MORTGAGES:
SCHOOL FUND MORTGAGES:
STATUTE OF LIMITATIONS:
RENEWALS:

Section 865, R.S. Mo. 1929 applies to school fund mortgages. School fund mortgage which has expired on account of statute of limitation may be renewed by the maker and will be supported by sufficient consideration.

June 22, 1938

6-30

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Mr. Claude T. Wood,
Prosecuting Attorney,
Pulaski County,
Waynesville, Missouri.

Dear Sir:

In reply to yours of June 18th requesting an official opinion from this department based upon the following letter:

> "The county court of this county would like to have your official opinion upon the following question, to-wit:
>
> 'Does the general statutes of limitations apply to School Fund Mortgages to a county and is Section 865 R.S. Mo. 1929 applicable to such instruments?'
>
> It is my opinion that both the general statutes of limitations and section 865 would apply to such an instrument (Section 888 R.S. Mo. 1929) (223 Mo. l.c. 495; 120 Mo. l.c. 595); and that after the lapse of twenty years from the date of the last maturing obligation on the face of a school fund mortgage--except the required affidavit be filed within the twenty years--the debt would be absolutely barred, could not be revived by payments and that any subsequent foreclosure would pass no title to the purchaser at the fore-

closure sale (Utz vs. Dormann, 328 Mo. l.c. 264).

Will you please favor me with your opinion on the above matters? And in the event that you agree with the conclusions in the last paragraph, would you give me your opinion on an additional proposition, to-wit:

'Suppose that more than twenty years had elapsed since the date of the last maturing obligation on a school fund mortgage; that the present owner of the land would execute a new mortgage to the county covering the total balance of the indebtedness, would such a new mortgage be supported by sufficient consideration?' (the old mortgage to be released upon the execution of the new mortgage.)"

Section 9250, R.S. Mo. 1929 provides that capital school funds are under the custody of the county courts. Section 9251, R.S. Mo. 1929 provides:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond; and no loan shall be made to any person other than an inhabitant of the same county, nor shall any person be accepted as security who is not at the time a resident householder therein, who does not own and is not assessed on property in an amount equal to that loaned, in addition to all the debts

for which he is liable and property exempt from execution. In all cases of loan, the bond shall be to the county, for the use of the township to which the funds belong, and shall specify the time when the principal is payable, rate of interest and the time when payable; that in default of payment of the interest, annually, or failure by principal in the bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate of interest as the principal. But before any loan shall be effected, the borrower shall file with the county court an abstract of title at the time he files his bond and mortgage to the real estate which is to be mortgaged."

Section 9252, R.S. Mo. 1929 provides as follows:

"Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, by publication in some newspaper published in the county, if there be one published, and if not, by at least six written or printed handbills, put up in didferent public places in the county, without suit on the mortgage, proceed and sell the mort-

> gaged premises, or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of competent jurisdiction foreclosing the mortgage. In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages and other securities, shall be paid by the borrowers respectively."

Section 9254, R.S. Mo. 1929 provides as follows:

> "Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

It will be noted from these sections that the county court is required to take a mortgage on the premises upon which it loans the school funds. By Sections 9252 and 9254, supra, a manner is prescribed by which such loans may be foreclosed in case of default in the payment of the principal and interest.

We are of the opinion that school fund mortgages come

within the same class of conveyances as mortgages and deeds of trust which are given to secure loans to private individuals or private corporations. Section 865, R.S. Mo. 1929 provides as follows:

> "No suit, action or proceeding under power of sale to foreclose any mortgage or deed of trust, to secure any obligation to pay money or property, shall be had or maintained after such obligation has been barred by the statutes of limitation of this state; nor in any event after the lapse of twenty years from the date at which the last maturing obligation secured by the instrument sought to be foreclosed is due on the face of such instrument, unless such termination of said period falls within two years after the passage of this act, or has heretofore happened, in which event such suit, action or proceeding may be begun within two years after the passage of this act without regard to the date of the instrument or the maturity of the obligation, unless otherwise barred under the provisions of the general statutes of limitation, unless before the lapse of said twenty years the owner of the debt thereby secured or some person for him shall file an affidavit duly verified, or file an instrument in writing acknowledged as deeds are required to be acknowledged in order to entitle them to record in this state, showing the amount due and owing thereon."

