

TAXATION: institution of suit contemplated by Section 9962b is satisfied by filing of petition.

5-15  
May 13, 1935.



Hon. A. H. Garner  
715 Frisco Building  
Joplin, Missouri

Dear Sir:

We acknowledge receipt of your letter requesting an opinion of this office upon the following state of facts:

" \* \* \* At the time of the passage of 94-called the Jones-Munger Act - and at the time this law went into effect, we had a number of suits pending; that is, filed in the clerk's office. Summons were not issued on all of them because we did not have time. However, since that time, summons have been issued and proceeding as necessary to complete them ready for judgment, and have been proceeding on all these suits which were filed prior to the enactment of Senate Bill 94, as provided by the old law, but have not filed any new suits. \* \* \* \* On account of the number of suits pending we could not get summons out immediately, but have proceeded from time to time as fast as summons and publications could be drawn. The point has been raised as to whether or not after suit was pending and summons not issued at the time of filing, whether summons could be issued at a later date. Bear in mind these suits were filed and summons issued as soon as we could get them out, \* \* \* could these suits be pursued to final judgment, bearing in mind that they were filed in the clerk's office prior to the passage of Senate Bill 94, being filed in March, 1933 and prior; and not having sufficient time to issue all the summons at one time, does the fact that they have been sent out since that time as quickly as prepared invalidate these suits."

I.

SUITS PENDING ON EFFECTIVE DATE  
OF SENATE BILL 94 MAY BE PRO-  
CEEDED TO JUDGMENT UNDER OLD LAW.

Under the provisions of Section 9962b, discretion is placed with the county collector as to the manner in which he shall collect the delinquent taxes, upon which suit had been instituted prior to the effective date of Senate Bill 94. He is permitted to proceed to final judgment and foreclosure of the tax lien under the old law or he may dismiss those suits and collect the taxes by virtue of Senate Bill 94. A portion of this section reads as follows, (page 445, Laws of Missouri 1933):

"\* \* \* as to suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

From the foregoing authority it is clear that authority is vested in the county collector to proceed to judgment in all cases which were pending at the effective date of Senate Bill 94. That is, providing the suits were "instituted" before that date.

## II.

FILING OF PETITION CONSTITUTES  
INSTITUTION OF ACTION.

It is the general rule in this State that the bringing of an action, such as will toll the running of a statute of limitation, is effected by the filing of the petition with the clerk of the Court, providing it is a Court of Record. The obligation of the plaintiff then ceases and it becomes the duty of the clerk to see that process is issued. If the statute of limitations runs before the clerk has had an opportunity to issue the process, the Court has held that this cannot be charged to the plaintiff and the plaintiff thus deprived of his right of action. In the early case of Lumber Company vs. Wright, 114 Mo. 333, this doctrine was first established. In the case of McGrath vs. Railroad Company, 128 Mo. 1, 9, the Court has stated on this subject:

"In the absence of directions to the contrary, the filing of a petition amounts to an order to the clerk to issue process in the cause.

Hence such filing was rightly held to be, in effect, a 'suing out' of the writ, as contemplated by the old section, 2013. But, as the plaintiff could not always direct the movements of the clerk in issuing process, it was also justly considered that the former could not be held answerable for any delay on the clerk's part in setting the legal machinery into full action, after the plaintiff had taken the proper initiative.

To avoid the barrier of limitation, the earliest move in the proceeding was considered and held to be its legal commencement, in accordance with a general principle of the common law demanding a liberal and favorable construction of a law, as against a forfeiture of rights."

Other cases indicate that if the plaintiff instructs the clerk not to issue the summons the statute would run. State ex rel. vs. Wilson, 216 Mo. 215, 292. In that case they held a delay of four months, more or less, in the issuance of the summons was not fatal to the plaintiff's action. In the instant case, however, it has been many months, possibly more than a year, in some cases, intervening between the filing of the petition and the issuance of the summons. The appropriate rule is laid down in the case of Franz vs. Radeacker, 264 S. W. 97, 98:

"The petition must, however, be filed with the bona fide intention that process be issued at once upon the defendant. The filing of the petition, without interference from the parties with the usual legal procedure thereon, serves as an implied demand that process be issued forthwith upon the defendant. But if the petition is filed with the clerk with instructions not to issue process at once upon the defendant, or to hold it until further notified, the implied demand becomes nullified, and the action will not be deemed to have been commenced at the filing of the petition, and the action will not be treated as brought until the order is given to the clerk to issue the citation."

The determination of the problem presented is really a question of fact rather than a matter of law. We can only apply the law to such facts as you have presented. If these suits were filed with a bona fide intention of the immediate issuance of process to the defendant, and diligent effort has been made since that time to obtain the issuance of such summons, or at least, if it can be said that the delay in the issuance of the summons cannot be chargeable to the plaintiff, it is our view that these suits were instituted within the meaning of Section 9962b, Laws of Missouri, 1933, page 445.

Hon. A. H. Garner

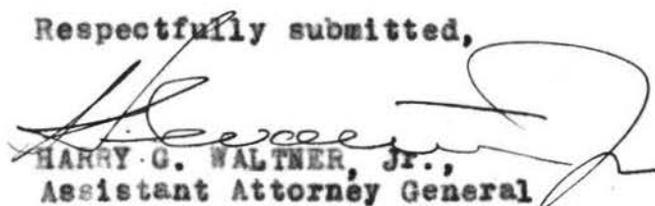
-5-

May 13, 1935.

CONCLUSION

It is therefore the opinion of this office that the County Collector may, in his discretion, proceed to prosecute the suits to final judgment which were instituted prior to the effective date of Senate Bill 94, and that such suits were instituted within the meaning of Section 9962b, Laws of Missouri 1933, page 445, if petitions were filed prior to July 24, 1933, and since that date plaintiff has not been at fault in the matter of the issuance of the summons.

Respectfully submitted,



HARRY G. WALTNER, Jr.,  
Assistant Attorney General

APPROVED:

---

ROY MCKITTRICK,  
Attorney General.

HGW:MM