No. 251

COUNTIES—PUBLIC OFFICERS, bonds of—LIMITATION OF ACTIONS—COUNTY CLERK AND RECORDER

Held: While Sections 9031 and 9033, subdivision 1, limit the time of bringing actions against public officers and their sureties to three and two years respectively, where fraud and fraudulent concealment of defaultations occur, which cannot be discovered in the exercise of ordinary diligence, the cause of action does not accrue until discovery is made and an action may be brought against the principal and the sureties at any time within two years of the discovery. (Section 9033, subdivision 4.)

September 23, 1941.

Mr. W. A. Brown
State Examiner
State Capitol
Helena, Montana

Dear Mr. Brown:

You have requested my opinion based on the following facts:

"This department is now engaged in making an audit of a county clerk and recorder's office in which irregularities have been found to exist, consisting of not paying over and faithfully accounting for all public moneys coming into his hands from different sources, the money referred to being for filing and recording fees, and also payments made for tax deed land sales.

"The officer referred to was in office continuously for over twenty years and was recently suspended by the board of county commissioners, based on a preliminary report filed in accordance with the provisions of Chapter 179, of the Twenty-sixth Legislative Assembly.

"The question that confronts this department is to know how many years back should we make the audit so that the statute of limitations will not be a bar to recovery from the principal or his sureties. To go back and make an audit beyond a period which is barred by limitation is expensive, which we wish to avoid."

The county clerk and recorders are required to give a bond conditioned "that the principal shall well, truly and faithfully perform all official duties then required of him by law, . . . and that he will account for and pay over and deliver to the person or officer, entitled to receive the same, all moneys or other property that may come into his hands as such officer." (Section 475, Revised Codes of Montana, 1935.)

In the ordinary action on the public official's bond, the plea of limitations may be successfully interposed if the action is not commenced within two years after the accrual of the cause of action where there is a breach of an express statutory duty (Gallatin Co. v. United States F. & G. Co., 50 Mont. 55, 144 Pac. 1085) and within three years in case a duty to account for money rests upon a promise implied by law. (City of Butte v. Goodwin, 47 Mont. 155, 134 Pac. 670.) The state of facts you present does not indicate the manner in which the irregularities occurred. If the irregularities consisted of shortages through neglect or inadvertance on the part of the officer, the above limitations will be applicable.

If, on the other hand, the irregularities consist of misappropriation of money entrusted to the officer and he fraudulently conceals his defaultations, the statute would not begin to run until the discovery of the fraud and the breach of the condition of the bond. (22 R. C. L. 510, Sec. 196.) This statement must be qualified by the limitation contained in Section 9033, subdivision 4, of the Revised Codes of Montana, 1935, limiting the time to bring "an action for relief on the ground of fraud" to two years after discovery of the facts constituting the fraud.

"Discovery" implies a concealment of facts. Ignorance of the facts is not sufficient and if the circumstances are such as to put one on inquiry which would lead to knowledge or if the facts are presumptively within one's knowledge, actual knowledge will be deemed to exist. Ordinary diligence in time of discovery of the facts must be shown.

Ray v. Divers, 81 Mont. 552, 264 Pac. 673;

Kerrigan v. O'Meara, 71 Mont. 1, 227 Pac. 819;

Frisbee v. Coburn, 101 Mont. 58, 52 Pac. (2nd) 882.

I am not unaware of the conflict in authorities touching this subject as to the operation of Section 9033, subdivision 4, supra, to extend the liability of the sureties on the official bond. The following authorities sustain the view I have taken:

McMullen v. Winfield Building & Loan Association, 64 Kan. 298, 67 Pac. 892;

56 L. R. A. 924;

Abernathy v. State of Oklahoma (C. C. A. 8th) 31 Fed. (2nd) 547, (Certiorari denied) 280 U. S. 599, 74 L. Ed. 645;

State v. Gant, 201 N. C. 211, 159 S. E. 427;
Bailey v. Glover, 21 Wall 342, 22 L. Ed. 636;
Morrisey v. Carter, 103 Okl. 36, 229 Pac. 510;
Skagit County v. American Bonding Company of Baltimore, 59 Wash. 1, 109 Pac. 197.

Illustrative of the opposing view is Norton v. Title Guaranty & Surety Company, 176 Cal. 212, 168 Pac. 16 (Citing County of Pomona v. Hall, 132 Cal. 589, 62 Pac. 257, 65 Pac. 12, 459; County of Calaveras v. Poe, 167 Cal. 519, 140 Pac. 23), in which the California Supreme Court had under consideration Section 338 of the California Code of Civil Procedure. Section 9033 of the Revised Codes of Montana, 1935, is identical to Section 338, supra, except that it prescribes a two-year limitation. Its history shows it was adopted from the California statute. I find no construction of the statute by the Supreme Court of California with respect to the problem herein presented prior to its enactment here. The rule that the construction of a borrowed statute by the highest court of the parent state, prior to its enactment by the borrowing state, should be followed (Esterly v. Broadway Garage Co., 87 Mont. 64, 285 Pac. 172) need not, therefore, apply here.

From the foregoing, I conclude that—if the facts negative fraud and fraudulent concealment—your audit should extend back no further than three years at the most. If these elements are present, however, and actual discovery occurs so that suit may be brought, within two years thereafter, you should proceed to audit as far back as you deem expedient, there being only the two-year limitation running from time of discovery.

Sincerely yours,
JOHN W. BONNER
Attorney General