I

STATE v. LEONARD
(86 Tenn. 485, 7 S.W. 453)

1. CONSTITUTIONAL LAW; CONSTITUTIONAL TENURE OF OFFICE CANNOT BE TERMINATED BY THE LEGISLATURE. — Acts Tenn. 1887, c. 84, repealed Acts Tenn. 1885, c. 71, under which defendant had been duly elected to the office of county judge of Marshall county, and conferred the power and duties incident to it on the chairman of the county court. *Held*: That this act could not deprive defendant of office for the remainder of the term for which he was elected, under Const. Tenn. art. 6, providing that the terms of office of the judges of such inferior courts as the legislature from time to time shall establish shall be eight years.

2. IBID.; IBID. — The act of 1887 did not attempt to abolish or diminish the powers and duties appertaining to the office. It simply repealed so much of the act as applies to Marshall county, (another county having had a similar chance made in its court system by the same act) and undertook to re-establish the office of chairman of the county court after the first Monday in April, 1887, and to vest in these officers all the rights, privileges, jurisdiction, duties, and powers pertaining to the officer as established and exercised by the county judge. If this legislation had merely named the defendant, and by name and title removed him from the position, and given it to another, it would not have more directly accomplished the purpose actually effected, if this be valid.

3. IBID.; PURPOSE OF THE CONSTITUTION IN FIXING THE TERMS OF JUDGES. — The constitution in fixing the terms of the judges of inferior courts elected by the people at eight years intended not only to make the judiciary independent, and thereby secure to the people the corresponding consequent advantages of courts free from interference and control, and removed from all necessity of being subservient to any power in the state, but intended also to prevent constant and frequent experimenting with county systems, than which nothing could be more injurious or vexatious to the public. It was intended when the legislature established an inferior court that it should exist such a length of time as would give opportunity for mature observation and appreciation of its benefits or disadvantages, and that the extent of its durability might discourage such changes as were not the result of most mature consideration.

4. IBID.; THE CONSTITUTION GUARDED THE JUDICIAL DEPARTMENT AGAINST BEING AT THE MERCY AND WHIM OF EACH RENEWING LEGISLATURE. — Realizing that a change, if made, to constitute an inferior court, would fix that court in the system of eight years, a legislature would properly consider and maturely settle the question as to the propriety and desirability of such change or addition to our system; and, conscious of the impropriety and the hazard of leaving the judicial department of the government at the mercy and whim of each renewing legislature — itself elected for but two years, — the framers of the constitution wisely guarded against these evils by the section referred to. Properly construed and enforced it is effectual for that purpose. Disregarded or impaired by such interpretation as leaves it to exist in form, without force or substance, and we have all the evils and confusion of insecure, changing, and dependent courts, frequent and constant experimenting with systems provided in haste, tried in doubt, and abolished before their merits or demerits were understood. It would be a mortifying reflection that our organic law makers intended any such result in their advanced efforts to make a government of three distinct independent departments; and still more humiliating, if we were driven to the conclusion that, while they did not intend it, they had been so weak or inapt, in the phraseology adopted, as to have accomplished it. Neither the intent nor the language of the constitution employed to express it fortunately bears any such construction.

5. IBID.; JUDGES ENTITLED TO THE PROTECTION AGAINST UNCONSTITUTIONAL LEGISLATION DEPRIVING THEM OF THEIR OFFICE. — When the court whose judge is elected by the people of one or more counties in district or circuit is constituted by the legislature, and an election had, and the officer commissioned and qualified, it is not in the power of the legislature to take from him the powers and emoluments of office during the term of eight years by devolving these intact upon another, or otherwise. The court so constituted, and judge elected, in this instance, was under the authority to establish inferior courts already quoted. The incumbent of the office was a judicial officer of this state, (State v. Gleen, 7 Heisk, 486; State v. McKey, 8 Lea, 24) and is entitled to the protection of the constitution as such, against unconstitutional legislation to deprive him of his office.

6. IBID.; THE CASE AT BAR DISTINGUISHED FROM STATE V. CAMPBELL AND STATE V. GAINES. — It is argued, however, that this act of removal is the same as the act abolishing a circuit court, with all its powers and jurisdiction, from the consequences of which it has been held by this court a circuit judge would be deprived of office. [State v. Campbell, (M.S.); State v. Gaines, 2 Lea, 316]. The act construed in these cases was one abolishing the Second circuit court on Shelby county, — the First and Second. As one was enough to do the business of the county, or supposed to be, the legislature abolished this court, leaving the entire business of both courts to be done by the first; thereafter to be styled "The Circuit Court of Shelby County." It was held in the cases referred to that the legislature might abolish a circuit court, held for a circuit or given territory, and that when the court was abolished the office of judge thereof terminated. Without desiring to be understood as assenting to the conclusion reached in those cases, (to the reasoning of which we do not subscribe) and which conclusions, we may remark in passing, were reached by a divided court, and against the weight of many opinions in other states, it is sufficient to say that the case here presents no such question as that determined there. The act of 1875 construed had abolished the court. It did not leave the court with all its powers, jurisdiction, rights, and privileges intact, and devolve them upon another, as in this case. Here the court was left as it existed, except the change made in its official head. He was simply removed by the operation of the act, if it could take effect according to its terms, and another put in his place.

