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GAMBLING — GOVERNOR MAY REMOVE LOCAL LAW ENFORCEMENT OFFICIALS FOR KNOWINGLY PERMITTING GAMBLING TO EXIST IN THEIR COMMUNITIES — PROVISIONS OF SECTION 4268 G. C. EMPOWER GOVERNOR TO REMOVE MAYOR FROM OFFICE FOR CAUSES SPECIFIED.

SYLLABUS:

The only provisions of law under which the Governor may remove local law enforcement officials for knowingly permitting gambling to exist in their communities are those contained in section 4268 of the General Code, which empower the Governor to remove a mayor from his office for the causes set out therein.

Columbus, Ohio, February 28, 1945

Hon. Frank J. Lausche, Governor of Ohio
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your recent communication, which reads as follows:

> "Intermittently I have received letters from citizens in various places in Ohio complaining that public officials knowingly allow the operation of commercial gambling in their communities. Whether these complaints are founded on facts or not, I do not know.

> I wish, however, that you would inform me what, if any, legal power I have as Governor of Ohio to deal with mayors, sheriffs, or other law enforcement officials, in the event they knowingly permit open and generally known widespread gambling to exist in their communities."

At the outset, it should be pointed out that the Governor, as all other public officials, has only such powers as have been expressly conferred upon him by the Constitution and statutes, and such implied or incidental powers as may be necessary to carry into effect, those expressly conferred.

Section 5 of Article III of the Constitution of Ohio, reads:

> "The supreme executive power of this state shall be vested in the governor."

Commenting on the power granted to the Governor by the above section, the Supreme Court of Ohio, through Marshall, C. J., declared:

> "We are of the opinion that supreme executive authority means the highest authority; that is to say, that there is no other authority pre-eminent or of equal eminence. It does not mean that all executive authority is lodged in the Governor, neither does it mean that 'supreme authority' is autocratic, absolute, despotic, or arbitrary. Such a construction would be inconsistent with the theory and the purposes of our republican institutions. It would be contrary to the traditions of American democracy. The Governor's authority is supreme in the sense that no other executive authority is higher or authorized to control his discretion, where discretion is lodged in him, and yet it is not supreme in the sense that he may dominate the course and dictate the action and control the discretion of other executive officers of inferior rank acting within the scope of the powers, duties, and authorities conferred upon them respectively."
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> State, ex rel., v. Baker,
> 112 O. S. 356, 366.

With respect to the power of the Governor to remove public officials from office, it is stated in 20 O. Jur., 118:

> "The power of a governor to remove public officers is not an incident of his executive office, but exists only where it is conferred by the Constitution or by statute, or is implied from the power of appointment."

Section 38 of Article II of the Constitution of Ohio, provides:

> "Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution."

Consequently, unless express statutory authority exists therefor, it would appear that the Governor is without power to remove or cause removal of a public official from the office held by him.

Section 4268 of the General Code, which provides for the removal of a mayor by the Governor, reads:

> "In case of misconduct in office, bribery, any gross neglect of duty, gross immorality, or habitual drunkenness of any mayor, upon notice and after affording such mayor a full and fair opportunity to be heard in his defense, the governor of the state shall remove him from office. The proceedings for his removal shall be commenced by the governor putting on file in his office a written statement of the alleged causes for the mayor's removal, and he shall cause a copy of such statement to be served upon the mayor not less than ten days before the hearing of the matter. Pending such investigation by the governor, he may suspend the mayor for a period of thirty days."

Section 4269 of the General Code provides that the decision of the Governor, when the same is filed in accordance therewith, shall be final.

The above sections were under consideration by the Supreme Court in the cases of State, ex rel. Vogt, v. Donahey, and State, ex rel. Vogt, v. Kirchoffer, 108 O. S. 440. In each of said cases the same issue was raised by the relator, who was the mayor removed by the Governor, one case being an action in mandamus and the other in quo warranto. In denying the writs prayed for, the court in a per curiom opinion, stated (page 445):

> "While, were the duty imposed upon this court to weigh the evidence and try the facts in this cause, we would hesitate to convict upon the quantum of proof, the Legislature having made the judgment of the Governor final we can but determine whether there was any evidence tending to support the judgment. We are

unable to say there was no evidence tending to support the finding that the relator was guilty of nonfeasance in office, and gross and willful neglect of duty in office, in that he did not enforce or in good faith try to enforce the laws."

While the question of whether or not the Supreme Court, or any other court, in the exercise of its judicial power, could control the action of the chief executive of the state in the matter of removal of officers from their offices, was not specifically decided in said cases, yet the above language from the opinion seems to indicate that a court may inquire as to whether there is any evidence tending to support the charges brought against a mayor in removal proceedings by the Governor. Reference to the above cases will disclose that the relator therein was charged, among other things, with knowingly permitting gambling houses to operate in many places in the city.

In addition to Section 4268, General Code, there appear to be only three other sections of the General Code which deal with the removal of local law enforcement officials by the Governor, to-wit, Sections 9150, 2855-1 and 2855-2 of the General Code.

Since the former section concerns the removal by the Governor of special policemen for banks, building and loan associations and railroad companies who were appointed and commissioned by the Governor under the authority of said section, it is obviously not pertinent hereto.

