
Rumbough vs. Berry, Auditor.

RUMBOUGH vs. BERRY, Auditor.

AUDITOR: *When cannot draw warrant.*

Where an appropriation made by the legislature for a specific purpose has been exhausted, the auditor cannot draw his warrant in payment of the same.

PETITION for *Mandamus*.

Willshire & Coblenz and *Pomeroy*, for petitioner.

J. R. Montgomery, Attorney General, for defendant.

GREGG, J. On the 3d of June, 1871, Rumbough filed his petition in this court against James R. Berry, as auditor of

Rumbough vs. Berry, Auditor.

the state, and alleged that upon proper application under the statute being made, the commissioner of public works appointed him to make surveys and estimates of the amount and kind of certain work, to determine the utility, etc., of making or repairing levees, ditches, etc.; that under such appointment and the order of said commissioner, he, for the state and for the use of said commissioner, made such surveys and estimates, which services so rendered, are worth two hundred and sixteen dollars and fifty cents; that his account for said services was made, and, by said commissioner certified to be correct; that he presented said account so certified, for the sum aforesaid, to the auditor of the state and demanded a warrant on the treasurer for the payment thereof, but the auditor refused to issue such warrant. And he prayed the court for a writ of *mandamus* to compel the auditor to issue such warrant, etc.

The auditor demurred to the petition; his demurrer was overruled. He then answered that there was no law requiring him to draw such warrant; that there was no appropriation out of which the petitioner's claim could be paid; that the sum of \$5,000 appropriated under section 13, act of March 23, 1871, to carry into effect the provisions of "an act to amend an act, entitled an act providing for the building and repairing of the public levees of this state," was exhausted, and nothing remained out of which to pay claims etc. Upon which petition and answer the cause has been submitted.

Sec. 3 of said act authorizes the commissioner of public works to employ an engineer to make the necessary surveys and estimates as required by the act, and upon the certificate of the commissioner, he is to be paid in the same manner as state officers are paid; and the amount so paid is to be levied upon and collected from the various counties interested as provided for in the act.

Is there an appropriation by law to pay for such services

Rumbough vs. Berry, Auditor.

over the \$5,000 alleged to be consumed? The clause referred to, that the engineer shall be paid upon a certificate, etc., shall be paid in the same manner as state officers, is not an appropriation of money, but a mode of paying out what may have been set apart for such purposes. And fortunately we think, our constitution has thrown a safeguard around the treasury against the payment of indefinite and unascertained amounts that might be claimed and certified to as correct by the executive or other state officers in the administration of the affairs of the state.

Sec. 20, art. V, provides that, "No portion of the public funds or property shall be appropriated by any resolution. No appropriation shall be made except by a bill duly passed for that purpose." And sec. 8 of art. X provides that "No money shall be paid out of the treasury until the same shall have been appropriated by law."

Under these clauses the auditor could not draw his warrant unless there was an appropriation made by law to pay such claim, and to say that an engineer shall be paid in the same manner as state officers are paid is no setting apart money to pay him; it only authorizes him to draw pay in the same manner, when money has been appropriated for such purpose.

Sec. 13 of the act referred to appropriates five thousand dollars to carry into effect the provisions of the act. There is no specified sum allowed for surviving and making estimates and if this five thousand dollars is not a limit of the amounts allowed to be drawn under the act, there is no limit and the treasury would be open to an unlimited extent, regulated by nothing higher than the discretion of an executive officer. We cannot hold that the legislature so intended. If the sum appropriated is not as much as the commissioner desires to have expended, he must look to the legislature for they alone can decide what sum shall be used for such purpose, and the courts

cannot extend relief to one who has rendered such service, when there is no money remaining out of any legislative appropriation to satisfy such demand.

The writ is denied.
