Kentucky Law Journal

Volume 14 | Issue 4 Article 3

1926

The Governor's Power to Remove County Officials

Charles J. Turck
University of Kentucky

THE GOVERNOR'S POWER TO REMOVE COUNTY OFFICIALS.

On the night of January 30, 1925, a fight occurred in a pool room in the city of Hazard. The sheriff and one of his deputies went to the pool room. When they arrived the fighting had ceased, but the participants were threatening to renew it. The sheriff, who was in an intoxicated condition, dispersed the crowd by ejecting every one from the pool room. He did this in a rough and violent manner, shoving, pushing, and peremptorily ordering them out, hitting several with his pistol, kicking at one, and striking a crippled boy over the head with his pistol, producing an ugly wound. The boy at the time was a spectator, sitting on a stool, and taking no part in the difficulty. After the crowd was dispersed, the sheriff went out upon the street, and engaged in a controversy with a policeman, in which he cursed the entire police force, and roundly abused and offered to fight the policeman, who had formerly been a deputy sheriff under him, and who had been discharged and later employed as a policeman; this boisterous and indecent conduct being continued until friends persuaded the sheriff to desist. Under these facts, has the governor of the state the power to remove the sheriff, a county official?

On March 5, 1925, the governor of the state, after proceedings held pursuant to the act of June 18, 1924, and based on the facts above recited and other charges not necessary to be set forth here, issued an order removing the sheriff from his office. On July 14, 1925, the Court of Appeals cancelled the order and dismissed the charges on the ground that the governor has no power to remove a sheriff from office except for "neglect of duty" and that the facts recited above did not constitute "neglect of duty." On October 13, 1925, a rehearing was denied.[1]

It must first be recognized that the court in deciding a law case cannot consider the practical expediency or the abstract justice of the result that may be reached. The law by fixed judicial decision or by legislative enactment or by constitutional

[1] *Holliday* v. *Fields, Governor*, 210 Ky. 179, 275 S. W. 642.

limitation may be so clearly established that the court has no alternative to the simple declaration of the rule as it finds it written, however reluctant it may be to apply that rule to the particular facts in hand. Consequently when a judicial decision has been announced that shocks the common sense of justice and leads to a somewhat general questioning of the effectiveness of popular government, the critic will not infrequently find that the root of the difficulty rests in some legislative ineptitude of phrase or intent rather than in the judicial decision. On the other hand, it sometimes happens that a court, in its earnest search for the true rule of law under the Constitution and the statute passed in pursuance thereof, may take up an interpretation that would in effect defeat the purposes of a constitutional provision, although it may conform letter by letter to the words used in the fundamental law. In such a case, it is not beyond the bounds of propriety for members of the bar and citizens generally to indicate their dissatisfaction with a too mechanical observance of old definitions in the interpretation of the Constitution, which of necessity is a living thing. "The letter killeth, but the spirit giveth life," is a maxim not unknown to the courts, and its importance is seldom overlooked by the judiciary.

To understand the Holliday case, it is first important to note that the Constitution of Kentucky provides as follows: "Judges of the county court, justices of the peace, sheriffs, coroners, surveyors, jailers, assessors, county attorneys and constables shall be subject to indictment or prosecution for misfeasance or malfeasance in office, or willful neglect in discharge of official duties, in such mode as may be prescribed by law; and upon conviction his office shall become vacant, but such officer shall have the right to appeal to the Court of Appeals."[2]

By chapter 62 of the Acts of 1918, subsequently ratified by the people, this provision was amended by the addition of the following enabling clause: "The General Assembly may, in addition to the indictment or prosecution above provided, by general law provide other manner, method or mode for the vacation of office or the removal from office of any sheriff, jailer, constable or peace officer, for neglect of duty, and may provide the method, manner, or mode of reinstatement of such officers."

[2] Ky. Const., section 227.

The original provision called for indictment or prosecution for (1) misfeasance in office; (2) malfeasance in office; or (3) willful neglect in discharge of official duties. The amendment gave the General Assembly power to provide other methods for removing county officials in one case only, (1) for neglect of duty.

There is thus presented at the outset the problem of interpreting the amendment. Did the people intend that "neglect of duty" should include the three kinds of official wrongs mentioned in the original provision or did they intend that it should refer to mere omissions or failures to act? The majority of the Court of Appeals held that "neglect of duty" had the last meaning only, that the amendment created a new cause for removals and authorized a new procedure for removals due to such cause only. The dissenting Judges (Clarke, C. J., and Dietzman, J.), held the intent of the amendment was to disregard all technicalities with reference to misfeasance, malfeasance or nonfeasance, as well as neglect of official duty, and to provide the new procedure for all such cases of dereliction by county officials.