While Sections 2855-1 and 2855-2 deal with the removal of a sheriff by the Governor, an examination thereof will, however, reveal that they likewise have no application in the instant case, since the authority of the Governor contained therein is limited to cases where it is found that a sheriff has been negligent in protecting a person in his hands and under his control and has permitted such person to be taken from him. Furthermore, removal proceedings thereunder may only be instituted upon written complaint of five qualified electors, charging that a sheriff has allowed or permitted any person in his custody to be taken therefrom and charging that such sheriff has failed to do his duty in protecting such person, and that such person has been lynched or suffered bodily harm.

It is therefore apparent that neither of the above sections furnishes authority for you to take action against the sheriff in the case you present.

In light of the above, it would therefore appear that your authority with respect to the removal of local law enforcement officials who are guilty of any neglect of duty, misfeasance or malfeasance in office is limited to the removal of a mayor.

Nor does it appear that those provisions of law under which an ouster or exclusion from office may be ordered by a court in quo warranto proceedings have any application. While Section 12303 of the General Code provides that an action in quo warranto may be instituted against "a public officer * * * who does or suffers an act which, by the provisions of law, work a forfeiture of his office," and Section 12305, General Code, provides that when directed by the Governor, the Attorney General or prosecuting attorney shall commence such action, it has been held by the courts that quo warranto is not the proper remedy for the removal of a public official who has been guilty of misconduct in office. In regard thereto, it is stated in 33 O. Jur., pages 965 and 966:

> "The General Code declares that a civil action may be brought in the name of the state against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office. At common law, the faithful performance of the duties of an office was the tacit condition upon which the continued right to hold the office depended, and any breach of that condition constituted cause for the forfeiture of the office. But quo warranto will not lie under the Ohio statutes in all cases which constituted a forfeiture of a public office at common law. In order to maintain an action in quo warranto against a civil officer under G. C. Sec. 12,303, the act complained of must be one which is made by statute a ground of forfeiture of his office. So, where the causes of removal from office are prescribed by statute, which also provides a special mode of procedure for such removal, the statutory remedy is the exclusive one, and quo warranto will not lie. Thus, quo warranto is not the proper remedy for the removal of a sheriff or mayor from office for failure to perform official duties required in the suppression of mobs and riots and the arrest of the offenders."

See also State, ex rel. Attorney General, v. McLain, 58 O. S. 313; Prentiss v. Dittmer, 93 O. S. 314; State, ex rel. Gettles, v. Gillen, 112 O. S. 534.

In the case of State, ex rel. Attorney General, v. McLain, it was held:

"1. In order to maintain an action in *quo warranto* against a civil officer under the second clause of Section 6760, of the Revised Statutes, the act complained of must be one which is made by statute a ground of forfeiture of his office.

2. Where the causes of removal from office are prescribed by statute which also provides a special mode of procedure for such removal, the statutory remedy is the exclusive one, and *quo warranto* will not lie."

In the opinion of said case, it was stated (pages 323 and 324):

"So, by Sections 1732 — to and including 1736 of the Revised Statutes, a complete and speedy remedy is provided for the removal of mayors and other officers of municipal corporations, for any misfeasance or malfeasance in office. Complaint may be filed in the probate court by any elector of the corporation, and a trial thereon be had in that court, by jury, if demanded, followed, if the complaint be sustained, by judgment of removal; in which case, the vacancy is required to be filled as is generally provided by law for the filling of vacancies in those offices. Error may be prosecuted by the accused, but he is not permitted to exercise the functions of the office until the judgment is reversed or vacated.

It can hardly be supposed that the legislature intended the remedy thus specifically provided, to be concurrent merely, with that of quo warranto. True, the one is instituted on complaint of the individual elector, and the other prosecuted in the name of the state; but the state, as well as the individual, is bound by the statute, which was enacted, we apprehend, with the twofold purpose of affording the accused in all such cases the right of a speedy trial by jury, and of relieving courts, invested with original jurisdiction in quo warranto, of the trial of that class of cases. And as the statute prescribes the causes for the removal from office and also provides the mode of procedure to accomplish the removal, under the well established rule the remedy thus provided must be regarded as the exclusive one in those cases. We are therefore constrained to hold that the charges against these defendants cannot be inquired into in this proceeding."

In addition to the statutes hereinbefore pointed out and referred to, which deal with the removal of specific officers, Sections 10-1 to and including 10-4, General Code, furnish a complete and adequate remedy for the removal of any state, county, municipal or township official who is guilty of gross neglect of duty, or malfeasance, misfeasance or non-

feasance in office. Said sections provide for the removal for cause of such officials after a judicial hearing initiated by the filing of a petition setting forth the charges and signed by ten per cent. of the electors of the appropriate subdivision.

Therefore, since statutory methods for the removal of public officials guilty of misconduct in office or other grounds of forfeiture are specifically provided, it would appear, in light of the above cases, that such methods are not concurrent with that of quo warranto and hence it must be concluded that the latter will not lie.

You are therefore advised, in specific answer to your question, that the only provisions of law under which the Governor may remove local law enforcement officials for knowingly permitting gambling to exist in their communities are those contained in Section 4268 of the General Code, which empower the Governor to remove a mayor from his office for the causes set out therein.

Respectfully,

HUGH S. JENKINS

Attorney General