Opinion No. 98.

County Surveyor—Rental of Equipment—Per Diem—Statute of Limitations.

HELD: 1. The statute of limitations (Sec. 9030, R. C. M. 1921), applies to a county surveyor's claim against the county for rental of equipment.

2. Assuming that Sec. 1632, R. C. M. 1921, as amended by Chapter 176, Laws of 1929, applies here, which is doubtful, the county surveyor, by contracting to accept $7.00 per day for services in supervising C. W. A. work on road projects, has estopped himself from claiming the additional compensation of $1.00 per day.

May 10, 1935.

Mr. P. J. Gilfeather
County Attorney
Winnett, Montana

From an opinion you recently gave the board of county commissioners of Petroleum County, a copy of which is before us, it appears that one E. J. Parkinson was duly elected, qualified and acting surveyor of such county continuously from January 3, 1927, to January 6, 1935. On March 4, 1935, he presented a claim for allowance to said board in the words and figures following, to-wit:

"Jan. 3, 1927, to Jan. 6, 1935, inclusive, rental of surveying transit, 96 months at $5.00 per month....$480.00
Rental on drawing instruments, 96 mos. at $0.25 .....$ 24.00
For services as county surveyor supervising grading and gravelling of county roads. Balance due.....$78.00"

In the opinion expression is given to the view that as each term of office is an entity, separate and distinct from all others (Griffin v. County of Clay, 19 N. W. 327; Thruston v. Clark, 40 Pac. 435; State v. Rose, 86 Pac. 296), only the items of "rental" accruing between the first Monday of January, 1933, and the first Monday of January, 1935, may, if deemed reasonable, be approved under the provisions of Section 4605, Revised Codes 1921. So far as the third item of the claim is concerned, it is contended in the opinion that as Parkinson was employed by the board, at his own solicitation, to supervise C. W. A. road projects, and as $7.00 per day was the compensation agreed upon, which has been paid, he is not entitled to the extra $1.00 per day, or $78.00 in all, by reason of being county surveyor when the services were rendered.

In view of the seeming paucity of legal authority available, you have asked us to give you the benefit of our opinion upon the questions of law involved herein. We will first consider the items of rental contained in the claim.

Section 4838, Revised Codes of Montana 1921, is as follows: "The county surveyor shall be provided with suitable office, together with necessary equipment, to perform his various duties as prescribed by law." In Hicks v. Stillwater County, 84 Mont. 38, the court held that this is a duty which must be discharged by the board of county commissioners, and that where it fails or neglects to do so but knowingly permits the county surveyor to use his own equipment, the county re-

ceiving benefits therefrom, it, the county, is liable for the reasonable value of its use as upon an implied contract.

Section 4605, Revised Codes of Montana 1921, is as follows: "No account must be allowed by the board unless the same is made out in separate items, the nature of each item stated, and is verified by affidavit showing that the account is just and wholly unpaid; and if it is for official services for which no specified fees are fixed by law, the time acutally and necessarily devoted to such service must be stated. Every claim against the county must be presented within a year after the last item accrued." A similar provision of the statutes of California was construed in Nelson v. Merced County, 55 Pac. 421, the court saying: "The contention of respondent is—and the court below sustained it—that only those items of the claim which accrued within a year prior to the presentation of the claim should be allowed under the provisions of the section above quoted. This contention cannot be sustained. The language of the statute is too plain to admit of construction. It provides that the board shall not allow any claim against the county 'unless the same be filed with the clerk of the board within a year after the last item of the account or claim accrued.' The limitation imposed by said section does not begin to run until the date at which the last item accrued; and the claim may be allowed if presented at any time within a year after that date. Statutes of limitation are to be strictly construed, and the court must find the intention of the legislature from the statute itself. Tynan v. Walker, 35 Cal. 634. If it had been the intention of the legislature to bar all items of a claim which did not accrue within a year before the presentation of the claim, it would have been easy to say so, or to say that no claim shall be allowed unless the first item thereof shall have accrued within a year before its presentation." (Welch v. Santa Cruz County, 156 Pac. 1003.)

