SUPERINTENDENT OF SCHOOLS:
QUO WARRANTO:
SALARIES:

Under Sec. 10617 R.S. 1939, it is mandatory that the County Superintendent of Schools shall not teach school during his term of office. He is subject to ouster if he continues to teach school; however, he is entitled to the salary of the office during his term of office.

December 17, 1945.

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Honorable William S. Thompson,
Prosecuting Attorney
Mercer County,
Princeton, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of December 4, 1945, to this department, which reads as follows:

> "Section 10617 Revised Statutes of Missouri 1939 - Superintendent shall not teach - provides, among other provisions, as follows: During his term of office the county superintendent shall not engage in teaching or in any other employment that interferes with the duties of his office as prescribed by law.
>
> "The County Court of Mercer County desires your opinion as to whether the Court should refuse to pay the Superintendent's salary in case the Superintendent does teach in addition to holding his office as County School Superintendent.
>
> "Also is there a duty imposed on the County Court to institute proceedings of ouster against the Superintendent in case he teaches in violation of said Section 10617?"

Section 10617 R. S. Mo. 1939, specifically holds in clear and unambiguous language that during the term of office of a county superintendent of schools he shall not engage in teaching. By use of the word "shall" in the foregoing provision, the Legislature apparently intended to make it mandatory upon the county superintendent of schools to refrain from teaching, and not to leave the matter with the discretion of the said superintendent of schools.

In McKittrick v. Wymore, 119 S.W. (2d) 941, l.c. 944, 343 Mo. 98, the court in construing the word "shall" as ordinarily used, held that it is usually construed as being mandatory. In so holding the court said:

> "Respondent argues that the remedy provided by this statute is an exclusive remedy against respondent for misconduct. On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory. If so, said remedy is not exclusive, for it is provided in Sec. 11202 that the offending official 'may be removed therefrom in the manner hereinafter provided'* * *".

Another well established rule of statutory construction is that where a statute is clear and unambiguous, and admits but one meaning, there is no room for construction. (See Cummings v. Kansas City Public Service Company, 66 S.W. (2d) 920, 334 Mo. 672.)

Therefore, we must conclude that it was the full intention of the Legislature in enacting Sec. 10617, supra, that under no circumstances shall the superintendent of schools teach school during his term of office.

You also inquire if there is any duty imposed upon the county court to institute proceedings of ouster against the county superintendent of schools who refuses to discontinue teaching school during his term of office.

Section 12828, R. S. Mo. 1939, provides that when any elective or appointed county officer has failed to devote his time to the performance of his official duties, he shall forfeit his office and may thereafter be removed in the manner hereinafter provided:

> "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 12829, R. S. Mo. 1939, further provides that any person having knowledge of such violation may file his affidavit with the clerk of the court having jurisdiction of the offense or deposit it with the prosecuting attorney, and it shall then be the duty of the prosecuting attorney, if in his opinion there are sufficient facts in said affidavit, to file a complaint in the circuit court, or he may file such complaint upon his official oath and upon his own affidavit.

Section 12829 reads:

> "When any person has knowledge that any official mentioned in section 12828 of this article has failed, personally, to devote his time to the performance of the duties of such office, or has been guilty of any willful, corrupt or fraudulent violations or neglect of any official duty, or has knowingly or willfully failed or refused to perform any official act or duty which by law it was his duty to do or perform with respect to the execution or enforcement of the criminal laws of this state, he may make his affidavit before any person authorized to administer oaths, setting forth the facts constituting such offense and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney or deposit it with the prosecuting attorney, furnishing also the names of witnesses who have knowledge of the facts constituting such offense; and it shall be the duty of the prosecuting attorney, if, in his opinion, the facts stated in said affidavit justify the

> prosecution of the official charged, to file a complaint in the circuit court as soon as practicable upon such affidavit, setting forth in plain and concise language the charge against such official, or the prosecuting attorney may file such complaint against such official upon his official oath and upon his own affidavit."

Under Section 1782, R. S. Mo. 1939, any person who shall usurp, intrude into or unlawfully hold or execute any office, the prosecuting attorney of the county in which the action is commenced shall exhibit to the circuit court an information in the nature of a writ of quo warranto at the relation of any person desiring to prosecute same. Said section reads:

> "In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the Attorney-General of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney. If such information be filed or exhibited against any person who has usurped, intruded into or is unlawfully holding or executing the office of judge of any judicial circuit, then it shall be the duty of the attorney-general of the state, or circuit or prosecuting attorney of the proper county, to exhibit such information to the circuit court of some county adjoining and outside of such judicial circuit, and nearest to the county in which the person so offending shall reside."

