COUNTY COLLECTOR: Terms of collector's bond is guide as to whether collector, who remains in office due to successor's failure to qualify as to giving of bond, shall be required to give a new bond.

March 29, 1935.

FILED
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Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

This department is in receipt of your letter of March 22 wherein you request an opinion regarding four questions, as follows:

> "We now have seventeen counties in Missouri where the collector has failed, refused or been unable to give a bond as provided in Section 9885, R.S. Mo. 1929. I have received several inquiries relative to the procedure to follow in such cases. I would like an opinion from your office as to the following questions:
>
> 1. How long does a collector have in which to qualify by giving a bond as provided in Sec. 9887?
>
> 2. Whose duty is it to declare the office of collector vacant where the collector has neglected or failed to file his bond?
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> 3. Can the collector continue to hold office until the collector-elect qualifies by giving his bond?
>
> 4. If so, is the collector required to give a new bond as his old bond expires on March 4 of this year?"

I - II - III.

On February 1, 1935 this department rendered an opinion to Hon. J.C. McKeehan, Collector of Adair County, Missouri, which contains the answer to your first three questions. A copy of said opinion is herewith enclosed. The answer to your fourth question will be rendered under a separate heading.

IV.

County collectors remaining in office due to their successors being unable to qualify must give new bond.

The statute which sets forth the form of the collector's bond is Sec. 9885, R.S. Mo. 1929. This section was repealed by the Legislature in 1933, Laws of Mo. 1933, page 464,and a new section, to be known as Section 9885, enacted in lieu thereof. As the question at hand deals with bonds executed prior to the 1933 session of the Legislature, we shall deal solely with Sec. 9885, R.S. Mo. 1929 and disregard the new section. Section 9885,R. S. Mo. 1929 is as follows:

> "Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any two months of the year preceding his election or appointment, plus ten per cent. of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, 1909, thereafter, and that he will in all things faithfully perform all the duties of the office

> of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties."

Assuming that the language contained in Section 9885 is contained in all the bonds of the seventeen collectors mentioned in your letter, and that the same is identical with the terms of the statute, we shall deal in our opinion mainly with the meaning of the phrase "for the four years next ensuing the first day of March, 1909".

As a matter of fact, we have examined the form of bond which the collectors actually executed, and they all appear to be identical, containing the following language:

> "NOW, THEREFORE, if the said _____ faithfully and punctually collects and pays over all state, county and other revenue for the four years next ensuing the first day of March, 19__, and in all things faithfully performs all the duties of his said office of collector according to law, then this bond to be void; otherwise to remain in full force and effect."

One of the most pointed decisions relating to the element of time or duration in a surety bond is that of Fisse v. Einstein, 5 Mo. App., l.c. 86-87, wherein the Court said:

> "The liability of a surety is said to be strictissimu juris; that is, the obligation of surety must not be extended to any other subject, to any other person,or to any other period of time than is expressed or necessarily included in it. This is what is meant by strict construction of a contract of suretyship; non extendatur de re ad rem, de persona ad personam, de tempore ad tempus. The contract, however, is subject to the common-sense rules of interpretation which govern any commercial instrument. No surety is to be bound beyond

> the extent of the engagement which shall appear, from the expression of the security and the nature of the transaction, to have been in his contemplation at the time of entering into it. But to this extent the surety is bound. The intent or latitude of the contract of suretyship is to be ascertained by a fair and liberal construction of the instrument, in furtherance of the intention of the parties, and then the case must be brought strictly within the terms of the guaranty, and the liability of the surety cannot be extended by implication. But one giving a guaranty shall be bound to the full extent of what appears to hafe been his engagement; and for this purpose, it is said, the words of the guaranty are to be taken as strongly against him as the words will admit. **** the strict construction of the obligation of a surety applies to its non-extension to subjects, persons, or periods of time not necessarily or expressly included in it; otherwise, it is subject to the ordinary rules of construction. Thus, a bond with sureties, by guardians of infants, conditioned that both the guardians shall faithfully execute the trust, one of them dying, it was held that the surety was liable for the acts of the survivor. The People v. Byron, 3 Johns. Cas. 53; Douglass v. Reynolds, 7 Pet. 122; 12 Wheat. 515; 12 East. 227; Noyes v. Nichols, 28 Vt. 173; Fisher v. Cutter, 20 Mo. 209; 3 Kent's Comm. 124; Fell's Guar. & Surety, 191; Burge, 40."

