STATE AUDITOR: COUNTY COURTS:

State Auditor may use some discretion in period covered by audit and examination of county records under Section 11478.

July 27, 1933 8-10

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Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This Department acknowledges receipt of your letter dated July 12, 1933, as follows:

> "We would be pleased to have the opinion of the Attorney General upon the following question:
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> From a practical standpoint, how many years back should an audit by the State Auditor, under authority of Secs.11478 and 11482, R. S. Mo. 1929, of a county officer's official records and accounts be extended?
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> Under Sec.863,R.S.Mo.1929, an action for official misconduct or omission of duty is barred within three years from the time the right of action accrued. But Sec.862, R. S. Mo. 1929, provides that actions for relief on the ground of fraud shall not be barred until five years. Is it possible that Sec.862 applies only as to fraud perpetrated by an officer in his individual capacity, Sec. 863 being alone properly applicable to official misconduct or fraud or omission of duty?
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> Assuming that Sec.862 was alone applicable, might it not be desirable to have the audit extend back more than

three years because of the following proposition: "Where a public officer misappropriates money intrusted to him, and fraudulently conceals his defalcations, the statute will not begin to run until the discovery of the fraud - 22 R. C. L. 510"? "

Section 11478 Revised Statutes Missouri 1929, referred to in your letter was repealed by Laws 1933, page 417.

Section 11478 as amended reads as follows:

"It shall be the duty of the State Auditor at least once every two years, either in person or by one or more competent persons appointed by him, to visit, examine, inspect and audit the accounts of the various institutions of the state, including the state hospitals, state university, Rolla School of Mines, State Teachers Colleges, Missouri State School, Reform School for Boys, Industrial Home for Girls, Missouri State Sanatorium, Confederate Soldiers' Home, Federal Soldiers' Home, and all other institutions supported in whole or in part by 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, and without cost to the county, 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. Such audit shall be made by the State Auditor as near the expiration of the term of office as the auditing force of the State Auditor will permit. Such audit shall be made in counties having a county auditor whenever qualified voters of the county to a number equal to five per centum of the total number of votes case in said county for the office of Governor at the last election held for Governor preceding the filing of such petition shall petition the State Auditor for such audit, but such counties shall pay the actual cost thereof into the state treasury. Provided, that any county having an audit by petition shall not be audited more than once in any one year.

The above section requires that you, at least once during the term for which the respective county officers are chosen, examine, inspect and audit the accounts of such officials, which means that you should examine the entire records and accounts of such officials made and kept by them during the entire term for which the respective official was chosen or elected. If such examination develops a situation that warrants you, in your judgment, in making an examination of additional books or records kept by any of the county officials named in the above section, then we think you would have a right to and should extend your examination and audit to such an extent as the facts developed by you would justify.

Section 863 Revised Statutes Missouri 1929, is as follows:

> "Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

Section 862 Revised Statutes Missouri,1929, provides:

> "Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 861, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

While Section 863 follows Section 862 yet we think both sections should be read together and that an action brought under the provisions of Section 863 on account of acts done by

virtue of an office may be extended under the provisions of Section 862 where fraud and concealment are properly pleaded and proven.

In Putnam County v. Johnson, 259 Mo. 73, a suit by the county against a county clerk, our construction of the two statutes is recognized. The court at page 84 of the opinion, referring to the case of Shelby County v. Bragg, 135 Mo. 291, saying:

> "It is true that Judge MacFarlane was discussing the tolling of the Statute of Limitation by fraudulent acts, but he says much that is of interest here. The county court passes upon and allows charges of the county clerk. To state a good cause of action grounded upon fraud, and fraud practiced must be pleaded. This is as much requisite in a petition grounded upon fraud, as it is a requisite to show fraud for the purpose of tolling the statute. We do not believe the pleader intended to ground the action upon fraud, but if he did, the demurrer was well taken, because the facts alleged were insufficient. The five-year Statute of Limitation has no application to the first and second counts.
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> But plaintiff says the three-year statute, supra, has no application, because the items of cash named were not received by defendant "in virtue of his office". We do not agree to this view. If they were not received "in virtue of his office " how were they received? We can conceive of no other way or capacity in which they were received. They may have been wrongfully and, speaking from the statute, unlawfully received, but they were evidently received "in virtue of his office." In other words they were received as an officer, not as an individual or agent. Take the alleged overcharge for the tax books. Whether the defendant was allowed or retained the proper or the improper

> amount for such service, yet whatever amount he did retain for such services was retained by him officially, for official work, and was received, had, held and retained "in virtue of his office" as used in the statute.
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> If these two counts (first and second) do not plead actions grounded upon fraud, as we have held, and if they do seek to recover from defendant money wrongfully held by him, but received by him "in virtue of his office," then the three-year Statute of Limitations applies, and the causes of action stated in these two counts are barred by such statute. Upon this theory the trial court was right in sustaining the demurrer as to these counts."

In the case of City of St. Joseph v. Wyatt, 274 Mo. 566, being an action by that city against the city treasurer, the court at page 570 of the opinion, referring to the defense that the action was barred by what is now Section 863, said:

> "We are clearly of the opinion that the liability of the Guaranty Company for the payment of said sum of $16,431.69 must be determined under the above section, <u>in connection with the facts of the case</u>. The burden of proof devolved upon plaintiff to show a state of facts which prevented said statute from running against it. The quantum of proof necessary under such circumstances is fully discussed in Shelby Co. v. Bragg 135 Mo. 1. c.298, and following; Callan v. Callan, 175 Mo. 1. c. 360-1-2; State ex rel.v. Harter, 188 Mo. 516; State ex rel. v.Yates, 231 Mo. 276; Johnson v. United Railways, 243 Mo. 1. c. 298, and following; Putnam County v. Johnson, 259 Mo. 73."

Obviously, the court was of the opinion that the Statute of Limitations provided for in Section 863 could be tolled when the facts as to fraud and concealment referred to in Section 862 were properly pleaded and proven.

For your information and future guidance as to what constitutes fraud and concealment within the meaning of the above Section 862, the case of State ex rel. v. Yates, 251 Mo. 276, is exhaustive.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

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