There is great variety in the phraseology of state statutes and constitutional provisions concerning the removal of public officers. The causes most commonly stated are malfeasance, misfeasance, inefficiency, neglect of duty, corruption, extortion, intoxication, and conviction of crime. The scope of the particular words used has been occasionally before the courts. Intoxication has been held not to be "misfeasance."[3] Failure to file a fidelity bond has been held not to be neglect of duty.[4] Irregularities in the publication of statements of sums of money allowed and in advertisements for bids and a failure to advertise for bids have been regarded as not constituting neglect of duty, because "the 'neglect' contemplated must disclose either wilfulness or indifference to duty so persistent or in affairs of such importance that the safety of public interests is threatened."[5] From these examples it can be seen that the courts have been curiously reluctant to give to provisions for the removal of pub-

[3] *Comm.* v. *Williams*, 79 Ky. 42, 42 Am. Rep. 204. Statutes frequently provide that habitual intoxication shall constitute ground for the removal of a public officer. *State* v. *Henderson*, 145 Iowa 657, 124 N. W. 767.

[4] *Comm.* v. *Slifer*, 25 Pa. St. 23, 64 Am. Dec. 680.

[5] *State* v. *Kennedy*, 82 Kan. 373, 108 Pac. 837.

lic officers ample scope. They have been influenced no doubt by the outworn fiction that a public officer has a vested right to his office. The decision in the Holliday case excluding acts of malfeasance and misfeasance from the single phrase "neglect of duty" used in the amendment cannot be said to be unwarranted by the general tendency to construe provisions for the removal of public officers with extraordinary strictness.

It is perhaps proper, however, to call attention in this connection to the fact that a broad construction of the phrase "neglect of duty" would have made possible an effective supervision of county officials by the responsible head of the state. The legislative enactment that the governor shall have power to remove an offending county official after due hearing is in line with the unanimous opinion of political scientists that such powers of removal are essential if state administration is to be effectively organized and maintained. In the first book that approached the problem of state government with the purpose of making a scientific analysis of the distribution of functions and powers of the state, J. M. Mathews wrote as follows:[6] "It was early seen by farsighted observers that the governor's power of removal must be extended, if he is properly to be held responsible for the conduct of the administration." With the vast increase in the functions of state governments and the widening of the fields where the state, as distinguished from a local unit of government, lays down a general policy, there has been a distinct development in the direction, as Walter F. Didd has phrased it,[7] of "an increased supervision of local offices and local governments as agents in the carrying out of state policy."

Several factors have delayed the full recognition of the Governor's power of removal. Unlike the president,[8] the governor is held to have no power of removal resulting from his general executive power or incidental to his appointive power.[9] Constitutional limitations, express or implied, have hindered

[6] *Principles of American State Administration*, p. 98.

[7] *State Government* (1922 ed.), p. 285. See also a discussion of responsibility in state administration in Charles A. Beard's American Government and Politics (1924 ed.), p. 583, and J. T. Young's New American Government (1923 ed.), p. 359.

[8] *Parsons* v. *U. S.*, 167 U. S. 324, 42 L. Ed. 185.

[9] *State* v. *Rhame*, 92 S. C. 455, 75 S. E. 881; *McDonald* v. *Brunnett*, 92 S. C. 469, 75, S. E. 873.

the grant of such power by the legislature. Elective officers have often been regarded as exempt from removal, as having a sanction in their popular election of equal validity with the governor's own status. The removal of local officials, elected by their local constituents, has been deemed to violate the principle of home rule. But in spite of such obstacles, the clear tendency is toward the enlargement of the governor's removal powers.

Everett Kimball in his work on State and Municipal Government in the United States,[10] has clearly pointed out the absurdity of the present situation when law enforcing agents, police in cities, constables in villages, and sheriffs in counties, all chosen by local agencies, but charged with the enforcement of state statutes, have practically no responsibility to state authorities. "The governor is held responsible by law enforcement, although actually he has little power. Rarely he can remove a sheriff." H. L. James[11] has advocated the *appointment* of sheriffs by the governor on the ground that most of his duties are those of a state agent charged with the enforcement of state law. But he recognizes the intense opposition to any central control over local police officials, and the most that can be expected at present is that while local officials will continue to be elected, an effective power of removal will be lodged in the governor. The decision in the Holliday case, unfortunately, makes necessary a new constitutional amendment in this state to give the governor this power in broad terms and thus to make possible a unified, effective, and responsible administration of state policies throughout the state.

