

STATUTE OF  
LIMITATIONS.

: Under Section 1015, R. S. Mo., 1939,  
: actions against circuit clerk and ex-  
: officio recorder for liability incur-  
: red by acts in official capacity must  
: be brought within three years from  
: date cause accrues in the absence of  
: a showing of fraud or concealment.

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March 22, 1944

3.29



Honorable Lynn Bradford  
Prosecuting Attorney, Phelps County  
Rolla, Missouri

Dear Mr. Bradford:

This will acknowledge the receipt of your letter under date of March 18, 1944, in which you request an opinion from this office. The text of such letter is as follows:

"In July, 1939, a former Circuit Clerk & Recorder of Phelps died, and according to the report of the State Auditor's Office after a recent audit of this County, he was in arrears something over \$1200 on Circuit Clerk fees collected but not turned into the County Treasurer. The County Court is requesting that I take action on the bond for the collection of this shortage. The bonding company takes the position that this action is barred by the 3-year statute of limitations in Missouri, under Section 1015, R.S. Mo. 1939. The following citations seem to me to bear out their contention:

Shelby County v. Bragg, 135 Mo. 291;  
Putnam County vs. Johnson, 259 Mo. 73;  
City of St. Joseph vs. Wyatt, 203 S. W. 819;

"I would appreciate your opinion with reference to whether the three-year or the five-year statute of limitations would apply under these conditions. There are no circumstances that I know of that would tell the limitation period, and it is simply a question of which limitation applies."

Section 1015, R. S. Missouri, 1939, 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."

In the City of St. Joseph v. George N. Wyatt, 274 Mo. 566, the court states that this section applies to actions on official bonds except where some fraud or concealment is plain which prevented discovery of the defalcation or shortage. The court at page 575 states "Statutes of Limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. A party seeking to avoid the law of the statute on account of fraud must aver and show that he used due diligence to detect it and if he had the means of discovery in his power, he will be held to have known it." See also Shelby County v. Bragg, 135 Mo. 291. Putnam County v. Johnson, 259 Mo. 73.

You make no mention in your letter of any facts on which to ground fraud or concealment and in the absence of such a showing it must be held that the three year statute applies.

The three year statute begins running from the date the cause of action accrues. In State ex rel, Buchanan County v. Fulks, 296 Mo. 614, where the suit was on a collector's bond for excess fees retained, the court stated that the cause began at the end of the fiscal year when the defendant made his annual accounting.

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"It was then at the end of the fiscal year, that he was required to make this detailed statement under oath and immediately pay over the excess of fees and commissions

received by him. At that time and not until then could the excess of commissions and fees received by the collector become due and payable. Failing to pay it over when the statutes made it due and payable he was then, and not until then in default and the cause of action then accrued.

CONCLUSION.

It is therefore the conclusion of this office that the three year limitation of Section 1015, R. S. Missouri, 1939, applies to actions against circuit clerks and ex-officio recorders upon a liability incurred by the doing of an act in an official capacity, in absence of showing of fraud or concealment.

Respectfully submitted

ROBERT J. FLANAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

RJF:LeC