7. IBID.; IBID. — It cannot be doubted that, if the legislature had said in the act of 1875, as in the act now being construed, that the office of the judge of the Second circuit court should be abolished, and that the court should remain, with like jurisdiction and duties, but these should be exercised by another officer, leaving the First circuit court also existing with its original jurisdiction and duties only, — that such would have been declared void. Nor can it be doubted that if the legislature should now declare that the office of a given circuit is hereby abolished, leaving the circuit and its court machinery as it, except the removal of the presiding judge, such act would be void. If this were not true, the legislature, at its next or any subsequent session, might pass a law setting out the circuits and chancery divisions by numbers, and declaring that the office of judge of each be abolished.

8. IBID.; CONSTITUTIONAL TEST.—It is no argument in answer to this to say that the legislature will not do this. It is not a question of what they will do that we are now considering; it is a question of constitutional power of what it can do. The question as to how such power is granted, or restraint imposed,

cannot be determined on the probability or improbability of its exercise. If it can abolish in this way the office of county judge, it can abolish the office of any inferior judge, as all are alike protected or not protected by the clause of the constitution referred to.

9. IBID.; THE INDEPENDENCE OF THE JUDICIARY MUST BE GUARDED AGAINST RASH AND CONSTANT EXPERIMENTS OF LEGISLATION. — For the honor of the framers of the constitution, the best interests of our people, the independence of the judiciary, and the security and order of our court system against rash and constant experiments of legislation, it offers us much satisfaction to give the constitution its plain, rational, and unobscure effect to invalidate legislation of this character, and be able to say that nothing as yet decided by our court stands as a precedent in the way of our doing so. But if there were, it would afford us pleasure to overrule it.

DECISION

SNODGRASS, J. By an act approved 30th of March, 1885, the legislature created the office of county judge for Marshall county. Acts 1885, p. 128. The defendant, Leonard, was duly appointed, commissioned, and qualified to fill said office, and entered upon the discharge of its duties. Subsequently, at the August election, 1886, he was elected to the position by vote of the people of the county, for the constitutional term, and was again commissioned and qualified, and continued to perform the duties of the office, without objection or interference, until the present bill was filed by the state on relation of D. C. Orr, to restrain him from so acting upon the ground that the act, in so far as it authorized the appointment of judge, had been repealed by an act of the legislature approved March 14, 1887, and the powers and duties of the office devolved upon the chairman of the county court to be elected to such position, and consequently sought in this proceeding to assert his authority, and to restrain defendant from interfering with him or from the usurpation of such power. A demurrer was overruled, the bill answered, and on final hearing the chancellor sustained the bill, and defendant appealed.

The question therefore is whether the legislature has power to terminate the office of a judge elected under a constitutional law, and for a constitutional term of eight years, within that term, leaving the court with its jurisdiction in existence and unimpaired, by simply transferring the duties of the office upon another official, namely, the chairman of the county court. In the act of 1885 creating the office of county judge, all the powers and jurisdiction vested in a chairman of the county court was vested in the county judge, (section 4, p. 129) and all the rights, powers, and jurisdiction that are conferred by existing law upon county judges, (section 3, p. 129). In the passage of this law the legislature acted under its constitutional authority to create originally, or by amendment of our existing court system, an inferior court. The first section of Article 6 of the state constitution provides "that the judicial power of this state shall be vested in one supreme court, and such circuit, chancery, and other inferior courts as the legislature shall from time to time ordain and establish, in the judges thereof, and in justices of the peace." The fourth section of the same article provides, among other things, that the judges of such inferior courts shall be elected by the qualified votes of the district or circuit to which they are to be assigned, and that their term of office shall be eight years. In the first section of the act of 1885 the term of the office is fixed at four years; but this is clearly a misprint or clerical error, for the next section, providing for the election of the judge after the first, fixes the period of eight years. This, however, is an immaterial matter. The act being otherwise valid, the constitution would regulate the term, although a different term was intentionally fixed; and the judge, being duly elected, would hold for eight years, — the constitutional term.