It has been held that quo warranto will lie to determine the right of individuals to exercise the office of school director. In State v. Wymore, 119 S.W. (2d) 914, l.c. 943, the court said:

> "'Quo warranto will also lie for the purpose of ousting an incumbent whose title to the office has been forfeited by misconduct or other cause. And in such a case it is not necessary that the question of forfeiture should ever before have been presented to any court for judicial determination, but the court, having jurisdiction of the quo warranto proceeding, may determine the question of forfeiture foritself. The question must, however, be judicially determined before he can be ousted.'
> "And if the alleged ground for ousting the officer is that he has forfeited his office by reason of certain acts or omissions on his part, it must then be judicially determined, before the officer is ousted, that these acts or omissions of themselves work a forfeiture of the office. Mere misconduct, if it does not of itself work a forfeiture, is not sufficient. The court has no power to create a forfeiture, and no power to declare a forfeiture where none already exists. The forfeiture must exist in fact before the action of quo warranto is commenced."' Mechem, Public Officers, Sec. 478, p. 308.
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> "'When the court has jurisdiction in quo warranto proceedings it may oust an incumbent from an office which he is holding without right, although the question of the right or of forfeiture, if that is in the case, has never before been presented to any court for judicial determination. The court which has original jurisdiction in quo warranto may determine the question of right or the question of forfeiture for itself, unless the statute provides that forfeiture shall follow a criminal prosecution and sentence, and if the act complained of does not ipso facto create a forfeiture, and is only a misdemeanor in office on account of which the law provides the manner in which the vacancy is to be declared, it is held that quo warranto will not lie.'" Ency. of Pleading & Practice, Vol. 17, p. 400.

See State v. Ellis, 44 S.W. (2d) 129, l.c. 131; also State v. Baker, 104 S.W. (2d) 729, l.c. 730.

Therefore, in view of the foregoing statutes and authorities cited, we are of the opinion that any individual, or the county court having knowledge of such violation of the law pertaining to the duties of the office of county superintendent of schools, may, and the county court probably should, file an affidavit with the county prosecuting attorney for ouster of said county superintendent of schools, if said county superintendent of schools refuses to discontinue teaching school during the term of his office.

You further inquire if the county court could refuse to pay the county superintendent of schools the salary of that office while at the same time he is teaching school.

The decisions hold that an officer is entitled to the salary provided for said office, so long as he holds said office; that the salary is an incident to the title to the office and not to the exercise of the duties of said office, and the mere fact that he is teaching during said term, contrary to the statutes provided, does not amount to an abandonment of the office and will not of itself deprive him or the salary of said office.

Volume 46 Corpus Juris, 1014, Sec. 233, in part reads:

> "The person rightfully holding an office is entitled to the compensation attached thereto; this right does not rest upon contract, and the principles of law governing contractual relations and obligations in ordinary cases are not applicable. Public officers have no claim for official services rendered except where, and to the extent that, compensation is provided by law, and, when no compensation is so provided, the rendition of such services is deemed to be gratuitous. The right to the compensation attached to a public office is an incident to the title to the office and not to the exercise of the functions of the office; hence, the fact that officers have not performed the duties of the office does not deprive them of the right to compensation, provided their conduct does not amount to an abandonment of the office."

In Cunio v. Franklin County, 315 Mo. 495, l.c. 407, the court, in approving the above principle of law, said,

> "It is a well-established principle that a salary pertaining to an office is an incident of the office itself, and not to its occupation and exercise, or to the individual discharging the duties of the office.
>
> "On the other hand, it is equally well settled that, if a person exercising the functions of an office is not entitled to the office, he cannot maintain an action for his services."

Therefore, we believe the decisions hereinabove quoted entitle your county superintendent of schools, under the facts stated in your request, to the salary of the office, since he is attending to said official duties, even though he does at the same time teach school. The fact that he is teaching school part of the time does not constitute an abandonment of his office, and he is, therefore, entitled to the salary of said office.

CONCLUSION.

Therefore, under the facts and circumstances in your request, we are of the opinion that said county superintendent of schools should not teach school during his term of office; that it is a direct violation of the law; also, that quo warranto will lie to oust him from said office if he does not discontinue teaching school, and any one having knowledge of this fact may file an affidavit, stating such facts, with the circuit court having jurisdiction thereof, or with the prosecuting attorney of the county, and it then becomes the duty of the prosecuting attorney to institute quo warranto proceedings against said county superintendent of schools, if, in his opinion, the facts contained in the affidavit will justify said action. That the county court can, and, in all probability should, cause such proceedings to be instituted.

Furthermore, under the facts, we are of the opinion that the said county superintendent of schools is entitled to the salary of the office, since the teaching of school at the same time does not constitute an abandonment of the office. That the salary is an incident of the title of the office and not of the exercise of the duties of said office.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney-General

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

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