

**LIMITATIONS:** Limitation does not begin to  
**COUNTY TREASURERS:** run against the County Treasurer  
and his bondsmen until the end  
of his term and breach of duty  
then to pay over funds.

March 24th, 1939

Honorable Paul N. Chitwood  
Prosecuting Attorney  
Reynolds County  
Centerville, Missouri



Dear Sir:

We have your inquiry which is as follows:

"On June 8th, 1938, a report of an audit made by County Examiners J. E. Sanders and L. L. Patterson, of the State Auditor's office, was made of all the county offices of Reynolds County, and filed with the County Clerk of said county.

"The audit covered the period during the years 1935 and 1936. It reported a shortage of \$4,469.45 of Mr. O. C. Lane, Treasurer, and consisted of a shortage of \$3,862.76 of Mr. Lane's accounts, plus \$606.69, representing an excess of one half of one percent of fees illegally retained by him for disbursing the school moneys of the county for the year 1936.

"I have sued Mr. Lane and his bondsmen, the American Surety Co. Inc. of New York in a civil action here in the Circuit Court, to recover this amount on the bond. I have been informed by the defendant Surety Company, that the principal defense would be the three year statute of limitations, i.e., that the present suit on the bond was not brought

until after the three years limitation, as they claim barred at least half of the alleged shortage. To sustain their point, they cite me 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 the action is given to the party aggrieved, or to such party and the state."

"They further cite numerous cases, the principal ones of which are Shelby County vs. Bragg, 135 Mo. 276, Putnam County vs. Johnson, 259 Mo., 73, State ex rel Bell vs. Yates, 231 Mo., 276, and City of St. Joseph vs. Wyatt, 274 Mo., 566. Also a number of other cases are cited to sustain the position, that a suit against an official on his bond, must be instituted within three years from the date of the breach of the bond, shortage or other defalcation complained of.

"Now according to the audit report, the shortages of Mr. Lane did not all happen at any particular date, but continuously over a long period of time. Apparently the defense does not believe their position to be good, or

at least logical. They have filed a motion to make the various accounts, the amounts taken and the dates of the shortages, along with their defense of the three year statute of limitations plea.

"It would be impossible to definitely give the exact dates of the shortages, since the balances in each fund were raised or lowered from day to day, apparently at the will of the treasurer. For the same varied almost daily. For the same reason any such shortages would be next to impossible to detect, since the treasurer carried all funds in his various book balances, in one bank account in Reynolds County Savings Bank, the county depository at that time. In my opinion the embezzlement, and shortages of Mr. Lane were not really complete as to set in operation of the statute of limitation until the last wrongful act was finally completed, and the total amount of shortage was capable of being ascertained. The total shortage of \$4,469.45, did not occur until February 5th, 1937, when the treasurer made his final settlement when the exact amount of the shortage was ascertained, and he failed to account for, and turn this amount over to his successor of this date. Section 860, R. S. Mo., 1929, provides:

"Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued:

Provided, that for the purposes of this article, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."

"Also the following cases are in point with this section: Fitchner vs. Mohr, 16 S. W. (2d), 739, and Lewis vs. Thompson, 96 S. W. 939.

"I do not care to burden you with a lengthy discussion of the points of law involved in this case, but in view of the importance of this case to Reynolds County, I would appreciate your opinion and advice as to which of the two sections of law relating to the statute of limitations will govern in the instant case."

Replying thereto, it occurs to us that your question boiled down is this:

When does the Statute of Limitation begin to run against the liability of the County Treasurer and his bondsmen, on account of the failure of the County Treasurer to properly account for and pay over the funds officially in his hands?

Section 12152, R. S. Mo., 1929, states with reference to the duties of the County Treasurer:

"He shall settle his accounts with the court semi-annually, at its first and third regular terms in each year; and at the end of his term \* \* \* \* \* shall immediately make such settlement, and deliver to his successor in office all things pertaining thereto, together with all money belonging to the county; and at each settlement the court shall immediately proceed to ascertain, by actual examination and count, the amount of balances and funds in the hands of such treasurer to be accounted for, and to what particular fund or funds it appertains, and cause to be spread on its records, in connection with the entry of such settlement, the result of such examination and count."

In the case of Fitchner against Mohr, 16 S. W. (2d), 739, the St. Louis Court of Appeals, speaking of when the statute of limitations begins to run, said l. c. 741:

"It seems to us therefore, that the time when the statute begins to operate against a claim under the constitutional and statutory provisions aforesaid, is that date when it has been discovered or made known to the public that the officials or agents have violated the provisions denouncing the reception of deposit when the bank is in a failing condition or insolvent."

The court there seems to hold that the petition there under attack which stated that on August 31, 1922, the bank became insolvent and was thereupon taken over by the Finance Department and by showing that at that time the information became available to the depositors which charged him with the duty of account, and the statute of limitation began to run at that time. In other words, the statute of limitation did not begin to run at the date of making of the deposit which, in that case, was on April 25, 1922, but did begin to run at the date the depositor became acquainted with the fact that the bank was insolvent.

In Lewis against Thompson, 96 S. W. (2d), 938, speaking of when the statute of limitation begins to run, the Kansas City Court of Appeals speaking of Section 860, R. S. Mo., 1929, page 944, said:

"Under this section it has been held that a cause of action has accrued when a right exists to institute a suit and for its enforcement \* \* \* \* \*

"A fundamental rule applies to the construction of all limitation statutes, is that the same may be deemed to begin to run only when the cause of action ascertained accrued to the person asserting it and that does not accrue in the legal sense it comes into being and such party has the right to assert the same in court."