It is the rule, no doubt, that for certain purposes each term of public office is a separate and distinct entity, but has the rule any application to a case of this kind? We do not think so. The test seems to be this: Can the items of rental be properly pleaded in one count or cause of action. In other words, if pleaded in one count would more than one primary right be sought to be enforced or more than one subject of controversy presented. In McCord v. Page County, 162 N. W. 242, the plaintiff, who had been sheriff of the defendant county for a period of seven years, brought suit to recover reasonable compensation for certain services rendered prisoners under his charge from January 1, 1904, to January 1, 1911. In ruling upon a motion addressed to alleged defects in the petition the court, among other things, said: "The fifth paragraph of the motion asks that plaintiff be required to state how many terms he served and the beginning and the end of each. This portion of the motion should have been overruled. The period of his service as sheriff is alleged, and the law fixed the time of each term of office. It was unnecessary to plead what the law ascertained. Another portion of the motion sought to have the petition show defendant's liability for each term of office and allege and plead his claims for compensation for services rendered during each term in a separate count and consecutively number the several counts. The petition, in an exhibit made a part thereof, alleged the number of prisoners and the number of days cared for in each quarter of each year, and that reasonable compensation per day would be 20 cents. There was no necessity, then, for more specifically specifying the liability for each year. Nor do we think there was any ground for separating into counts. The services rendered were continuous and of the same kind, and the claim therefor not different in one term than in another. The only object of so doing would be to enable defendant to interpose the statute of limitations by way of demurrer. This may be done with the petition in its present form; for the claim for compensation during any quarter of any year may be thus assailed. This portion of the motion should have been overruled." (49 C. J. 157; 1 C. J. 1108; 1 Bancroft's Code Pleading, sec. 92; Pomeroy's Code Remedies, sec. 467.)

In the event that suit is instituted

to recover, reasonable "rentals" from January 3, 1927, to January 6, 1935, for the use of the transit and drawing instruments, would any part of the cause of action be barred by the statute of limitations? Our answer is in the affirmative. Clearly the action would not be one "to recover a balance due upon a mutual, open, and current account where there have been reciprocal demands between the parties," such as is contemplated by section 9042, Revised Codes of Montana 1921. (Adams v. Patterson, 35 Cal. 122; Millet v. Bradbury, 41 Pac. 865; Flynn v. Seale, 84 Pac. 263; Hills v. City of Hoquiam, 161 Pac. 1049; Merchants' Collection Agency v. Levi, 163 Pac. 870; 37 C. J. 769.) It would, however, be "an action upon a contract, account, promise, not founded on an instrument in writing" (School Dist. No. 12 v. Pondera County, 89 Mont. 342), and Parkinson would be entitled to recover reasonable "rentals" for that part of five years next preceding the commencement of the action in which he served as county surveyor, and only for that part. (Section 9030, R. C. M. 1921; Harlan v. Loomis, 140 Pac. 845; Cochise County v. Wilcox, 127 Pac. 758; Hills v. City of Hoquiam, supra; Adams v. Patterson, supra; 37 C. J. 764, 868.)

We will now deal briefly with the item in the claim for supervising the grading and graveling of county roads. Following the decision of the supreme court in the Hicks case, the legislature at its 1929 session (Chapter 176), amended Section 1632, Revised Codes 1921, to read as follows: "The Board of County Commissioners may direct the county surveyor or some member or members of said board, to inspect the condition of any highway or highways or proposed highway or any work, contract or otherwise, under the direction, supervision or control of the county officials, being done or completed or any highway or bridge in the county during the progress of the work or before any work is commenced, or after completion and before payment therefor, and such person or persons making such inspection shall receive for making such inspection when so directed the sum of Eight Dollars ($8.00) per day and actual expense, which shall be audited and allowed in the same manner as other claims against the county; * * *." The omission of the words "and for all other work performed for the county under the direction of the board of county commissioners, the sum of eight dollars per day and actual expenses," constituted one of the important changes in the statute. Assuming that the section as amended covers the peculiar situation here shown, which is somewhat doubtful, we however incline to the view that Parkinson has estopped himself from claiming the additional compensation. (DeBoest v. Gambell, 58 Pac. 72, 353; Boyle v. Ogden City, 68 Pac. 153; Chandler v. City of Elgin, 278 Pac. 581; Myers v. City of Calipatria, 35 Pac. (2d) 377; 21 C. J. 1111, sec. 113. Contra, Breathitt County v. Noble, 116 S. W. 777; Geddis v. Westside Nat. Bank, 145 Atl. 731.)