

COMMISSIONS: Governor has no power to withdraw commissions once issued.

COUNTY SURVEYORS: County surveyors may be removed for delinquencies in office by general statutory method.

November 30, 1939

Honorable Lloyd C. Stark
Governor of the State of Missouri
Jefferson City, Missouri



Dear Governor Stark:

We are in receipt of your letter of November 20th enclosing copy of a letter from members of the Butler County Court. You request an opinion as to your power to revoke the commission of the County Surveyor of Butler County, Missouri, for alleged misconduct and failure to perform his official duties as such surveyor.

The question of the right of the executive authority to revoke commissions previously issued arose in the case of State ex rel. Vail v. Draper, Auditor, 48 Mo. 213. In that case, which was a petition for mandamus on the part of one Vail to compel the State Auditor to pay his salary as Circuit Judge, it appeared that the Governor had erroneously issued a commission to Vail when one Dinning was actually possessed of title to the office. In deciding that the Governor had no further powers in regard to a commission already issued, the court stated, in part, l. c. 215:

"When Governor McClurg, acting upon evidence which he doubtless deemed satisfactory, of Vail's election, issued a commission to him, the executive function, so far as commissioning a judge for that circuit was concerned, was exhausted. The commission invested Vail with the title, and was prima facie evidence of his right to the office. It gave him the possession, and he could only be deprived of it or ousted upon due process, in the manner prescribed by law. He exercised its duties and privileges by color of law, and that was sufficient till some other person legally established a better and a higher right.

After the governor had issued his commission, and Vail had qualified and been inducted into office, it was incompetent for any subsequent

governor, upon any evidence whatever, to attempt to nullify or revoke that commission and devolve the office upon another. It is true that Governor Brown acted upon the certificate of Mr. Rodman, the former Secretary of State, and the evidence of Dinning's right was doubtless to him considered conclusive; still, after his predecessor had acted in the course of his official duties upon the same subject, we do not think that by any executive action Vail could be ousted or deprived of his prima facie right to the office. Such a proceeding would be the exercise of judicial rather than of executive powers. If an error was committed in the issuance of the commission to Vail, and Dinning was the party justly and fairly entitled to the office, the courts furnished the proper and appropriate mode for seeking redress. He should have proceeded at once by quo warranto and settled his claims. This remedy the law points out. To sanction any other course would lead to anarchy and disorder, and we should have the spectacle of two judges holding rival courts, each claiming obedience and authority, and both deriving their power from identically the same source. Such a state of things ought not to exist."

In the latter part of the opinion, the court stated that quo warranto was the proper procedure to try the validity of the office.

Other authorities sustaining the above position are found in 46 C. J., p. 954, Section 69.

There appears to be no specific method set out in the statutes for the removal of a County Surveyor, so that Article II, Chapter 68, R. S. Mo. 1929, providing the manner of removal of county and township officers in general, will govern. Sections 11202, 11203 and 11207 are the applicable sections, and are set out in their order, 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.

When any person has knowledge that any official mentioned in section 11202 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.

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."

These sections appear to provide an adequate remedy to be pursued by the County Court of Butler County under the facts as given to you.

In view of the foregoing, it is our conclusion that you, as the chief executive authority, have no power to revoke commissions once issued by you or your predecessor, and that the proper method for the removal of a County Surveyor who has been guilty of misfeasance or nonfeasance in office is under the general statutory method for removal of officers.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

RLH:VC