

Official Bond, Limitation of Action On. Statute of Limitations.

An action on an official bond of a county clerk is based upon
“ a liability created by statute.”

Helena, Montana, June 7th, 1906.

Hon. John C. Lyndes, County Attorney, Forsyth, Montana.

Dear Sir: The single question presented in the case of State of

Montana v. County Clerk Charles W. Bailey and his bondsman, with which we now have to deal, is the Statute of Limitations.

The earlier California decisions seem to regard an action upon an official bond as one based upon "a contract in writing," but the later decisions in California, as well as elsewhere, now hold that such an action is based upon "a liability created by statute."

County of Sonoma v. Hall, 132 Cal. 569.

County of Sonoma v. Hall, 62 Pac. 257 and 312.

County of Sonoma v. Hall, 65 Pac. 12 and 459.

Spokane County v. Prescott (Wash.), 53 Pac. 661.

State v. Davis, (Ore.), 71 Pac. 68.

Davis v. Clark, 58 Kan. 454, also cases cited below.

The Supreme Court of Montana in a very recent decision in the case of Palatine Insurance Company v. Northern Pacific Railway Company, not yet reported, have held that Sec. 513 of the Code of Civil Procedure which named five years as the time within which "an action upon a liability created by statute may be commenced" was superceded by Sec. 524 of the same code, which names two years as the period within which such actions shall be commenced. The court further held that the Act of March 11th, 1901, is void as never having been passed. The effect of this decision is to limit the time within which such an action may be commenced to two years.

The only remaining question then is when the statute begins to run. While in many cases the misfeasance or nonfeasance in office the statute of limitations begins to run with the close of the term, yet this present action is based upon acts of malfeasance where a party other than the county, to-wit: the State of Montana, was defrauded, and in such cases the authorities are practically a unit that the statute begins to run with the commission of the act, for an action might then and there be instituted against the official and his bondsmen.

Davis v. Clark, 58 Kan. 554.

Rizer v. County, 58 Kan. 114.

Latin v. Gillette (Cal.) 30 Pac. 545; 29 Am. St. Rep. 115.

Northrup v. Hill, 57 N. Y. 351; 15 Am. Rep. 501.

Madden v. County, 65 Fed. 188.

Woos Lim. Actions, Par. 122.

Angell Lim. Actions, Par. 136.

19 Am. & Eng. Enc. Law, 2nd Ed. 200.

The older cases of Bank v. Waterman, 26 Conn., and State v. Kelly, 32 Ohio St. 421, appear to hold to the contrary but are not strictly in point.

The last fraudulent issue by Bailey, according to our complaint, was in May, 1903, while the action was not commenced until on or about November 1st, 1905. It is, therefore, apparent that it would be useless to incur the expense of a trial of this action.

In our opinion, and for the reasons above stated, you should file a praecipe for the dismissal of the action.

Very truly yours,

ALBERT J. GALEN,
Attorney General.