In the case of Utz v. Dormann, 328 Mo. l.c. 264, the court in discussing this section which was Section 1320 in the 1919 statutes, said:

> "* * * It is evident, we think, that Section 1320, as amended, means that

> a deed of trust may not be foreclosed in any event after a lapse of twenty years from the date the last maturing obligation secured by it is due on its face, provided that the holder of the obligation had two years from the date the statute became operative to file a suit, an action or to proceed under power of sale, and provided further that before the lapse of said twenty years the owner of the debt or some one for him may file a verified affidavit or an acknowledged instrument showing the amount due and owing thereon. The section interdicts and precludes the foreclosure of a deed of trust in any event after a lapse of twenty years, saving that the owner of the debt was granted by the statute two years in which to bring a suit or an action or proceed to foreclose under power of sale and saving that the owner or some one for him may file the requisite verified affidavit or acknowledged instrument, thus tolling the statute."* * * *

In the case of County of St. Charles v. Powell, 22 Mo. 525, the court held:

> "The rule of the common law, embodied in the maxim 'nullum tempus occurrit regi,' and adopted generally in this country, applies only to the state at large, and not to the political subdivisions thereof. The statute of limitations runs against the municipal corporations and other authorities established to manage the affairs of the political subdivisions of the state, as against private individuals. The immunity was at common law an attribute of sovereignty only."

From this case it appears that statute of limitations apply to counties as well as to individuals and therefore

the provisions of Section 865, supra, would apply to counties. Section 859, R.S. Mo. 1929 provides as follows:

> "Nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this state."

In the case of Dunklin County v. Chouteau, 120 Mo. 577, l.c. 595, the court said:

> "* * * * These swamp lands would not come within the terms of that section, and hence the statute of limitations would run in favor of one in adverse possession, even as against the county. Delay on the part of a county will not ratify an act of its officers, where the county had no power under any circumstances or condition of things to do the particular act."* * * * * * * *

Section 861, R.S. Mo. 1929 provides as follows:

> "Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief, not herein otherwise provided for."

While Section 865, supra, will apply to the school fund mortgage it will not apply to the bond for which such mortgage is given to secure. Said Section 861 governs the limitations on the bond.

CONCLUSION

We are, therefore, of the opinion that the statute of limitations, that is, Section 865, supra, applies to counties in matters pertaining to school fund mortgages and foreclosures of same and that after the lapse of twenty years from the date of the last maturing obligation as shown on the face of the mortgage, if no affidavit is filed as is required by said Section 865 the lien of the mortgage would expire and the county's right to foreclose would be lost and in case the county attempted to foreclose under such a mortgage it could pass no title by such proceedings.

We are also of the opinion that payments on the bond which is secured by the mortgage would not toll the statute of limitations as to the mortgage, however, if payments have been made on the bond, then the limitations will not run against the bond until ten years after the date of the last payment.

II.

Assuming that the school fund mortgage has expired because of the running of the statute and there is yet an indebtedness, then you inquire as to whether the new mortgage executed by the present owner of the premises to the county covering the total balance of indebtedness would be such a contract as is supported by a sufficient consideration.

In the case of Loewenstein v. Insurance Company, 227 Mo. 100, l.c. 120, the court said:

> "* * * * When the Statute of Limitation runs on a note it does not render the note void, on the contrary the note still has sufficient legal vitality to constitute a consideration for a new promise to pay;"* * * *

Volume 13 Corpus Juris, page 315, section 150, the rule is stated as follows:

"It may be laid down as a general rule,

> in accordance with the definition given above, that there is a sufficient consideration for a promise if there is any benefit to the promisor or any loss or detriment to the promisee. It is not necessary that a benefit should accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction.* * * * * "

If the statute of limitations has run against the bond, then by the ruling in the Loewenstein v. Insurance Company case supra, it yet has sufficient legal validity to constitute a consideration for the new promise to pay, and for the giving of the mortgage to secure the payment of the bond. We think that the same rule would apply to the consideration for the renewal of the mortgage that applies to the renewal of the note in the Loewenstein case, and that the mortgage would have sufficient legal validity to constitute a consideration for the giving of a renewal mortgage to secure the payment of the bond.

CONCLUSION

Therefore, we are of the opinion that if the debtor wishes to give to the county a renewal school fund mortgage and bond to take the place of the one which has expired on account of the running of the statute of limitations against it, that the old mortgage and bond have sufficient legal validity to constitute a sufficient consideration for the giving of the renewal mortgage and bond.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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