On the question of extending the terms of a surety beyond his contract, we quote the case of Fisher v. Cutter, 20 Mo. 206. The Court said (l.c. 209-210):

"I admit that contracts of guaranty, like all commercial contracts, have received a liberal interpretation in furtherance of the intention of the parties; but then they should never be extended beyond the obvious import of the terms in their reasonable interpretation. Justice Story said, in the case of Miller v. Stewart, 9 Wheat. 702: 'Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication, beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound and no further. Courts of equity, as well as courts of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness.' In Lawrence v. McCalmont et al., 2 How. Rep. 449, the same judge says: 'The words of such guaranty contracts should receive a fair and reasonable interpretation, and should not be forced out of their natural meaning.'

Applying these rules to the case before us, and we cannot hesitate to say, that Cutter's guaranty here has a direct relation to the contract between Dana and Butler, as it was then made--***** It was a guaranty against loss upon the contract as then made and not upon any future contract which Butler might make with Fisher & Fellows. Fisher & Fellows got their pay for this change of the terms. They pay the drafts, and wait ninety days longer. Now Cutter was to guaranty against losson the sale, that is, loss on the sale at ninety days' credit, as then made, which is equivalent to guaranteeing against loss on the drafts which Dana had drawn at ninety days on Fisher & Fellows. Surely his contract cannot be extended to a guaranty

> against any loss which Fisher & Fellows and Butler might cause by their after arrangements, in holding over the lard and extending the time of the drafts, by renewing them for ninety days."

The two above quoted decisions are among the earliest decisions relating to our question, and the rules contained therein have been sustained by the courts without exception.

In the early history of our state sureties for hire or compensation were practically unknown, and the voluntary or gratuitous surety was a favorite of the law, but as compensated sureties and surety companies came into existence, the rule relating to such hired sureties was reverted and hired sureties were not treated as favorites. This subject was discussed in the case of City of St. Joseph ex rel. v. Stone Co., 224 Mo. App., l.c. 897, in the following language:

> "Relator cites many cases holding that the statutory provisions are to be read into bonds taken under the statute. (Fogarty v. Davis, 265 S.W. 879, 880; Zellars v. Surety Co., 210 Mo. 86, 92; State ex rel. v. Rubber Mfg. Co., 149 Mo. 181, 212; Henry Co. v. Salmon, 201 Mo. 138, 162, 163; Board of Education v. Fid. & Guaranty Co., 155 Mo. App. 109, 115). There is nothing in these cases holding that a court can interpret plain language of a bond when there is no need for interpretation. In other words these cases do not hold that the courts may construe a bond to mean differently than expressly provided in the bond actually taken. As is well said in Pingrey on Suretyship and Guaranty, p. 170:
>
> The measure of liability of sureties is fixed by the terms of the instrument they sign, and such undertaking cannot be enlarged or varied by judicial construction. Their undertaking will be construed as the words used are ordinarily understood.

> Whether the surety is a compensated one or not, the rule applicable to the construction of bonds is that, for the purpose of ascertaining the meaning of the language used therein, and thus in determining the extent of the guaranty, the same rules of construction are to be applied as are applied in other instruments. (Kansas City to Use v. Youmans, 213 Mo. 151, 166, 167; Jobes v. Miller, 201 Mo. App. 45, 47). Of course if it be a fact that the surety herein is a compensated surety the general rule applies which is, if there is any ambiguity in a written contract it will be construed most strongly against the person using the language giving rise to such ambiguity. (Union State Bank v. American Surety Co., 23 S.W. (2d) 1038, 1044; State to Use v. Cochrane, 264 Mo. 581) However, there is no ambiguity in this bond. It provides in no uncertain terms that it covers persons 'who have contracts directly with the principal for .... material.' As relator had no contract directly with Hackett, the contractor, the furnishing of material by it was not covered by the terms of the bond in question."

It will be noted in the above decision that regardless of whether a surety is a favorite or not, the courts will not hold a surety beyond what is expressly provided in his bond actually taken.

Coming nearer to the point at hand, the decision in the case of North St. Louis B. & L. Ass'n. v. Obert, 169 Mo. 507 deals with the different phases and the different expressions in official surety bonds as to time, and the distinctions therein, in the following language: (l.c. 513-515)

> "In support of its proposition that the surety on the bond for the faithful performance of the official duties of the principal is not liable for defalcations occurring

