

COUNTY HIGHWAY COMMISSION - May not appoint more than two commissioners from same county court district; quo warranto is proper remedy to try title to office.

1-28
January 16, 1935.



Hon. Louis V. Stigall,
Chief Counsel,
Mo. State Highway Dep't.,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"The term of William Dunn, formerly a member of the Henry County Highway Commission, expired in 1934. He refused reappointment. He was a member from the North judicial district. Despite the fact that the County Court had pointed out to them that the law prohibits appointment of more than two members from each district to the Commission, they named a man from the extreme southwestern part of the county--Claude Lampkin, of Montrose--to the vacant position.

Is not the appointment void? Will the fact that it is void invalidate acts of the Commission?"

Preliminary to turning to the pertinent statutes and cases construing these statutes, we wish to submit for your consideration the general rule respecting the validity of the acts of officers de facto, which rule is as follows: The exercise of a power by an officer de facto, either judicial or ministerial, which lawfully pertained to the office of which he had possession, is valid and binding, where it is for the interest of the public, or of any individual, except the officer himself, to sustain the officer's act; but where the officer himself founds a right upon such exercise, either personally or officially,

it is not valid in his favor. (Throop's Public Officers) However, as was early decided in the case of People v. Nostrand, 46 N.Y. 357, "where a person sets up title to property, by virtue of an office, and comes into court to recover it, he must show an unquestionable right. It is not enough that he is an officer de facto, that he merely acts in the office; but he must be an officer de jure, and have a right to act."

I.

At the outset, it would appear not inappropriate to observe that an appointee of a county highway board is a public officer within the meaning of that term as frequently judicially defined. In the case of State ex rel. v. Morehead, 256 Mo. 683, l.c. 690-691, the Court said:

"Under the express statute, therefore, creating the position of a member of the highway board and in the light of the reasons stated in the cases above cited, an appointee to this position, upon qualifying, becomes a public officer, the act of his creation not only stating his term but definitely defining his duties."

II.

While the facts as presented to us in the rescript heretofore set out do not clearly so indicate, we take it that the County Court of Henry County, in the appointment of one Claude Lampkin to the County Highway Commission, has appointed more than two of said commissioners from the same county court district. Conceding, then, that this be a fact, we can but conclude that the County Court was without the authority to make the appointment, Section 7857, R.S. Mo. 1929, in part, expressly providing: "Not more than two of said commissioners shall be appointed from the same county court district. ****"

However invalid the appointment may be, nevertheless, the acts of the Commission will not thus be invalidated.

"While an appointment will be presumed to have been made in accordance with the law, at the same time the appointing power must comply with the formalities prescribed by law in order that an appointment be valid, and the

appointment of an ineligible person is an absolute nullity, except that the official acts of such a person are regarded as the acts of an officer de facto, and cannot be validated either by ratification or recognition."

46 Corpus Juris, Sec. 63, p. 950.

Judge Scott, in the early case of St. Louis County Court v. Sparks, 10 Mo. 80, decides this question most convincingly (l.c. 82-93):

"****When the appointing power has made an appointment, and a person is appointed who has not the qualifications required by law, the appointment is not therefore void. The person appointed is de facto an officer; his acts in the discharge of his duties are valid and binding. He may be guilty of usurpation, and be punished for acting without being qualified; but the peace and repose of society imperiously require that his official acts, so far as others are concerned, should be valid. ****"

III.

Article II, Chapter 42 of the Revised Statutes of Missouri, providing for the creation of a County Highway Commission, does not provide for the removal of a commissioner by a county court once the appointment has been made. Section 1618, R.S. Mo. 1929, however, provides that an action in quo warranto may be brought against any person who shall usurp, intrude into or unlawfully hold or execute any office or franchise.

One of the more recent cases wherein this section was considered is that of Civic League v. City of St. Louis, 223 S.W. 891. In that case Henry L. Weeks had been holding the position of Superintendent of Excavation in the City of St. Louis. The city charter provided for an examination to be held and an eligible list to be prepared containing the names of those having the requisite qualifications. One W. J. McKenzie had been certified as eligible, but the street commissioner refused to appoint him and retained the defendant Weeks. The Court held that

injunction was not the proper remedy to correct the situation and particularly pointed out what is now Section 1618, R.S. Mo. 1929 as the proper procedure:

"The jurisdiction of a superintendent of excavation in the City of St. Louis is coextensive with the boundaries of said city. He has superintending control over all excavations therein. He is paid out of the treasury of said city, and from its funds. His duties relate to the public welfare of said municipality, and we can conceive of no good reason for holding that the provisions of the statute heretofore quoted, should not apply to this office, as well as to any other office of said city. The statute, supra, affords a speedy and complete remedy, without resorting to a court of equity. Under its provisions, the right of the incumbent to hold the office can be inquired into, and his removal obtained, if he is wrongfully holding same. The fact that the incumbent is holding said position at the pleasure of the street commissioner presents no obstacle in the way of contesting his right to hold the position under above statute. **** The above statute is not only sufficient to cover the present case, but it has been the established doctrine of this court from its earliest history that an information in the nature of a quo warranto was a proper remedy to determine the title to an office. *****"

CONCLUSION

In view of the foregoing, it is the opinion of this department that the appointment to the County Highway Commission of one not qualified is not void. The person appointed is de facto an officer and his acts in the discharge of his duties are valid and binding.

It is our further opinion that an information in the

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nature of a quo warranto is the proper remedy to determine the title to an office.

Respectfully submitted,

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APPROVED:

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