COUNTY CLERK:1)No authority to collect principal and interest on school fund loans -- not liable on official bond for such funds inadvertently collected.

COUNTY COURTS;2) Have no authority to allow borrower and sureties to execute new bonds and mortgage for sole purpose of reducing interest rate.

STATUTES: 3) Section 10386 Laws of Missouri 1943, procedural in character--applies to prior and subsequent school fund loans.

November 10, 1943

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11-15

Honorable Leo Mitchener
County Clerk
Ripley County
Doniphan, Missouri

Dear Sir:

We are in receipt of your letter of November 3, 1943, wherein you request an opinion of our Department which request reads as follows:

> "My attention has been called to an opinion handed down by you concerning interest on school fund loans. I would like to have some information on this question. In Ripley County, all school fund mortgages have drawn up to draw 8% interest and for a number of years now the County Court has each year made an order setting the rate of interest at 5%, and that is what has been collected. I have been informed that this is not legal (I have not seen the opinion from your office).
>
> "What would happen to me or to my bond if I go ahead and accept 5% interest in compliance with this Court order as has been done in the past instead of collecting 8% as set out in the face of the mortgage?
>
> "Should the court order a renewal on all these loans in order to draw the mortgage up at 5%, then would they all come under the new law (Senate Bill #13) and have to have appraisers to go out and appraise the land etc. Also many of the bondsmen could not qualify under the new law, that is the ones that are now on the bonds. It seems that this would work an undue hardship on many persons who now have loans, and would seem quite unfair to charge 8% on the old loans and all the new loans made hereafter drawing 5%. There is perfect harmony between the County Court and myself in the matter, and we just want to get a clear understanding of what we can and should do."

In reply to the same, we are herewith enclosing an opinion rendered by this Department on June 24, 1943, to Mr. Charles S. Greenwood, and we trust that it is the one referred to in the first portion of your letter.

Now turning to your question which reads as follows:

> "What would happen to me or to my bond if I go ahead and accept 5% interest in compliance with this Court order as has been done in the past instead of collecting 8% as set out in the face of the mortgage?"

Section 13285, R. S. Mo. 1939, provides as follows:

> "Every clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Missouri, with good and sufficient securities, who shall be residents of the county for which the clerk is appointed or elected, in any sum not less than five thousand dollars, the amount to be fixed and the bond to be approved by the court of which he is clerk, or by a majority of the judges of such court, in vacation. The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hands by virtue of his office, and that he, his executors or administrators, will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office."

It will be noted from the reading of the above section that it is provided:

> "***The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hands by virtue of his office, * * *"

We find that the court in the Case of Newton Burial Park vs. Davis, 78 S.W. (2d) 150, l.c. 153, had this to say:

> "***The bond of Davis is only liable for the money he actually received by virtue of his office. Davis cannot bind his bond by receipting for money he never received and could not

have received by virtue of his office.'***"

Before discussing the ruling in the Davis Case Supra, we wish to call attention to Section 10388 which provides as follows:

> "When any portion of principal or interest, or both, may be collected, as provided in any of the foregoing sections, it shall be paid into the county treasury; and it shall be the duty of the treasurer to give the person making payment thereof duplicate receipts, specifying the sums paid and on what account. One of said receipts shall be given to the clerk of the county court, who shall file and preserve the same in his office, charge the treasurer with the amount, and credit the payment to the party on whose account it is made on his bond and mortgage."

The above section was construed in the Case of Knox County vs. Goggin, 105 Mo. 182, 16 S. W. 684, wherein the court said:

> "This section makes it the clear duty of the mortgagor to pay the money to the county treasuere and then present the duplicate receipt to the county clerk. Hence it was held in the case of State ex rel. v. Moeller, 48 Mo. 331, that it was not the duty of the county clerk to collect the proceeds arising from the sale of swamp lands, or from the sale of the sixteenth section. That was a suit on the bond of the county clerk, and it was held that the clerk and his sureties were not liable on his bond for such moneys, because it was not part of the duties of the clerk to receive the same. Says the court: 'We cannot make him a county treasurer, or collector proper, without nullifying other provisions of the statute and throwing into confusion our whole system of county finances.' The case just cited and State to use v. Bonner, 72 Mo. 387, set at rest the questions in hand, and show that the county clerk had no authority to collect the money due upon this bond and mortgage. It also follows that his

> deputy had no such authority. When Brown gave the money to the deputy clerk, he made the deputy clerk his agent for the purpose of paying off that debt, and the county is in no way responsible for the misconduct of the deputy in not applying the money as directed, for the deputy in receiving the money was not acting within the scope of his duties, but outside of them."

Therefore, in answer to the first question we must conclude that the sureties on a county clerk's bond could not become liable for the collection by a county clerk of either principal or interest on a school fund bond for the reason set forth in the Davis Case Supra, and especially in view of the fact that section 10388 significantly provides that such money must be paid to the county treasurer thereby precluding said bond money from being actually received by the county clerk by virtue of his office.

We shall next turn to your second question wherein you ask:

> "Should the court order a renewal on all these loans in order to draw the mortgage up at 5%."