The question is, can the legislature subsequently, and within the term, deprive him of the office by devolving its powers and duties upon another? The act of 1887 did not attempt to abolish or diminish the powers and duties appertaining to the office. It simply repealed so much of the act as applies to Marshall county, (another county having had a similar chance made in its court system by the same act,) and undertook to re-establish the office of chairman of the county court after the first Monday in April, 1887, and to vest in these officers all the rights, privileges, jurisdiction, duties, and powers" pertaining to the officer as established and exercised by the county judge." If this legislation had merely named the defendant, and by name and title removed him from the position, and given it to another, it would not have more directly accomplished the purpose actually effected, if this be valid. The constitution in fixing the terms of the judges of inferior courts elected by the people at eight years intended not only to make the judiciary independent, and thereby secure to the people the corresponding consequent advantages of courts free from interference and control, and removed from all necessity of being subservient to any power in the state, but intended also to prevent constant and frequent experimenting with county systems, than which no thing could be more injurious or vexatious to the public. It was intended when the legislature established an inferior court that it should exist such a length of time as would give opportunity for mature observation and appreciation of its benefits or disadvantages, and that the extent of its durability might discourage such changes as were not the result of most mature consideration. Realizing that a change, if made, to constitute an inferior court, would fix that court in the system of eight years, a legislature would properly consider and maturely settle the question as to the propriety and desirability of such change or addition to our system; and, conscious of the impropriety and the hazard of leaving the judicial department of the government at the mercy and whim of each renewing legislature — itself elected for but two years, — the framers of the constitution wisely guarded against these evils by the section referred to. Properly construed and enforced it is effectual for that purpose. Disregarded or impaired by such interpretation as leaves it to exist in form, without force or substance, and we have all the evils and confusion of insecure, changing, and dependent courts, frequent and constant experimenting with systems provided in haste, tried in doubt, and abolished before their merits or demerits were understood. It would be a mortifying reflection that our organic law makers intended any such result in their advanced effort to make a government of three distinct independent departments; and still more humiliating, if we were driven to the conclusion that, while they did not intend it, they had been so weak or inapt, in the phraseology adopted, as to have accomplished it. Neither the intent nor the language of the constitution employed to express it fortunately bears any such construction.

When the courts whose judge is elected by the people of one or more counties in district or circuit is constituted by the legislature, and an election had, and the officer commissioned and qualified, it is not in the power of the legislature to take from him the powers and emoluments of office during the term of eight years by devolving these intact upon another, or otherwise. The court so constituted, and judge elected, in this instance, was under the authority to establish inferior courts already quoted. The incumbent of the office was a judicial officer of this state, (State v. Glenn, 7 Heisk, 486; State v. McKey, 8 Lea, 24) and is entitled to the protection of the constitution as such, against unconstitutional legislation to deprive him of his office.

It is argued, however, that this act of removal is the same as the act abolishing a circuit court, with all its powers and jurisdiction, from the consequences of which it has been held by this court a circuit judge would be deprived of office. (State v. Campbell, (M.S.); State v. Gaines, 2 Lea, 316). The act construed in these cases was one abolishing the Second circuit court of Shelby county, — the First and Second. As one was enough to do the business of the county, or supposed to be, the legislature abolished this court, leaving the entire business of both courts to be done by the First; thereafter to be styled "The Circuit Court of Shelby County." It was held in the cases referred to that the legislature

might abolish a circuit court, held for a circuit or given territory, and that when the court was abolished the office of judge thereof terminated. Without desiring to be understood as assenting to the conclusion reached in those cases, (to the reasoning of which we do not subscribe,) and which conclusions, we may remark in passing, were reached by a divided court, and against the weight of many opinions in other states, it is sufficient to say that the case here presents no such question as that determined there. The act of 1875 construed had abolished the court. It did not leave the court with all its powers, jurisdiction, rights, and privileges intact, and devolve them upon another, as in this case. Here the court was left as it existed, except the change made in its official head. He was simply removed by the operation of the act, if it could take effect according to its terms, and another put in his place. It cannot be doubted that, if the legislature had said in the act of 1875, as in the act now being construed, that the office of the judge of the Second circuit court should be abolished, and that the court should remain, with like jurisdiction and duties, but that these should be exercised by another officer, leaving the First circuit court also existing with its original jurisdiction and duties only, — that such would have been declared void. Nor can it be doubted that if the legislature should now declare that the office of a given circuit is hereby abolished, leaving the circuit and its court machinery as is, except the removal of the presiding judge, such act would be void. If this were not there, the legislature, at its next or any subsequent session, might pass a law setting out the circuits and chancery divisions by numbers, and declaring that the office of judge of each be abolished.

