SCHOOL FUND MONEYS: A loan good when made remains a valid loan although borrower thereafter is elected to county office, except county judge.

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Mr. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

We acknowledge your inquiry which is as follows:

> "Section 9244 R. S. Missouri, 1929, pertaining to the loaning of the County School Funds by the County Court states in part as follows:
>
> "'The County Court shall not loan any money belonging to the School Fund to any Officer of the County or his deputy, nor shall such Officer or his deputy be accepted as security on the obligation given by the person borrowing * **'.
>
> "If an individual has obtained from the County Court one of these School Loans and is later elected and becomes a County Official, can he continue to be a valid borrower of this School Money?"

Section 9244, R. S. Mo. 1929, is as follows:

> "The county court shall not loan any money belonging to the school fund to any officer of the county or his deputy nor shall such officer or his deputy be accepted as security on the obligation given by the person borrowing. Any officer of the county who shall violate the provisions of

> this section by authorizing any such loan or drawing any warrant for moneys loaned in violation of this section shall be held responsible for the sum so loaned, with interest thereon to be recovered in the name of the county to the use of the district whose fund has been so used."

In the case of Sharp's Administrator v. Collins, 74 Mo. 266, l. c. 269, having under consideration the validity of a second mortgage securing school money when the statute required that such money should be loaned only on first mortgage security, the court said:

> "The object of that requirement was to secure the school funds loaned, and it would be a singular construction of the statute which would destroy the security because not as complete as the county was required to take."

In Morrow v. Pike County, 189 Mo. 610, among other things, the court considered the rights and duties of the officials charged with the control of county school funds, and said, l. c. 622:

> "The public school fund does not belong to the county in a technical sense. It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the law-making power in relation to the fund (Ray County to use v. Bentley, 49 Mo. l. c. 242); it may not divert the general county revenue to its protection, and, on the other hand, it can not apply the school fund to the payment of ordinary county debts."

And at l. c. 623:

> "It was said, among other things, that the court was a mere agent of the State for the management of a trust, and that,

> 'It is authorized to sell lands, to lease them, to receive and sue for the purchase money, and if there be danger of loss of a debt contracted for the purchase of these lands, the court, we think, might resort to those extraordinary remedies provided for creditors generally. It might sue by attachment, and, if the purchaser is stripping the land of its timber, and thereby endangering the security for the debt, must the agent of the State stand by and witness this spoilation, and trust to the criminal law to indemnify the township by the fine imposed against persons committing the waste on such lands?'"

In Montgomery County v. Auchley, 103 Mo. 492, l. c. 503, the court says:

> "'In relation to these funds the county courts are trustees. They have no authority to dispose of the principal intrusted, or any of its interest, otherwise than is prescribed by law. There is no difference in this respect between the principal and interest of these funds. If they can give away the one, they can give away the other. * * * The welfare of the state is concerned in the education of the children. She has provided and is providing means for that purpose, not only for those now in existence, but for those who may come after them. The fund, as has been said, is a permanent one, and, if every man, woman and child in a township should petition the county court to give away, that which is by law intrusted to it, for the education of its children, it should without hesitation reject their prayer.'"

And at l. c. 506:

> "We deem it a wholesome rule to hold county courts to a strict performance of their duties in the management of

> this trust. With all these stringent provisions large sums of these moneys are frequently lost through negligent management."

Section 9243, R. S. Mo. 1929, provides in part as follows:

> "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 four per cent. per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund."

Section 9248 specifically places these funds under the care and management of the county courts, and Sections 9250 and 9251 further prescribe the security to be taken for such loans.

From the above it appears that the legislative policy of this state has been marked and defined by enactment of statutes and by construction placed on those statutes by the courts, and that such policy is that there shall be great care and caution exercised in the management and control of such funds. This perhaps, among other justifiable reasons, because the proper safeguarding of these funds means so much to the education of the oncoming generations and therefore to the welfare of the sovereign state.

However, Section 9244, supra, contemplates an affirmative act to be done by the county court, to-wit, "to loan" the money to such officer, and it is this affirmative act that is prohibited. Said section does not say that no person shall continue to hold a school fund loan after he is so elected to office if he had the loan before being elected. When he as an individual who was not an officer procured the loan of school funds, there was a valid contract entered into between him and the county court. He had the right thereafter to rely upon the terms of that contract being fulfilled by the county court, and

likewise the county court had the right to rely upon his fulfilling the terms of the contract thereby placed upon him.

In the event a person has borrowed school funds and owes them and is thereafter elected a member of the county court, a serious question is presented as to whether he could qualify to said office when he owes money under such school fund contract. The general principle of law is that a person can not act as a trustee of property when he is a debtor. In the case of Samuels v. E. F. Drew & Co., 296 Fed. 882, a part of the syllabus is as follows:

> "A debtor can not be a trustee of its obligation to creditor, nor can debtor hold its obligation to creditor as security, for security presupposes the existence of property."

Under the holdings of the Missouri decisions, the members of the county court are trustees of these school funds and would appear to come within the prohibition of the above announced rule and be unable to qualify as to said office of county judge so long as said person was a borrower of said school funds.

CONCLUSION

It is our opinion that an individual who has borrowed school moneys from the county court, who is not at the time he borrows said funds a county officer, but is thereafter elected a county officer, does not because of such later election disqualify himself, nor does the law disqualify him from continuing to be a lawful borrower of such school funds.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JONN W. HOFFMAN, Jr.,
(Acting) Attorney General

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