

OFFICERS - JUSTICES OF THE PEACE - COUNTY COURT -! County Court has the right to declare the office of Justice of the Peace vacant upon finding certain facts.

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August 2, 1934

Honorable Elliott M. Dampf
Prosecuting Attorney Cole County
Jefferson City, Missouri



Dear Mr. Dampf:

Your letter requesting an opinion is as follows:

"Will you kindly give me your opinion on the construction of Section 2164, Revised Statutes of Missouri, 1929, applying to the following facts:

Upon the death of a Justice of the Peace in and for Jefferson Township, Cole County, Missouri, the County Court of Cole County made an appointment to fill the vacancy to the office. The person so appointed qualified, but has failed and refused to establish an office for the transaction of the business of a Justice of the Peace in Jefferson Township, Cole County, Missouri, or to perform the duties of a Justice of the Peace. Said appointee, while still maintaining his legal residence in Cole County, Missouri, has accepted a position with the United States Geodetic Survey and is working outside the State of Missouri. He has refused to resign the office of Justice of the Peace.

Therefore, would it be possible for the County Court of Cole County, Missouri, to declare the office vacant and obtain custody of the books as provided in the aforesaid section. "

Missouri Constitution, Article VI, Section 37, provides:

"In each county there shall be appointed, or elected, as many justices of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law."

Missouri Constitution, Article XIV, Section 7, provides:

"The General Assembly shall, in addition to other penalties, provide for the removal from office of county, city, town and township officers, on conviction of wilful, corrupt or fraudulent violation or neglect of official duty. Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution.

Section 11202 R. S. Mo. 1929 provides as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

Section 11207 R. S. Mo. 1929 provides as follows:

"If any official against whom a proceeding has been filed, as provided for in this article, shall be found guilty of failing personally to devote his time to the performance of the duties of such office, or of any willful, corrupt or fraudulent violation or neglect of official duty, or of knowingly or willfully failing or refusing to do or perform any official act or duty which by law it is made his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, the court shall render judgment removing him from such office, and he shall not be elected or appointed to fill the vacancy thereby created, but the same shall be filled as provided by law for filling vacancies in other cases. All actions and proceedings under this article shall be in the nature of civil actions, and tried as such."

Section 2164 R. S. Mo. 1929 provides as follows:

"Whenever a justice of the peace shall resign, move out of the township or be otherwise disqualified, he shall immediately thereafter deliver to the clerk of the county court, or, if in the city of St. Louis, the city register, all dockets, records, books, papers and documents appertaining to his office, or relating to any suit, matter or controversy committed to him in his official capacity: PROVIDED FURTHER, that when a justice of the peace dies it shall be the duty of the clerk of the county court, or, if in the city of St. Louis, of the city register, on the affidavit of any person having any interest in such dockets, records, books, papers and documents, stating the nature of such interest, and that such justice of the peace is dead, being filed with such clerk of the county

court, or such city register if in the city of St. Louis, to issue an order, in writing, to the sheriff, directing him to immediately take into his custody all such dockets, papers, books, records and documents and deliver the same, without delay, to the clerk of the county court, or, if in the city of St. Louis, to the city register; and for such services the sheriff shall receive the same compensation as he is allowed by law for serving process, to be paid out of the county contingent fund, or, if in the city of St. Louis, out of any moneys in the municipal revenue fund not otherwise appropriated."

From the facts stated in your letter, Section 2164, supra, can be invoked to recover possession of the books. The clerk of the county court should demand the same of him, and, upon refusal, he could institute a possessory action against him. This is not the exact remedy which you desire, according to your letter. You are more interested in vacating the office by legal process, but it must be remembered that even if the office is judicially vacated, a possessory action for the tokens of office may become necessary.

In the case of *State ex inf. Gentry v. Toliver*, 315 Mo. 737, 1.c. 746, 287 S. W. 312, the Supreme Court said:

"Relator contends that, in making appointments of county employees, officers and agents, the county court acts ministerially and not judicially. This may be true where no finding of facts on the part of the county court, upon which its very power to make the appointment depends, has to be made. If a duly elected, regular justice of the peace should die or resign, the county court would not be required to ascertain anything, other than that a vacancy had occurred, to authorize it to fill such vacancy by appointment. (Sec. 2692, R. S. 1919.) The making

of an appointment in such case would involve no finding of facts giving the county court the power to make the appointment. The statute itself confers such power and requires no finding of facts authorizing the exercise of the power.

None of the cases cited by relator, wherein it is held that in making the appointment the court or officer acts ministerially, is a case wherein the very right to make the appointment depends upon the finding of the existence of a state of facts giving the court or officer the power to make the appointment. Such cases are thus distinguished from the case at bar and need not be separately considered. * * * * *

It is not necessary to lengthen this opinion further in the consideration of cases. We hold that the act of making the appointment of respondent necessarily involved a finding by the county court that such a state of facts existed as to authorize it to appoint an additional justice of the peace, including the finding that two additional justices of the peace had not already been appointed, or, if they had previously been appointed, that both were not qualified and acting at the time. Such finding had the force and effect of a judgment and cannot be attacked in this proceeding, wherein fraud is neither alleged nor sought to be proven."

Thus we see that where the county court is required to find, as a fact, that the Justice has "moved out of the township" they are acting judicially in any court order made pursuant thereto.

Machem on "Public Officers", Section 438, provides:

"Where the law thus requires the officer to reside within the district which he

represents, and a fortiori so where it expressly declares that his removal from the district shall create a vacancy, a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result.

But a mere temporary removal for a limited time and with no intention to abandon or surrender the office or to cease to perform its duties, will not have this effect."

In the case of State ex rel. Attorney General v. Sanderson 280 Mo. 258, 217 S. W. 60, the court states:

"* * * * the policy of the State is, that a duly elected or appointed official shall not be deprived of his position except for remissions in the performance of the duties of the office, or conviction of some crime which demonstrates he is unworthy to hold a position of honor or trust. Not only is said policy to be gleaned from statutory enactments but this court has decided that if an official possesses the requisite qualifications for his position, he can be removed from it only for misconduct connected with the performance of the duties of the office, except when some transgression apart from those duties is made by statute cause for removal; and that rule is general.* * * * *"

We have seen that the Constitution and no less than three statutes pursuant thereto, could be invoked in vacating said office of Justice of the Peace.

CONCLUSION.

It is the opinion of this office that the county court, under provisions of Section 2164, supra, after making a

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finding of fact, which should be made of record, of the facts as given in your letter and particularly a finding that said Justice has moved out of the township, then it is within their jurisdiction and judicial power to enter a judgment of record, based upon said finding, that the office is vacant, and then they can proceed to fill the vacancy as provided by law.

Under the provisions of Section 11202 and Section 11207, supra, quo warranto proceedings are available, but so long as Section 2164, supra, is available, quo warranto is not a necessary remedy.

Respectfully submitted,

Wm. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

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