

OFFICERS:
LIMITATIONS:

Section 863 R. S. Mo. 1929 applies to actions against an officer to recover excess salaries, absent fraud.

February 5, 1936

2-15

Mr. Brevator R. Creech
Prosecuting Attorney
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Troy, Missouri



Dear Sir:

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

"I would like to obtain an opinion from your office concerning the matter of applicability of the Statute of Limitations respecting claims against County officials for excess salaries paid to and received by them. That is, whether or not the three year statute, Sec. 863, R. S. 1929 applies."

Section 863, Revised Statutes Missouri 1929, about which you inquire, provides:

"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 the action is

given to the party aggrieved, or to such party and the state."

The case of Putnam County v. Johnson 259 Mo. 73, we think, fully answers your question. The Court, passing upon the identical question, at l. c. pages 81, 83, 84 and 85, stated the law as follows:

"The question now material is, whether these counts state a cause of action which is barred by the three-year statute. Plaintiff says not, and defendant contra. The statute, Revised Statutes 1909, section 1890, reads:

"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 any 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 the action is given to a party aggrieved, or to such party and the State."

"This question requires a statement of the items sued for in the count named, to the end that we may see whether or not they fall within this statute. These items, fully set out in the first count of the petition, are as follows:

"Item 1. The sum of one thousand three hundred and six dollars and ninety-one cents, being the amount wrongfully exacted and obtained from said county and charged for making out and computing the tax books, the defendant having wrongfully charged said county on a basis of sixty-five words and figures for each name on said tax books, instead of charging on a basis of forty words and figures for each name appearing thereon, the proper and correct basis as shown by actual count.

" ' Item 2. The sum of seventy-eight dollars and eleven cents, being the amount wrongfully charged exacted and retained as back salary for previous years, and to which the defendant was not entitled."

* * * * *

"More than three years had elapsed, and if these items come within the purview of the statute above quoted, and such statute has not in some way been tolled under the facts pleaded, then the demurrer was properly sustained as to these counts. Plaintiff urges in the brief that these items were not received by the defendant 'in virtue of his office', but that they were fraudulently received. To the one class of cases the three-year statute applies, whilst as to the other the five-year statute would apply.

"We have fully set out the petition. The wording of it is not such as to justify us in saying that the actions in the first and second counts of the petition stated, are grounded upon fraud. If this was the view of the pleader, then he failed to allege facts sufficient to state a cause of action. (Shelby Co. v. Bragg, 135 Mo. 291.) In the Bragg case, Macfarlane, J., said:

" 'It cannot be said that the evidence of the facts constituting plaintiff's cause of action was conceded or suppressed. The evidence all existed upon the official books and records of the office open to the examination of the court. The expert accountants who afterward made an examination encountered no difficulties in making an account of fees collected. They reported no destruction of books, or the suppression or concealment of no

fact which could prevent an accurate statement being made.

"It is insisted that the duty of this officer and his relation to the county court was such that the latter had the right to rely implicitly on the correctness of these statements and that making a statement which did not fully and truthfully account for all fees collected is such a fraudulent concealment of the facts as would delay the running of the statute. But the county court is required to examine the statement and see that they are correct before approving them; it was not intended that they should accept as true any statement the officer should make. The evidence by which the truth could have been ascertained was at hand and open to their examination. Indeed, the statements themselves did not all purport to be accurate; they do not pretend to give an itemized account of the fees collected and from whom; they virtually refer the court to the records of the offices for the evidence.

"The county court is given the power to audit the accounts of these officers and it is made their duty to examine statements made by them and, if necessary, to hear the evidence of witnesses. A mere examination of the statements is not a proper performance of their duty. They should see that the statements are correct. This is particularly so when the statements on their face, as in this case, are not such as the law requires. It cannot be said that the county court was ignorant of facts which were open to its examination, and which it was its duty to know."

"It is true that Judge MacFarlane was discussing the tolling of the Statute of Limitation by fraudulent acts, but he says much that is of interest here. The county court passes upon and allows charges of the county clerk. To state a good cause of action grounded upon fraud, and fraud practiced must be pleaded. This is as much requisite in

a position grounded upon fraud, as it is a requisite to show fraud for the purpose of tolling the statute. We do not believe the pleader intended to ground the action upon fraud, but if he did, the demurrer was well taken, because the facts alleged were insufficient. The five-year Statute of Limitation has no application to the first and second counts.

"But plaintiff says the three-year statute, supra, has no application, because the items of cash named were not received by defendant 'in virtue of his office.' We do not agree to this view. If they were not received 'in virtue of his office' how were they received? We can conceive of no other way or capacity in which they were received. They may have been wrongfully and, speaking from the statute, unlawfully received, but they were evidently received 'in virtue of his office.' In other words they were received as an officer, not as an individual or agent. Take the alleged overcharge for the tax books. Whether the defendant was allowed or retained the proper or the improper amount for such service, yet whatever amount he did retain for such services was retained by him officially, for official work, and was received, had, held and retained 'in virtue of his office' as used in the statute.

"If these two counts (first and second) do not plead actions grounded upon fraud, as we have held, and if they do seek to recover from defendant money wrongfully held by him, but received by him 'in virtue of his office,' then the three-year Statute of Limitations applies, and the causes of action stated in these two counts are barred by such statute. Upon this theory the trial court was right in sustaining the demurrer as to these counts."

CONCLUSION

In view of the above, it is the opinion of this department that excess salaries paid to and received by a county official are received by him 'in virtue of his office,' and, absent fraud on the part of such official the three-year statute of limitations applies, and an action against such official to recover excess salaries paid to him more than three years before the bringing of the action would be barred by such statute.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

JET:LC