

STATUTE OF LIMITATIONS: If officer voluntarily pays shortage of five years, he cannot demand refund for two years for the amount of shortage of two years.

September 23, 1936. *9-24*

Mr. William L. Mitchell,
Judge of County Court,
Carroll County,
Bosworth, Missouri.



Dear Sir:

This department is in receipt of your letter of September 21, wherein you make the following inquiry:

"In the Spring of 1935, Carroll County was audited and the amounts due the county from the several township assessors set forth. This audit covered five years but later the ruling came that the audit could not go back but three years.

"Now the question comes up as one assessor paid his full amount as charged for five years. Should the county repay him the difference from the full amount and the amount that he paid the State as due it for the three years? * * * "

It would appear from your letter that the assessor in question rightfully owed for five years, both to the state and to the county, but the Statute of Limitations prevents the collection for only three years. Therefore, the assessor could not under the law be compelled to pay for more than three years if he saw fit to plead the defense of the Statute of Limitations. Having paid the county the full amount, the question arises as to whether or not the assessor has waived the Statute of Limitations.

It is a well recognized principle of law that in order for a person to avail himself of the Statute of Limitations, the same must be specifically pleaded. In the instant case we assume that there was no action brought against the assessor, but that the payment on his part was purely voluntary.

The question of waiver was discussed in the case of Conkling v. Henry Quellmalz Lumber & Mfg. Co., 34 S.W. (2d) 990, wherein the Court said (l.c. 992):

"In arriving at the conclusion that under the facts in this case the defendant waived for all time its right to invoke the statute of limitations to plaintiff's amended petition, we have in mind the line of cases which the defendant calls to our attention which lay down the broad rule to the effect, that, where a motion for new trial has been sustained, the case then stands as though there had never been a trial. Brayton v. Gunby (Mo. App.) 267 S.W. 450, l.c. 452; Hurley v. Kenally, 186 Mo. 225, l.c. 228, 229, 85 S.W. 357; Star Bottling Co. v. Exposition Co., 240 Mo. 634, l.c. 639, 144 S.W. 776. This general rule, however, has its exceptions as is evidenced by those cases which we have cited above to the effect that, where the defendant, by answering plaintiff's amended petition after motion to strike on the ground of departure, files his answer, the defendant thereby waives for all time the right to invoke such plea. So, too, privilege, as that between a patient and physician, once being waived, cannot thereafter be invoked and is therefore conclusive on retrial. Ryan v. Met. Life Ins. Co. (Mo. App.) 30 S.W. (2d) 190, l.c. 194, and cases cited; Elliott v. Kansas City, 198 Mo. 593, 96 S.W. 1023, 6 L.R.A. (N.S.) 1082, 8 Ann. Cas. 653; State v. Long, 257 Mo. 199, 165 S.W. 748."

And in the case of Landers Lumber Co. v. Short, 81 S.W. (2d) l.c. 376, the Court said:

"It is conceded in this case, we think, that the proceedings in the justice court were a nullity, since the amount involved exceeded the jurisdiction of the justice of the peace. It is also

conceded on both sides that, unless the plea of the statute of limitations has been waived by the pleadings, the claim of Prosperi is barred. It was so held in *McPherrin v. Lumber Men's Supply Company*, 211 Mo. App. 385, 242 S.W. 136, and *Redlon v. Badger Lumber Company*, 194 Mo. App. 650, 189 S.W. 589. In the *McPherrin* Case, supra, it was further held that the statute is one of limitation and must be pleaded in order to avail defendant. To the same effect is the case of *American Radiator Company v. Conner Plumbing & Heating Co.*, 277 Mo. 548, 211 S.W. 56, as well as a number of other cases. It is also well established that the statute of limitations may be waived by the filing of a general denial, particularly where the bar of the statute appears upon the face of the petition. *Conkling v. Henry Quellmalz Lumber & Mfg. Co.*, 225 Mo. App. 494, 34 S.W. (2d) 990. The latter case further holds, and we think correctly, that the statute, having once been waived by answer, cannot subsequently be invoked, absent a departure."

CONCLUSION

It is the opinion of this department that the Assessor mentioned in your letter has waived his right to any refund by paying the full shortage for the five years.

Respectfully submitted,

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Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.