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CIRCUIT CLERK: An action to recover shortage of circuit clerk which occurred more than three years prior to date Statute of Limitations began to run is barred by Statute of Limitations.
(2) Circuit clerk who has failed to pay all money for which he is accountable is ineligible to hold any office of trust or profit in this state.

5-15
May 13, 1935.



Hon. Elvin S. Douglas,
Prosecuting Attorney,
Polk County,
Bolivar, Missouri.

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

"Mr. Jesse House has sued this County (Polk) for \$1041.67 alleged to be back pay that he is entitled to but has not been paid, as Circuit Clerk of the county for the term beginning January 1st, 1931 and expiring December 31st, 1934.

"This suit is brought on the theory that when he went into office the salary he was entitled to was figured on a population in this county of 38,110, which was figured by multiplying the presidential vote in 1928 by 5; but that after the election in 1932, multiplying the presidential of that year by 5 the population of the county would exceed 40,000. That during his four year term he was paid a salary of \$2,000.00 based on population of less than 40,000, when in fact for the last twenty-five months of his term he was entitled to a salary of \$2500.00 per year because the population after the election in 1932 was in excess of 40,000.

"I have studied the decision of the Supreme Court in the case of State ex rel. vs. Hamilton, 282 Mo. 608, 260 S.W. 466, and apparently Mr. House is entitled to judgment

for the back salary. However, I have always thought that the Supreme Court is wrong in deciding that case as it does, and our County Court wants the Supreme Court to have another chance at the question before it pays him.

"In connection with his claim for salary we have this situation in his office. On May 5th, 1931, The Farmers State Bank of Bolivar failed and Mr. House had on deposit as Circuit Clerk about \$1259.00. Soon afterward he stood a suit on a \$450.00 check he had written against the account which the payee had held an unreasonable length of time, and won his case, thereby relieving himself of that much of his loss. He later put \$125.00 of his own funds into the Circuit Clerk's account. This leaves a balance of \$684 that Mr. House is short in his office account, which he has not replaced after the expiration of four years from the time of loss.

"The County Court has taken the position that since the Clerk is in a hurry for his money, they are in a hurry for the Clerk to straighten up his account. We have no way of knowing without an audit to whom the various funds the Clerk holds belongs to, nor whether he owes the County any money as a result of the loss that he hasn't accounted for.

"I plan to file a demurrer to his petition, then take time to plead. My idea is to set up an equitable answer in the nature of a counter-claim, asking the court for an accounting by the Clerk, and that his office be audited to determine the exact amount of the Clerk's shortage.

"In the event an audit is made and the exact amount of shortage of the Clerk in his accounts is determined, what is the opinion of your department as to the proper remedy to compel the Clerk to replace the loss? I am assuming that there should be

no question but what the Clerk is personally liable for the bank loss, and he has never denied his liability. The Clerk's funds consist of filing fees deposited with him on institution of civil suits by litigants, fines collected, if any, fees earned, etc.

"Our Circuit Court convenes on the 27th day of May and Mr. House's suit against the county is returnable on that day."

If we understand your question correctly, you desire to know what is the proper remedy to compel the Clerk of the Circuit Court to make good a shortage in his office if an audit of his books shows that a shortage exists. You state in your letter that the loss about which you inquire occurred in a bank failure on May 5, 1931. We therefore call your attention to Section 863, R.S. Mo. 1929, which reads as follows:

"Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state."

In view of the above, it is the opinion of this department that an action to recover a shortage of money owed by a circuit clerk, which shortage accrued more than three years prior to the date when the Statute of Limitations began to run, would be barred by the Statute of Limitations.

You state that Mr. Jesse House was Circuit Clerk of your county for the term beginning January 1, 1931, and expiring December 31, 1934. The roster of county officers compiled by the Secretary of State shows that Mr. Jesse House was elected in November of 1934 to succeed himself as Circuit Clerk and that he is also ex officio Recorder of Deeds. We direct your attention to Section 19 of Article II of the Constitution of Missouri, which provides as follows:

May 13, 1935.

"That no person who is now or may hereafter become a collector or receiver of public money, or assistant or deputy of such collector or receiver, shall be eligible to any office of trust or profit in the State of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable."

It is therefore our opinion that a circuit clerk who has failed to account for and pay over all public money for which he is accountable is ineligible to hold any office of trust or profit in the State of Missouri, and if such clerk is elected to and attempts to hold an office of trust or profit in this state, he would be subject to be ousted from office by the proper procedure.

Very truly yours,

J. E. TAYLOR,
Assistant Attorney-General.

APPROVED:

ROY MCKITTRICK,
Attorney-General.

JET/afj