after the expiration of the prescribed term of office, the learned counsel for appellant cite a long list of adjudicated cases and text-writers, and a reference to their brief will show all the authorities on that point that could be desired. The proposition in its general terms is conceded by the learned counsel for respondent, but they contend in the first place that it is qualified in this, that if it appears that it was the intention of the parties to the contract that the bond was to cover the acts of the officer not only during the period of the first prescribed term, but also during the period of his actual continuance in office, whether by holding over or re-election, the bond will cover such acts according to such intention, and, secondly, that the evidence in this case does not show any prescribed term of office and that the only limitation as to period of liability is to be found in the character of the contract with appellant, which contemplates an annual renewal of the bond upon the payment of an annual premium, whereby the bond runs for a period of one year from the date of its delivery. In Lionberger v. Krieger, 88 Mo. 160, the sureties on the bond of the cashier of a national bank, whose term of office was prescribed as one year, but who was reelected yearly and continued in office for nine years, were held liable for his misdeeds during the whole period. In that case, however, the bond on its face expressly provided that it was to cover the acts of the cashier, not only during the first year, but also during all the time he might be continued in office. That case is authority for the proposition that sureties on such a bond may be liable for the conduct of the principal beyond the period of his first term if that is the contract. There is nothing so peculiar in the nature of

such a bond as to necessarily limit its operation to the acts of the principal during his first term. The extent to which we approve the proposition contended for by appellant is, that if the term of office is prescribed and the bond is conditioned without express limitation as to period, for the faithful performance of the principal's duties, and nothing else appears to give it a wider effect, it will be construed as intended to cover acts occurring only within the prescribed term. We thus, by construction, read into the bond a limitation as to period. But if it appears from all the circumstances that the intention of the parties to the contract was that the bond, being unrestricted by its own terms, should cover the acts of the principal during his continuance in the office, whether by reelection or holding over, we cannot give it the restricted construction. Of course, if the bond in express terms should limit its operation, we could not, from evidence beyond its face, enlarge its face, enlarge its effect, any more than we could, by the application of the principle contended for by appellant, restrict in its effect a bond like that in the case of Lionberger v. Krieger, above mentioned. When it is 'so nominated in the bond' there is no room for construction, but it is not so nominated in the bond now under consideration, and if we give this bond the restricted meaning appellant contends for, we must do so because we are satisfied from all the evidence in the case that that was the intention of the parties. When it becomes a matter of construction it is the duty of the court to put itself in an attitude to view the contract from the same standpoint that it was seen by the parties when they entered into it. (Westervelt v. Mohrenstecher, 76 Fed. 118).

The question is again discussed in the case of Citizens Trust Vo. v. Tindle, 199 S.W., l.c. 1029, as follows:

> "This reasoning is based upon the general rules of construction applicable alike to all obligations. When, however, the rights of sureties are involved, the doctrine of strictissimi juris may properly be invoked in construing the contract--this, of course, when it is otherwise clear, plain, and its meaning unmistakable. State ex rel. v. Smith, 173 Mo. loc. cit. 407, 73 S.W. 211. It is elementary, and does not admit of question, that the reason underlying the application of this limitation to the general rule of construction is that sureties are the favorites of the law. In Blair v. Insurance Co., 10 Mo. loc. cit. 566, 47 Am. Dec. 129, this court first gave judicial recognition to this doctrine. This classification of sureties cannot be better defined than in the words of Sherwood, J., speaking for this court in Nofsinger v. Hartnett, 84 Mo. loc. cit. 552, where he says in effect, citing numerous cases, that: It is a well-settled rule, both at law and in equity, that a surety is not to be held beyond the precise terms of his contract, and except in cases of accident, mistake, or fraud, a court of equity will never lend its aid to fix a surety beyond what he is fairly bound to at law. This rule is founded on the most cogent and salutary principles of public policy and justice. In the complicated transactions of civil life, the aid of one friend to another, in the character of surety or bail, becomes requisite at every step. Without these constant acts of mutual kindness and assistance, the course of business and commerce would be prodigiously impeded and disturbed. It becomes then excessively important to have the rule established that the surety is never to be implicated beyond his specific engagement. Calculating upon the extent of that engagement, and having no interest or concern in the subject-matter for which he is surety,

> he is not to be supposed to bestow his attention to the transaction, and is only to be prepared to meet the contingency, when it shall arise, in the time and mode prescribed by his contract. The creditor has no right to increase his risk without his consent, and cannot therefore vary the original contract, for that might vary the risk."

There should be no strained construction in order to release or hold sureties. This question is discussed in the case of Fire Insurance Co. v. Nevils, et al, 217 Mo., l.c. 642, as follows:

> "This seems to us to be a fair and reasonable construction of the terms of the bond. While it is true, as contended by respondents, that voluntary sureties are the favorites of the law and have the right to stand on the strict letter of the obligation they sign as has often been held by the courts of this state, for which see Pemiscot County Bank v. Tindle, 272 Mo. 681, 695, 199 S.W. 1025, et seq.; Saginaw Medicine Co. v. Dykes, et al, 210 Mo. app. 399, 405-6, 238 S.W. 556, and many other cases that might be cited, yet the same cases, and many others, also hold that the contract of a voluntary surety is to be construed by the same rules as all other contracts and the language used is to be given its ordinary meaning with a view to carry out the intention of the parties as expressed in the instrument executed by them. 'There should be no strained construction in order to release or hold the sureties.' (Beers v. Wolf, 116 Mo. 179, 184, 22 S.W. 620; Mo. Kan. Tex. Ry Co. v. American Surety Co., 291 Mo. 92, 122, 236 S.W. 657; Evans v. U.S. Fidelity & Guarantee Co., 195 Mo. App. 438, 443, 192 S.W. 112)."

