

STATE AUDITOR:

State institutions and appointive and county officers required to set up and maintain records and forms as prescribed by State Auditor under Section 11479 and may be compelled by the State Auditor in mandamus to so do.

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March 23, 1934



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This Department acknowledges receipt of your letter dated March 19, 1934, as follows:

"Section 11479 on page 417 of the 1933 Laws of Missouri, provides that the State Auditor shall formulate and set up a uniform system of bookkeeping for all state institutions and for each and every county office.

I would like an opinion from your department as to whether I can force a county official to set up this uniform system of bookkeeping, and how to proceed should they refuse to comply with this section."

1.

An answer to your request involves the application of both Sections 11478 and 11479 Laws Missouri 1933, page 417.

Section 11478, in part, provides:

"It shall be the duty of the State Auditor at least once every two years * * * to visit, examine, inspect and audit the accounts of the various institutions of the state * * * and such other officers of the state as receive their appointment from any elective officer, and also at least

once during the term for which any county officer is chosen to examine, inspect and audit the accounts of the various county officers of the state, supported in whole or in part by public moneys,* * * county clerks, circuit clerks, recorders, county treasurers, county collectors, sheriffs, public administrators, probate judges, county surveyors, county highway engineers, county assessors, prosecuting attorneys, county superintendents of schools, in every county in the state which does not elect and have a county auditor.* * * "

Audits, however, may be made in counties having a county auditor whenever a proper petition shall be made for such audit.

Section 11479, above referred to reads:

"The State Auditor shall formulate a simple and complete system of accounting and reporting for all state institutions and appointive officers referred to in Section 11478, and for each and every county office. This system shall be uniform in its application to offices of the same grade and kind and of accounts of the same kind. He shall prescribe the form of books, receipts, vouchers and documents required to separate and verify each transaction, and forms of reports and statements required for the administration of such officer, or for the information of the public. He shall also prescribe a uniform method and plan of publishing the county financial statement each year for the information of the public."

Section 11479 was undoubtedly enacted in order that the state auditor might more completely and efficiently carry out and perform the duties imposed upon him by Section 11478.

Whenever it is necessary in the discharge of official duties that records be kept such officer is required to keep records of his official acts either by specific statute or by necessary implication. For instance, with reference to county treasurers Section 12143 Revised Statutes Missouri 1929,

provides:

"The county treasurer shall keep a just account of all moneys received and disbursed, and regular abstracts of all warrants and scrips drawn on the treasury, and paid or received by him, and shall cancel the same by writing in ink 'paid' across the fact thereof, when paid or received."

2.

The keeping of such books and records is a ministerial duty and involves no discretion on the part of an official. A ministerial duty or act is defined in *Burton Machinery Co. v. Ruth* 194 Mo. App. 184, 199, to be:

"* * * one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate or legal authority, without regard to or the exercise of his own judgment upon the propriety of the acts being done."

On the same subject in 46 C. J. 1036, Section 304, it is stated:

"Permissive words in a statute are construed as mandatory, where a duty is coupled with the power and the exercise of the power is necessary to affect the public interests or the rights of third persons. A positive act of the legislature may not be nullified or suspended by neglect of an official to perform a duty enjoined on him by law."

In *Burton Machinery Co. v. Ruth*, supra, at page 197 it is further held:

"It is well settled rule that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do the act, he is liable in damages

at the suit of a person injured. In such cases a mistake as to his duty and an honest intention is no defense."

3.

We come now to consider the available remedy in the event any one in charge of the above named institutions or if any officer referred to in Sections 11478 and 11479 should fail or refuse to set up or maintain his records, books and forms, after you have discharged your duties under Section 11479.

(a) Article IX of Chapter 7 Revised Statutes Missouri 1929, provides for the issuance of writs of mandamus by certain of the courts of this state.

Recognizing the right of the Supreme Court of this state to issue writs of mandamus and further recognizing the right to issue the same against an officer to compel the performance of a ministerial act, in State ex rel v. Tracy 94 Mo. 217, 220, it is said:

"Mandamus, however, is in no sense a writ of review, nor does it perform the functions of an appeal or writ of error. When addressed to a ministerial officer, as in this case, it simply commands him to perform some specific act, the performance of which is required of him by law."

The case of State ex rel v. Adams 161 Mo. 349, was an action by mandamus to compel a county treasurer to pay the warrant there in question. The court at page 364 of the opinion held:

"It is the well settled doctrine of this state that county treasurers are simply ministerial officers, and can be compelled to perform their duties."

State ex rel v. Williams 232 Mo. 56, involved a petition for mandamus to compel the county treasurer to pay a warrant. Discussing a foreign case with reference to the

duties of a clerk of a court, the court at page 66 of the opinion quoted with approval the following:

"The act referred to requires him to receive and record these papers; his duties are purely ministerial, and the court below properly awarded the peremptory mandamus."

While Section 11479 does not specifically provide that the officers shall set up or keep their books according to the systems and forms prescribed by you under the latter section, yet, it is unmistakable that such was the purpose and intent of the Legislature and the direction to the various officers to follow the systems of bookkeeping and forms prescribed by you necessarily follows and must be read into Section 11479.

(b) In reference to who may maintain an action for mandamus the Supreme Court of Missouri in State ex rel Clark v. Smith 104 Mo. 661, 666, held:

"The remedy by mandamus will only be allowed against a public officer in case the one claiming its benefits shows himself to be directly interested in the performance of the thing demanded, and that he has no other adequate, specific and effective remedy at law by which he may obtain the result sought."

CONCLUSION

From the foregoing, we are of the opinion that the state institutions, appointive officers referred to in Section 11478 and each and every county officer in the state are required to set up, use and maintain the bookkeeping systems and forms when the same have been prescribed by you in accordance with Section 11479 Laws Missouri 1933, page 417; that the setting up and keeping of such records and forms are ministerial duties on the part of the officials named; that a refusal of those in charge of such institutions or a refusal of such officers so to do, after the lapse of a reasonable time in

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which to put the systems and forms prescribed by you into effect and operation, would subject those in charge of such institutions and such officers to an action in mandamus to compel the performance of such duties on their part, and that such action in mandamus could be maintained by yourself as State Auditor, provided that the failure or refusal of the persons in charge of such institutions or such officers to set up and keep records and forms, as prescribed by you, is the fault of such person or officer.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

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