CRIMINAL PROCEDURE - Suit against sheriff, for excessive fees retained, must be filed within three years after the discovery of the shortage.

December 10, 1942

FILED
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Honorable Alvin B. Walker
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of December 7, 1942, which, omitting the tabulation set out therein, reads as follows:

> "On August 5th. 1937 the State Auditor filed with the County Clerk of Sullivan County, an audit of the various county offices of said county for the period of January 1, 1935 to December 31, 1936.
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> "In this report it shows excess fees paid John W. Lee Sheriff for the year of 1935 by the county the sum of $476.50 and for the year 1936 the sum of $467.85 or a total of $944.35.
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> " * * * (Omitting tabulation).
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> "It is now called to my attention that no adjustment of this matter has been made.

> "I would like to have your opinion as to whether limitation has run such as would bar an action to recover the excess fees paid the sheriff whose term expires on the 31st. day of December 1936.
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> "It is my impression that this would be an action for money had and received and would be barred by the five year statute or Section 1014 R. S. 1939."

Under the facts in your request the State Auditor, on August 5, 1937, filed with the county clerk of Sullivan County, an audit showing that the sheriff at that time had retained fees, in excess of those lawfully allowed to him, in the amount of $944.35, which amount was due Sullivan County. Also, in your request you state that it is your impression that this action would be barred by the five year statute, as set out in Section 1014 R. S. Missouri, 1939. Section 1014, supra, reads as follows:

> "Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 1013, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or

> injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting fraud."

We are calling your attention to Section 1015 R. S. Missouri, 1939, which has been held by the courts of this State as being applicable to actions against a sheriff, for money received by him, in virtue of his office. Section 1015, supra, 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."

In construing both Section 1014 and Section 1015, supra, the Supreme Court of this State, in the case of Putnam County v. Johnson, 259 Mo. 73, l. c. 79, 84, said:

> " * * * The judgment upon the demurrer will have to be reversed, because both the third and fourth counts in this petition state good causes of action for money had and received. Not only so, but upon their face it is shown that the five-year Statute of Limitations is the only one which could be invoked, as to them, and it could not be successfully invoked. These counts in the petition do not proceed upon the theory of the defendant having been an official, and having received the money sued for 'in virtue of his office' as contemplated by Revised Statutes 1909, section 1890, the three-year Statute of Limitation. These counts charge that the defendant received these funds as the agent of the county, not as an officer of the county. What the proof may show upon trial is one thing, and what the petition shows, when attacked by demurrer, is quite a different thing. It may be that the proof will utterly destroy the allegations of these two counts, but that is a matter to be determined upon the trial of the facts, rather than upon this demurrer. It is not uncommon for county officers to be agents of the county for matters beyond those of the office. Whether

the facts will so show in this case, we have no means of knowing. We only know that defendant is alleged to have received the funds as agent. For this reason the demurrer was not well taken as to these two counts, and for like reason the instant judgment will have to be reversed.

" * * * * * * * * *

"'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 petition 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.
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> "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."

Under the holding of the above case the court held that even though the county clerk was described in the petition as an agent, he still had received the money by virtue of his office, and, the cause may be barred in three years, as set out in Section 1015, supra. The action would not revert to what is now Section 1014, supra, even if he was described in the peti-

tion as an agent of the county. Also, in the case of St. Joseph v. Wyatt, 274 Mo. 566, l. c. 570, (Sup. Ct.) on the same theory said:

> "It is contended by the United States Fidelity & Guaranty Company that plaintiff's demand as to said shortage of $16,431.69, which occurred more than three years prior to the commencement of this action, is barred by the provisions of Section 1890, Revised Statutes 1909, which reads as follows:
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> "'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.'
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> "We are clearly of the opinion that the liability of the Guaranty Company for the payment of said sum of $16,431.69 must be determined under the above section, in connection with the facts of the case. The burden of proof devolved upon plaintiff to show a state of facts which prevented said statute from running against it. The quantum of proof necessary under such circumstances is fully

discussed in Shelby Co. v. Bragg, 135 Mo. l. c. 298, and following; Callan v. Callan, 175 Mo. l. c. 360-1-2; State ex rel. v. Harter, 188 Mo. 516; State ex rel. v. Yates, 231 Mo. 276; Johnson v. United Railways, 243 Mo. l. c. 298, and following; Putnam County v. Johnson, 259 Mo. 73."

In the above case the suit was against the bonding company who was on the bond of a city treasurer of the city of St. Joseph. The same holding was also had in the case of The State to use of Hudson v. Finn, 102 Mo. 222, where a former sheriff of the city of St. Louis had refused to make a settlement on taxes due the State. In that case they held that the three-year section applies to sheriffs.

CONCLUSION

In view of the above authorities, it is the opinion of this department that a suit cannot be maintained at this time by Sullivan County against a sheriff for the recovery of excessive fees retained by him for the years of 1935 and 1936, which fees were reported on August 5, 1937, to the county clerk of Sullivan County by the State Auditor's office, by reason of an audit of the various county offices of that county. Such an action is barred in three years from August 5, 1937, by the Statute of Limitations, as set out in Section 1015 R. S. Missouri, 1939.

APPROVED:

Respectfully submitted

ROY McKITTRICK
Attorney General of Missouri

W. J. BURKE
Assistant Attorney General

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