Whether or not the dissenting judges are right in their distinction between malfeasance, misfeasance and nonfeasance or neglect, there is no doubt that the 1924 Legislature thought that the distinction had been blotted out. Acting on the authority it assumed had been given by the amendment, it provided:

"That if any sheriff, jailer, constable or peace officers of this Commonwealth be guilty of gross misconduct in office, bribery, gross neglect to enforce the laws of this Commonwealth, gross immorality or habitual drunkenness, he shall be deemed

[10] *State and Municipal Government in the United States*, ch. 9, p. 166.
[11] *Local Government in the United States*, Ch. 3.

guilty of neglect of official duty and shall be removed from office by the Governor."[12]

Obviously, legislative interpretations of constitutional powers do not bind the court. But the effort to determine what matters may now subject a county official to removal by the governor and what may not is so difficult a task even for the Court of Appeals that it may be doubted whether the people in adopting the amendment had in mind any such distinctions at all. For example, the court (majority opinion) says that "gross misconduct in office," may or may not involve a neglect of duty, depending on the facts charged. Likewise, bribery is and gross immorality may be a violation of law, but may or may not involve a neglect of duty, depending on the circumstances. Who will draw the line? Is it not readily perceived that the line is so shadowy (if indeed it has any existence) that no governor will trouble himself to draw it and the law and the constitutional amendment become dead letters by reason of the interpretation put upon them by the court?

To follow further the majority opinion, we must grant that the legislative act authorizing removal of county officials by the governor is valid as to the offenses listed in the act only when these offenses amount to "neglect of duty" and nothing more. But is there not clear proof of neglect of duty in the facts set forth at the beginning of this article? The majority opinion answers in the negative with the following explanation: "Appellant's intoxication and conduct on this occasion were reprehensible, and, while not so stated in the charge, may be denominated as gross misconduct. He may be heavily fined both for the assault on the boy and for the breach of peace in the Begley episode. He is also subject to a heavy fine for being intoxicated. The affair with Begley, the policeman, was not an official act, and, though a disgraceful row, it does not appear that he neglected any official duty by reason of it. The dispersal of the crowd in the pool room appears to have been done officially, and the attack on the boy was unlawful. It might sustain a prosecution for malfeasance in office, which upon his conviction would automatically remove him from office, but for this he is entitled

[12] Chapter 49 of Acts of 1924.

to a jury trial; it not being the character of neglect contemplated by the amendment."

The explanation rests upon the notion that "neglect of duty" means "neglect of official duty" as distinguished from individual, unofficial misconduct. The distinction is thus phased with accuracy, although with disapproval, by the dissenting judges: "That his conduct was most reprehensible, and may be denominated as gross misconduct, is admitted by the majority opinion, which nevertheless holds that he cannot be removed from office therefor, because, though drunk and acting wrongfully in the performance of an official duty in the poolroom, he was acting diligently, and, after leaving the poolroom, he was not acting officially, but individually, in trying to run a city peace officer away from his post of duty and putting him in such fear as to prevent him from arresting and lodging appellant in jail."

What can be the explanation of a distinction so strained, of a theory that violates the most elementary conceptions of the obligations of a public officer? What possible excuse can there be in this day for holding that a sheriff who immediately after closing a poolroom curses the police force of the town and engages in a disgraceful drunken row is nevertheless not guilty of neglect of duty? The critic was warned at the outset that he would find his answer in all probability in some fixed rule of law, and here unfortunately, as it seems, the Court of Appeals found what it regarded as a fixed rule of law, a decision of its own, *Commonwealth* v. *Williams*.[13] The court was following precedent in making the distinction here criticized, but it is submitted that the precedent itself is wrong.

In the Williams case, the removal of a county judge was sought for the offence of misfeasance in office, and the indictment set forth that the judge was intoxicated when an applicant came before him as county judge to have letters of administration issued and appraisers appointed. The court held that the phrase "misfeasance in office" meant the wrong-doing of an official act and that the misconduct charged in the indictment was not official, but personal. "In this case, no complaint is made that the appellee (judge) did not faithfully, honestly and correctly

[13] *Commonwealth* v. *Williams*, 79 Ky. 42, 42 Am. Rep. 204.

discharge all his duties as an officer." As if a drunken judge could "faithfully" discharge the duties of his office! The dissenting judges in the Holliday case, in an opinion that boldly challenges the correctness of the Williams' case and the propriety of applying its reasoning to the Holliday case, say: "Whatever may have been the judicial view in 1880 and prior thereto about the duties of peace officers, I feel sure that most, if not all, citizens who in 1919 voted either for or against the amendment did so with the firm belief that it was the official duty of a peace officer, in consonance with his oath of office, to observe the law himself, as well as to enforce its obedience upon others. Indeed, it seems axiomatic to me that such must always have been the conception of good citizens everywhere, and I cannnot believe that now or at any time since the foundation of this Commonwealth a contrary declaration was justified by enlightened public opinion, good morals, sound judgment, or even the technicalities of the law."

However disheartening a decision like *Holliday* v. *Commonwealth* may be to those who desire a more effective administration of state government, a continuance of the present impotence of the governor to control the execution of state policies by local officials cannot be laid to the court. A judicial decision, however unfortunate, need not be "recalled." There is a more orderly remedy provided in the Constitution, the process of amendment. The friends of a strong centralized state government should prepare a new amendment making indisputably clear the power of the governor to remove a county official at fault, whether his fault be malfeasance, misfeasance or nonfeasance.

CHARLES J. TURCK.

University of Kentucky, College of Law.