In that case the question considered was when the statute of limitation began to operate as to a broker's commissions for the sale of a business establishment, the value of which was to be determined by an inventory to be made after the entering into of the contract of sale. The court held the statute to begin to run, not from the date the contract was

entered into, but from the date the inventory was made, because at the latter time the amount of broker's commissions was thereupon capable of ascertainment, saying at page 945:

"Until such time plaintiff could not know the amount of the compensation to which he was entitled, and had no cause of action therefore he might assert in court."

It will be noted that Section 12152, supra, uses the term "settle" speaking of the duty of the county treasurer with reference to his semi-annual settlements. That statute requires him to pay over the money officially in his hands "at the end of his term \* \* \*". The county treasurer acts as a reservoir or receptacle officially of the county funds. There is no other person to whom the county treasurer can pay the county funds belonging to the county as long as he himself is in office. It did not become the duty of the county treasurer to pay over the county funds to any other person (except of course, funds called for by county warrant properly issued against the funds) until the end of his term.

Your inquiry does not disclose that the County Treasurer declined nor neglected to render semi-annual settlements. Under Section 12153, R. S. Mo., 1929, certain other officers are required to make settlement at each term of the county court, and "pay into county treasury any balance which may be due the county \* \* \*" Section 12154, R. S. Mo., 1929, states that:

"If any person thus chargeable shall neglect or refuse to render true accounts, or settle, as aforesaid, the court shall adjust the accounts of such delinquent, according to the best information they can obtain, and ascertain the balance due to the county."

Section 12153, supra, apparently does not apply to the county treasurer because the parties required by that section to make such settlements and balances of accounts and by it required to pay such moneys to the county treasurer. Subsequent sections there following relate to the penalties and liens applicable in summary proceedings of the county court in adjusting defaulting office accounts, but seems to refer to proceedings directly against the official and not to liability on his official bond.

If the cause of action accrues to the court at the semi-annual settlement called for by Section 12136, then the statute of limitations begins to run from that date. If by the term "settlement" is meant merely the stating of the account and it would not become the duty of the county treasurer to pay over any money to anyone until the end of his term. It might be argued that he has not violated his official duty in not paying over the proper amount until the end of his term.

If A owes a promissory note which is due the first day of January, 1941, A has not violated his legal duty to the payee by declining to pay said note prior to January 1, 1941. It might be A's duty to render account to the payee by writing him letters at each term when the county court convenes and setting out all of the circumstances surrounding the note and the payment thereof, by the fact that A failed to do these latter things, would not of itself accelerate the due-date of the note, nor would that fact start the statute of limitations.

It occurs to us the last above is somewhat of a parallel to the statutory duties and responsibilities of the county treasurer while it is his statutory duty to make settlements with the county court semi-annually, yet does not become his duty to pay over the balance of official funds until the end of his term when the statute of limitation does not begin to run until he has violated that duty, which violation must occur at the end of his term by failing to pay the same over to his successor.

The cases in your letter mentioned as cited by the bondsmen do hold that the statute of limitation begins to run against the county officials when they make settlements required by law to be made by them with the county court, and the settlements as made by them show on the face to be incorrect and also when the other public records available for the county court to use in checking up the accuracy of the report and show the report as made to be incorrect, and seem further to hold that the only instances where the statute does not begin to run against an official making a settlement with the county court are those where he has made a false settlement and there is no available record by which the falsity thereof could be reasonably discovered but on the contrary, there has been by the defaulting officer a concealment of the true facts, but those cases apply the above rule to officers after the liability to make the payment there under consideration has accrued. If it was the duty of the county treasurer in the instant case, to pay this money over to someone at each semi-annual period when the statute requires him to "settle" his accounts, then the statute would begin to run from those periods, but if, as we have stated here above, his duty to pay over the money does not come into existence until the end of his term of office, then the statute of limitations should not begin to run until he has reached that date.

The cases cited by the bondsmen and above mentioned, and the three year statute of limitations preclude a successful prosecution if such were instituted more than three years after the time at which the final settlement of the county treasurer was due, if there was no fraud in the making of the settlement, and if the records were available for the county court as the auditing body, to determine that the settlement as made was fraudulent or incorrect. If the county treasurer in making such settlement had made an incorrect settlement and had so manipulated his records by falsification or kept a dual set of records, and there was no available public records by which the county court could ascertain that the settlement as made was false, the statute of limitations would not begin to run until after the county court had had a reasonable opportunity, all the facts and circumstances considered, to discover the falsity of the settlement. See St. Joseph against Wyatt, 274 Mo. 567, for a summary of the law as to the last above expression herein.

We do not by this opinion desire to be understood as in any way excusing the failure of the county court to require a strict and proper accounting of public funds of the county. It is their duty to protect the county funds. They are by law created the fiscal agents of the county. They are the guardians of the proper handling of the county funds. It is their duty to faithfully and assiduously watch over the settlements made by county officials with the county as is said in the last case above mentioned, page 575:

"The County Court is given the power to audit the accounts of these officers and it is made their duty to examine settlements 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."

CONCLUSION.

It is our opinion that the statute of limitation does not begin to run against the county treasurer and his bondsmen until he has violated his duty to pay over county funds, and that his duty to pay over county funds does not spring into existence until the end of his term of office, absent the other statutory provisions for the termination of his office.

Respectfully submitted,

DRAKE WATSON,  
Assistant Attorney General.

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General.

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