In the Case of Saline County vs. Thorpe, 88 S. W. (2d) page 183, the court in paragraph 4 of said case, reviews the several statutes controlling the handling and investing of school funds. From paragraphs 5 and 7 we quote as follows:

> "The purpose of requiring a bond and personal security is, of course, to make it possible to collect the debt even if the land, securing the loan, decreases in value. The county court has no authority to give any right of the county to collect either principal or interest, due (Veal v. Chariton County Court, 15 Mo. 412), or to dispense with either the bond, with its personal obligation to repay the money, or the mortgage conveying clear land as security. Lafayette County v. Hixon, 69 Mo. 581. Neither does it have authority to release a surety from his liability upon the bond or to take in payment of the amount due or any part thereof, upon a school fund bond and mortgage, a note which does not conform to the statutory requirements. Mont-

> gomery County v. Auchley, 103 Mo. 492, 15 S. W. 626. Why should it have any authority to release one who borrowed from this fund from his obligation to repay it?* * *"
>
> "* * *If a county court could release the obligation to repay school fund loans, at its own whim or pleasure, for any chips and whetstones, the intent of the statute to safeguard the public school funds by requiring double security of unencumbered land, in every loan, would be nullified.* * *"

Therefore, we must conclude that in the absence of a section in the statutes which gives a county court the right to cancel the bonds given for the receipt of school fund moneys by a debtor, which bonds are secured by a school fund mortgage and in lieu thereof, to allow the debtor to execute new bonds with new sureties or with the same sureties and secured by the same lands as was described in the original school fund mortgage for the sole purpose of reducing the interest rate. (We use the word "sole" advisedly for there are many instances where it is perfectly legal to take new bonds and mortgages in place of the old.) This in our opinion, would be a subterfuge and to tolerate such a practise would be to allow the county court to do indirectly that which they could not do directly, for we have pointed out in the opinion hereto attached, that they could not reduce the interest rate through an order of the county court or a rider placed upon the school fund mortgage or bond and, therefore, if they were allowed to take new bonds and mortgages obligating the debtor to pay a lower rate of interest for the use of the same money would in our opinion, be a mere subterfuge and illegal, and we think we are supported in this view by the Case of Saline County vs. Thorpe, Supra.

Now turning to your third question:

> "then would they all come under the new law (Senate Bill #13) and have to have appraisers to go out and appraise the land etc.)"

In answer to this question it will follow that the position that we have taken on question 2, in holding that the county court could not take new bonds and sureties for the sole purpose of reducing the interest rate would necessarily prevent a situation as outlined in this question.

However, we might call attention to section 10386 Laws of Missouri, 1943, which reads as follows:

> "When any moneys belonging to said funds shall be loaned by the County Court, and a mortgage is taken to secure payment thereof, the county court shall require the borrower and the parties who have signed the bond, as personal sureties, as above provided, to produce and furnish 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 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. 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 provide and furnish other solvent sureties, of the qualifications herein provided, 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, as provided in this article."

It will be noted from the reading of the aforementioned section that the borrower and his sureties must annually on interest paying date or within thirty days thereafter, satisfy the county court of their solvency, and if the court is of the view that they are not, then the court shall proceed to enforce payment of both principal and interest due. It will be further noted, that this section uses the word "shall" and it is our view that through the use of the word "shall" the statutes makes it mandatory upon the county court to proceed to enforce payment where they find that the borrower and sureties are not in a state of solvency. For it was said by the court in the Case of State ex rel. McKittrick vs. Wymore, 119 S. W. (2d) 941, l.c. 944:

> "* * *On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory.* * *"

In Ballentine's Law Dictionary we find the following approved definition of the word "shall":

> "The word 'may' is construed to mean 'shall' whenever the rights of the public or third persons depend upon the exercise of the power or the performance of the duty to which it refers. And so, the word 'shall' may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction. But, if any right to anyone depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. But, where no right or benefit to anyone depends upon the imperative use of the word, it may be held to be directory merely. See Montgomery v. Henry, 144 Ala. 629, 1 L.R.A.(N.S.) 656, 658, 39 South Rep. 507."

It is our view that the statement in your letter that many of the bondsmen could not qualify under the new law will be of no avail if section 10386 Laws of Missouri 1943, applies to the present borrowers of school funds and their sureties and in this connection we call attention to section 10386 R. S. Mo. 1939, which section was re-enacted and is now section 10386 Laws of Missouri 1943, heretofore set out verbatim. We shall, for the purpose of comparison, set out verbatim, section 10386 R. S. Mo. 1939:

> "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."

It is our view that section 10386 R. S. Mo. 1939, as well as the re-enacted section 10386 Laws of Missouri 1943, are procedural in character. Therefore, section 10386 Laws of Missouri 1943 is fully applicable to outstanding school fund mortgage loans as well as to new school fund mortgage loans made after said section became effective. The general rule laid down governing the effect of a statute which is procedural in character is laid down in the Case of State ex rel. Midwest Pipe and Supply Company et al, vs. Haid et al, 52, S. W. (2d) 183, l.c. 186, wherein the court said:

"* * *It is a well-settled rule that, if before final decision in a case a new statute as to procedure goes into effect, it must from that time govern and regulate the proceedings. Clark v. Railroad, 219 Mo. 524, 118 S. W. 40. And a like result is produced by a change in the construction of a statute relating to procedure by a court of last resort.* * *"

CONCLUSION

1) In view of the fact that the statutory authority to receive money payments for principal and interest paid by a borrower on school fund bonds is placed upon the county treasurer to so receive, it is the opinion of this Department that a county clerk and his sureties are not liable on his official bond for such moneys for it is not part of his duties to receive the same.

2) It is the opinion of this department that a county court does not have authority to allow a borrower to execute new school fund bonds with the same sureties, and to execute a new mortgage covering the same land as described in the original mortgage where such new bonds and mortgages are taken by the county court for the sole purpose of allowing the borrower to reduce the interest rate that he was originally obligated to pay. Such act would be a mere subterfuge.

3) It is the opinion of this Department that section 10386 Laws of Missouri 1943, which is a re-enactment of section 10386 R. S. Mo. 1939, is procedural in character and therefore, applies to school fund mortgage loans both prior and subsequent to the enactment of said section.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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