SCHOOL FUND MORTGAGE - State is not affected by the laches of its agents in the management and care of school funds.

March 13, 1933.

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Hon. J. W. Thurman
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Mr. Thurman:

We acknowledge receipt of your letter dated March 6th, which letter is as follows:

"The County hold a School Fund Mortgage against a certain tract of land, and of course has a personal bond in connection therewith. The bond was executed in 1914, in the amount of $1000.00, and was permitted to run along without any payments of interest until it reached the total of $1474.00 at which time the debtor was permitted to make a new bond for the first principal amount plus the interest of $474.00, making a total mortgage of $1474.00.

"In 1928 one of the signer on the Bond was Bankrupt, and the County Court had due notice thereof, in 1929, another of the Bondsmen died. The County Court also had notice of this and another one of the bondsmen asked that the mortgage be foreclosed, also the maker of the mortgage asked that it be foreclosed.

"The total amount of the mortgage and interest at this time is, something over two thousand dollars. It is my contention that the County has lost their right against the Bondsmen since they have permitted this thing to drag after they have had notice of all the transaction that I have enumerated to you."

The law covering the situation presented by your letter has been determined by the Supreme Court of this State in Johnson County v. Gilkeson, 70 Mo. 645, the court saying:

> "This was a suit against Gilkeson and Brammer, securities for one Swan on a bond given the county for the use of school township number 44, range 28, in 1866. The defense on the part of Brammer was, that he gave notice to the plaintiff to sue or to foreclose a mortgage on Swan's property, and by reason of the neglect of the county to do either within the thirty days after the notice, the debt was lost so far as the principal was concerned by his insolvency after the notice. Another defense was, that the name of Ends, another security on the bond when it was signed, had been erased. In regard to this last defense the court found, as a matter of fact, that it was not true, and the evidence authorized the finding. And the only question here is as to the first defense. As this court has already decided this question in two cases, (Cedar Co. v. Johnson, 50 Mo. 225, and Jasper Co. v. Shanks, 61 Mo. 332,) it is useless to look into the long list of authorities elsewhere cited by the counsel for appellant. Whether this right claimed here is under our statute or at common law, the result is the same, since the court has declared that 'one who becomes a surety on such public bonds must hold himself ready to pay it, if the principal fails, and if he fears his insolvency, he should pay the obligation and collect it, if he can, of his principal; but he will not be discharged on account of the neglect of public officers.' Judgment affirmed. The other judges concur.";

also in the case of Ray County, to Use of Common School Fund, v. Bentley, 49 Mo. 236, the court held that,

> "The rule that a surety will be discharged whenever the creditor commits acts which operate to his injury or disadvantage does not apply where the creditor is the state or its agents, and the state is not affected by the laches of its agents in the management and care of school funds, and so a surety for a loan thereof can claim no relief on account of such laches."

It is the opinion of this office that the county has not lost its right against the bondsmen.

Yours very truly,

WILBUR C. BUFORD
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

WCB:EG