In the case of Trust Co. v. Tindle, 272 Mo. 681, the Court, after reviewing the rules of construction and interpretation, concluded the decision with the following language:

> "This bond speaks for itself. Thus speaking the liability of the sureties thereon is limited to its exact words. If these will not render them liable, nothing can. There is no equity against sureties and courts will not so construe a bond as to create a liability at variance with its letter. Such a construction would be necessary to fix the liability of the sureties here, under the allegations of this petition. We therefore hold that it does not state a cause of action, from which it follows that the judgment of the trial court should be affirmed. It is so ordered."

In the case of School Dist. No. 18 v. McClure, 224 S.W. 831, l.c. 832, Judge Ragland discusses the question as to whether or not the rules of construction are different in common law bonds and statutory bonds. He said:

> "It is suggested by appellant that the bond sued upon herein is a common-law bond, and that the strictissimi juris rule of construction applies. The character of the bond (as to whether statutory or common law) has nothing to do with this rule of comstruction. This court has deviated from the rule of strictissimi juris in suits upon bonds, but the deviation from such rule was not based upon the kind or character of the bond involved. The rule has been relaxed or ignored in those cases where the surety is one engaged in the business of making bonds for hire, or a stipulated stipend. The old-time accommodation surety has the benefit of the rule, whilst the hireling has not. The rule that sureties are the favorites of the law has no application to the surety who is engaged in the business of

> making bonds and contracts of suretyship for the cash to be realized from the business. Such contracts of suretyship are to be construed as ordinary contracts, and under the rules applicable to ordinary contracts. The intention of the parties is the vital issue. State v. Chicago Bonding & Surety Co., 215 S.W. loc. cit. 25; Lackland v. Renshaw, 256 Mo., loc. cit. 140, 150, 151, 165 S.W. 314.
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> This intention is to be gathered from the four corners of the instrument, as you would gather the intention of the parties in other contracts. In other words, we use the ordinary rules of construction to determine the meaning of the contract and the breaches thereof. 5 Cyc. 753.
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> Appellants speak of extending the obligation of the bond by mere implication. The rule is to get the intent of the parties under the usual rules of construction, and this rule we shall apply in the construction of this bond."

The common sense viewpoint of the matter was assumed by the court in the case of Moore, Admr. v. Title Guaranty & Trust Co., 151 Mo. App., l.c. 260:

> "While the strictissimi juris rule of construing the contract of a surety should be, and to some extent, has been relaxed in the judicial inspection of bonds executed by surety companies for hire, the express limits placed by such contracts on the obligation of the surety must be respected, else courts will be making contracts for persons which they did not make nor intend to make for themselves. The judgment is affirmed. All concur."

Relating to the intention of the parties, we wish to quote from the case of Erath & Flynn v. Allen & Son, 55 Mo. App., l.c. 113, as follows:

> "The plain meaning of the statute of Nebrasks, already quoted, is that the commissions shall, in cases where mechanics and laborers have no lien to secure the payment of their wages, take from the person to whom the contract is awarded a bond with at least two good and sufficient sureties, conditioned for the payment of the wages of all laborers and mechanics for labor performed in erecting the building or performing the contract. The bond in question is not broader or more comprehensive in its scope than the statute provided it should be. The liability of the sureties depends upon the construction of the language of the statute authorizing the bond. The bond, it is seen, is one of indemnity provided by the statute for the benefit of laborers and mechanics. If the plaintiffs are persons falling within either or both of these statutory designations, then they are entitled to the benefit of the indemnity.
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> The obligations of sureties, it has long ago been decided in this state, are to be strictly construed, and their liabilities are not to be extended by implications. Blair v. Ins. Co., 10 Mo. 566; Harrisonville v. Porter, 76 Mo. 358. The statute under consideration, as against the sureties on the bond sued upon, must be strictly construed."

CONCLUSION

The terms of the bond are the sole guide in answer to your question. If the bonds in question are in the form as set forth in the beginning of this opinion, containing the phrase "for the four years next ensuing the first day of March, 19__", as contained in the statute, and contain no

other words qualifying such terms, the foregoing authorities indicate the appellate courts would relieve the sureties of liability for acts after the 1st day of March, 1935, and to protect the interest of the State and governmental subdivisions, new bonds should be required of the collectors holding over.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

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