereto.'"

CONCLUSION

We are of the opinion that the state's interest, if any, is merely nominal, and said state acts merely in a representative capacity and not in the exercise of its sovereignty in a judgment procured on a recognizance or bail bond. Therefore, a statute of limitations may be effectual. We are also of the opinion that the three-year lien immediately attaches to the real estate upon the rendition of the judgment, as provided in Section 1270, R. S. Mo. 1939, and that such judgment can be revived through scire facias or a suit upon the judgment.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
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BRC:VC