

Opinion No. 249

**Sheriffs & Constables—Mileage—
Statute of Limitations.**

HELD: Neither Section 4605 or 9033, R. C. M., 1935, applies to a sheriff's claim for difference in mileage at the rate of 7c and 10c.

A sheriff's claim for the difference between 7c, the rate paid him, and 10c the rate allowed by statute, is not barred by statutes of limitations.

August 7, 1940.

Mr. W. E. Coyle
County Attorney
Butte, Montana

Dear Mr. Coyle:

The sheriff of Silver Bow county, whose term expired January 3, 1939, has presented claims for mileage for the years 1933, 34, 35, 36, 37 and 38. The sheriff has computed the mileage and presented these claims promptly as the mileage accrued and was allowed 7c per mile. Since that time this office has held that the proper allowance under the statutes of the State of Montana is 10c per mile. He has now presented a claim for the difference between the 7c rate and the 10c rate. The question raised is whether the statute of limitations bars his collection of these claims.

Section 4605, R. C. M., 1935, relates to the time for the presentation of claims against the county, 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 actually 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."

This section would not be applicable to the claim in question because of the last sentence, "Every claim against the county must be presented within a year after the last item accrued." These claims were all presented each month

and the last item accrued during the last month of his term and the statute would not run until a year had elapsed from the time that item accrued. A case squarely in point is *Flynn v. Beaverhead County*, 54 Mont. 309:

"Plaintiff then commenced this action to recover compensation for the land taken by the county. Among other defenses interposed, the county pleaded the bar of certain statutes of limitations, * * *.

"It will be observed that these sections have to do with claims or accounts against a county, * * *. That the subject matter of this litigation is not such as to give rise to a claim within the meaning of that section is apparent. * * *

"The legislature never contemplated that the county would enter into a solemn compact and then deliberately violate it, and therefore made no provision for a case of this character. It is *sui generis*; but the county has the use and occupation of the right of way over plaintiff's land and will not be heard to say that through its breach of faith it has placed the plaintiff in a position where he is remediless."

The other statute would be Section 9033, which relates to the general limitation of actions and provides for a two year statute of limitations when

"4. An action for relief on the ground of fraud or mistake, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

It is readily apparent that this statute is not applicable because it is conceded that the various county commissioners throughout the State of Montana acted in good faith when they approved claims for sheriffs' mileage at the rate of 7c, and the sheriff himself acted in good faith in presenting his claim upon this basis and it was not until the opinion of the Attorney General was issued pointing out the mistake that the "discovery by the aggrieved party of the facts" occurred. Actually there is serious question as to whether or not the statute of limitations applies at all.

In 37 C. J. 786 it is said:

"There is authority to the effect that actions for official salaries or **statutory fees are not actions on debts** arising on contract, express or implied, but are actions on demands founded on statute, * * *." (Emphasis ours.)

While the ordinary rule is that statutes in derogation of common law are to be strictly construed has been altered by statute in the State of Montana (Section 4, R. C. M., 1935), nevertheless the Court cannot go beyond the plain provisions of a statute (*Harrington v. Butte, Anaconda and Pac. Ry. Co.*, 36 Mont. 478). The whole purpose of the enactment of statutes limiting the time in which actions may be brought was to prevent delay in bringing actions until witnesses' memories fade, vouchers are lost, witnesses die or important evidence becomes destroyed. None of these factors are present in the instant situation. There is no question but that the claims are valid, the mileage has been determined as correct and the only question is rectifying a mutual mistake resulting from misinterpretation of the law.

It is my opinion that neither Section 4605 nor 9033 regarding limitation of actions or any other statute of limitation applies to the situation about which you inquire.