It is no argument in answer to this to say that the legislature will not do this. It is not a question of what they will do that we are now considering; it is a question of constitutional power of what it can do. The question as to how such power is granted, or restraint imposed, cannot be determined on the probability or improbability of its exercise. If it can abolish in this way the office of county judge, it can abolish the office of any inferior judge, as all are alike protected or not protected by the clause of the constitution referred to. For the honor of the framers of the Constitution, the best interests of our people, the independence of the judiciary, and the security and order of our court system against rash and constant experiments of legislation, it offers us much satisfaction to give the constitution its plain, rational, and unobscure effect to invalidate legislation of this character, and be able to say that nothing as yet decided by our court stands as a precedent in the way of our doing so. But if there were, it would afford us pleasure to overrule it.

The decree is reversed, and bill dismissed with costs.

II

STATE, ex rel. GIBSON v. FRIEDLEY
21 L. R. A., 634

1. CONSTITUTIONAL LAW; THE LEGISLATURE CANNOT LEGISLATE OUT A JUDGE. — The Constitution of Indiana provides that the circuit courts shall each consist of one judge, that the state shall, from time to time, be divided into judicial circuits, a judge for each circuit shall be elected by the voters thereof. He shall reside within his circuit and hold his office for a term of six years, if he so long behave well. The Constitution likewise provides that there shall be elected, in each judicial circuit, by the voters thereof, a prosecuting attorney, who shall hold his office for three years.

Held: It seems beyond the power of the legislature to legislate a judge and prosecuting attorney out of office, and if the legislature cannot by a direct act deprive them of their offices neither can it do so by the indirect mode of abolishing their circuit. The authors of our constitution well understood the long struggle for many years previous to secure the independence of the judiciary and the tenure of office of the judges; hence the Constitution divides the powers of the state government into three distinct co-ordinate departments, carefully excluding any control of one over another. If the legislature, by a special act, may remove one judge or one prosecuting attorney, it may remove any and all such officials in the state, and hence they would be at the mercy of any legislature whose enmity or illwill they may have incurred.

2. ID.; LEGISLATURE CANNOT TRANSFER THE ENTIRE CIRCUIT OF ONE JUDGE AND ATTACH IT TO ANOTHER CIRCUIT. — If the general assembly can transfer bodily the entire territory which constitutes the locality in which the judge or prosecuting attorney may lawfully exercise the functions and duties of his office, and attach that territory to another circuit, then it can strip the incumbents of their respective offices as effectually as it is possible to do so by any words that can be used. It is, in fact, as much a removal of the judge and prosecutor so deprived of all territory as would be a judgment of a supreme court removing either of them from his trust. It is not to be assumed that the framers of the constitution builded it so unwisely as to secure to a judge an office and its tenure, and the right to exercise all its prerogatives within a defined locality for a period of six years, if he so long behave well, and by the same organic law intended that the general assembly might remove him, at its will, from the exercise of all the privileges and duties pertaining thereto, without a hearing, without a conviction for misconduct, under the guise of "from time to time dividing the state into judicial circuits."

3. ID.; LIMITATIONS OF THE LEGISLATIVE POWER TO DIVIDE THE STATE INTO CIRCUITS.—The division of the state into judicial circuits may be exercised by the legislature, where the act does not legislate judges and prosecutors out of their respective offices, but not otherwise. The general assembly may add to, or may take from the territory constituting a circuit. It may create new circuits. It may abolish a circuit, if the act be made to take effect at, and not before the expiration of the terms of office of the judge and prosecutor of such office, as constituted, at the time of the act. The general assembly has the power, at its discretion, to divide a judicial circuit, at any time, during the terms of office of the judge and prosecuting attorney of such circuit, subject only to the restrictions that the legislature cannot, by any legislation, abridge the official terms of either of such officers, nor deprive either of them of a judicial circuit, wherein he may serve out the constitutional term for which he was elected.

D E C I S I O N

DAILEY, J., delivered the opinion of the court:

On the 28th day of August, 1893, the relator filed an information in the Jefferson circuit court against the appellee Friedley. By the information, it is averred that the relator is a judge of the fourth judicial circuit of the state of Indiana, and that said appellee has usurped and intruded into said office and detains the same from him, although he has demanded possession thereof, and judgment is prayed that the relator may be awarded the possession of said office and all other proper relief. To this information the appellee, in the court below, filed his answer, pleading especially the authority by virtue of which he holds the possession of said office as judge, as against the said relator. To this answer the appellant filed his demurrer, which was overruled, and exception being reserved to the decision of the court. There upon the appellant filed his reply, to which the appellee demurred, the demurrer being sustained and an exception reserved on the part of the appellant. The appellant standing by the reply and declining to plead further, judgment was rendered in favor of the defendant, from which the relator prosecutes this appeal. The errors assigned in this court are as follows: