CRIMINAL COSTS: Fee bills filed with the County Court to be acted upon are subject to the Statutes of Limitations; Defense of limitations may be waived by county.

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Hon. Llyn Bradford
Prosecuting Attorney
Rolla, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"There is a matter pending before the County Court of Phelps County concerning which I should very much appreciate having your official opinion.

Fred C. King of Rolla, Missouri held the office of Sheriff of Phelps County from January 1937 until January 1, 1941. During his tenure of office there were a number of fee bills approved by the then Prosecuting Attorney of this County and the Circuit Judge which were filed in the office of the County Clerk for allowance and payment by the County Court. No action of record or otherwise was taken by such County Court or any of the county courts in office later with regard to the allowance or refusal to allow these bills for payment. They simply remained on file in the County Clerk's office and pending without any action or decision of the County Court. Mr. King is now requesting the present County Court to allow and pay these bills and there is a question as to the statute of limitations as some of the bills are more than 5 years old.

The question is whether the filing of these bills with the County Clerk has the effect of tolling the statutes of limitation and if the County Court could legally pay these bills."

Your request submits two questions. The first is whether the filing of a criminal cost fee bill, duly certified, with the County Court tolls the statute of limitations, and the second question is whether the County Court can legally pay the fee bills mentioned in your letter. We shall discuss these questions in order.

Section 1012 R.S. Mo. 1939 reads in part as follows:

"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: * * * * * "

Section 1014 R.S. Mo. 1939 reads in part as follows:

"Within five years: * * * * Second, an action upon a liability created by a statute other than a penalty or forfeiture; * * * * * "

From the above sections it is evident that for the Sheriff to avoid the limitations set forth in Sections 1014, supra, he must commence or must have commenced an action for the recovery of his fees within five years from the time a cause of action thereon accrued to him. In order to determine whether the sheriff can recover for the fees mentioned in your letter it is necessary to determine when a cause of action accrued to him for those fees and whether the filing of the fee bills with the County Court amounted to the commencement of an action to recover such fees.

A cause of action accrues to a party whenever that party has the right to commence a suit to enforce his claim. In Crawford v. Metropolitan Life Insurance Company 167 S. W. 2, 915, 922, the Court said:

"But there is ample authority in our State to the effect that the statute of limitations does not begin to run until a time is reached when the creditor has a right to enforce payment of the debt by suit. State ex rel. Fehrenbach v. Logan, 195 Mo. App. 171, 190 S.W. 75; Lewis v. Thompson, 231 Mo. App. 321, 96 S.W. 2d 938. And the length of time between incurring a liability and the right to sue thereon is unimportant."

Likewise, in the State Ex. Rel. vs. Schulte, 90 S.W. 2, 1078, 1083, the Court said:

"A cause of action does not accrue so as to set in operation the running of the statute of limitations until the injured party has the right to sue thereon." (citing numerous authorities.)

We must, therefore, determine when the sheriff first had the right to commence a suit to recover the fees shown in the fee bills under consideration. Fee bills for criminal costs are provided for by Section 4236, 4237 and 4240, R.S. Mo. 1939. Said sections read as follows:

Section 4236:
"The Clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Section 4237:
"It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

Section 4240:
"Each and every bill of costs presented to any county court for allowance shall be examined and certified to by the judge and prosecuting attorney in the same manner, all necessary charges excepted, as provided for certifying bills of costs to the state auditor for payment; and any county judge who shall pay, or vote to pay, any cost incurred in any criminal case or proceeding, unless the same is so certified to, shall be adjudged guilty of a misdemeanor."

Since Section 4240, supra, makes it unlawful for the county court to pay any criminal cost fee bill unless the same has been certified to by the Judge and prosecuting attorney, it follows that the claimant of such fees could not maintain an action for same until the fee bill had been so certified. Such claimant would, therefore, not have a cause of action (the right to sue) for his fees in such cases until the fee bill had been made out and certified to according to law, and, therefore, statutes of

limitations would not start running against said fees until such certifications had been made. Under Section 1014, supra, therefore, the sheriff you mentioned would have five years from the date of the certification and delivery to the Circuit Clerk of the fee bills within which to commence an action for his fees.

Your letter states that the fee bills (duly certified) were filed with the county court but that no action was taken thereon by the county court. The question arises as to whether the filing of such fee bills amounted to the commencement of an action by the sheriff.

Section 13824, R.S. Mo. 1939 provides in part as follows:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; * * * * *"

Section 2496 R.S. Mo. 1939 reads as follows:

"If any account shall be presented against a county, and the same, or any part thereof, shall be rejected by the county court, the party aggrieved thereby may prosecute an appeal to the circuit court in the same manner as in other cases of appeal from the county to the circuit court; and the circuit court shall proceed to hear, try and determine the case anew, without regarding any error, defect or other imperfections in the proceedings of the county court."

At first blush it would seem that since a right of appeal is given to a party aggrieved by the action of a county court on an account filed with it, such a procedure is in fact a suit or action against the county. However, the courts have considered this question many times and have ruled that the filing of an account against the county with the county court for allowance is not the commencement of an action against the county. The case of K. C. Sanitary Co v. LaClede County, 307 Mo. 10,269 S.W. 395, was a case where a company had sued the county in the circuit court upon an account. One of the defenses asserted by the county was that the circuit court did not have jurisdiction to hear the action because the exclusive original jurisdiction to hear and determine such a claim was in the county court. In discussing said defense the Court said, 269 S.W. l.c. 397:

"Subdivision 2 of section 2436 provides for exclusive original jurisdiction of the circuit court in all civil cases which shall not be cognizable before county courts, probate courts, and justices of the peace and not otherwise provided for by law. Defendant apparently contends that section 2589 has made such provision otherwise. The function of the county court is merely to audit and settle claims and demands against the county. Section 2574. A claim against a county is not technically a suit at all. Gammon v. Lafayette County, supra. If a claim is presented to the county court and allowed, well and good. If it is rejected, the claimant may appeal to the circuit court. There is no language in section 2589 which may fairly be construed as constituting rejection of a demand against a county by the county court a final adjudication of demandant's right to recover against the county.

It is true that one having a demand against a county may present his demand to the county court, and, if it is rejected, he may prosecute an appeal to the circuit court. But such procedure is not exclusive. He may file his suit in the circuit court, regardless of the amount of his demand (section 9506), and proceed therein to trial and judgment, if he so elects, regardless of whether or not the county court has rejected such claim. Filing a claim against a county in the county court is not filing an action at all in the legal sense. If it were, then section 9506 entirely deprives the county court of the right to pass upon such claim, which clearly was not intended."

In Jackson County v. Fayman 44 S.W.(2) 849 (Mo. Sup.) the court again discussed the nature of a proceeding before the county court on a claim against the County. In that case the court said, l.c. 852:

"The power and authority of county courts and the capacity in which such body acts in auditing and paying claims against the county has been before this court for decision many times. We think that it is now well settled that county courts do not act judicially in allowing, adjusting, or refusing claims presented against the county, or necessarily arising from managing its financial affairs. While such body does not act in a purely ministerial capacity in such matters, in the sense that they act without investigation and have no discretion in the matter, yet they do not try the merits of the claim as a court, but rather act as auditing financial agents of the county whose action is not final in the sense that a judgment of the court is final except on appeal or by other appropriate remedy."

In the latter case the court quoted with approval from the case of Sears v. Stone County 105 Mo. 236, the following, l.c. 853:

"'In auditing accounts, there is no part of the proceeding which takes the form of a judicial proceeding. 'No petition is filed, no parties are summoned to answer the demand and no issues are triable by a jury, except in the discretion of the court.' Gammon v. Lafayette County, supra. It is true, in a certain sense, they act judicially when they decide upon claims against the counties, but not more so than the auditor or financial agent of a corporation or firm when he passes upon an account presented. It is true, also, that the right of appeal is given in case the account presented against the county, or any part thereof, be rejected. This appeal is specially provided, and would be altogether unnecessary if the rejection of an account constituted a judgment. * * * The statute allowing appeals from their action in rejecting accounts could only have been intended to provide a convenient and inexpensive method for having a judicial determination of a matter about which the parties are unable to agree. That could hardly be called a judicial proceeding in which the agent of one party sits in judgment upon the rights of the others."

From the above, we think it is clear that the filing of a claim against a county with the county court for allowance does not amount to the commencement of a "civil action" against the county as those words are used in Section 1012 of the statutes, supra, and hence the filing of the fee bills mentioned in your letter did not toll the running of the statute of limitations.

Your next question is whether the county court can now lawfully pay the fee bills mentioned in your letter. Your letter indicates that some of the fee bills are not more than five years old. Of course, fee bills which have been certified to less than five years ago could be paid by the county court if the budget of the county permitted such payment. We presume your last question is directed primarily to those bills certified more than five years ago.

The defense of statutes of limitations are affirmative defenses and must be specially pleaded and raised in order to be available to a party. In Murray v. De Luxe etc. 133 S.W. (2) 1074, 1076, (Mo. App.) the Court said:

"In the case before us defendant was content to file as its answer a general denial, under which the benefit of any statute of limitations was not available, for a plea of the statute of limitations in defense is an affirmative one and must be pleaded."

In Kopp v. Moffet, 167 S.W.(2) 87, 91 (Mo. App.) the Court, in discussing statutes of limitations said:

> "This is an affirmative defense and must be pleaded in order for defendant to rely thereon."

It has also been held that statutes of limitations do not extinguish a debt but only bar the remedy. In Sturdy v. Smith, 152 S.W. 2 1035, 1037 (Mo. App.) the Court said:

> "Defendants' contention that plaintiff's rights are barred by the special statutes of limitations pleaded by them, because of his failure to file his claim in the probate court against the estate of Louise Smith during the one year period provided by such statutes, cannot be sustained. A debt is not extinguished by the bar of such statute of limitations. By pleading the bar of such statute, the person owing the debt merely avoids a personal judgment if such plea is sustained."

Likewise, in Hickey v. Sigillito, 162 S.W. (2) 639, 641, (Mo. App.) the Court said: "The statute of limitations does not extinguish a debt. It does not affect the right, but affects the remedy only. The bar of the statute may be waived."

It will be seen, therefore, that the mere fact that the sheriff has not commenced an action against the county for his fees within five years after he first had the right to bring such an action does not extinguish his claim. Whether the county wants to avail itself of the defense of the statute of limitations is a question of policy for the county court to determine. If the sheriff should bring an action against the county for his fees and the county did not specially plead the five year statute of limitations, the sheriff could recover, unless there is some other defense to his claims which are not mentioned in your letter.

CONCLUSION

It is, therefore, the opinion of this office (1) that the filing of criminal cost fee bills with the county court of a county does not amount to the commencement of an action against the county thereon and does not toll statutes of limitations and (2) that the county court can pay criminal cost fee bills which have been certified according to law more than five years ago if and when proper funds are available for that purpose under the county budget.

Yours very truly,

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APPROVED:

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