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:

1. That the answer of the appellee, William T. Friedley, in the court below, did not state facts sufficient to constitute a cause of defense.

2. That the court below erred in overruling the demurrer to said appelle's answer.

3. That the court below erred in sustaining the demurrer to appellant's reply.

It is not disputed that, on the 4th day of March, 1893, Clark county alone constituted the fourth judicial circuit of the state of Indiana. Elliott's supp. par. 263.

And the statute in force provided that the terms of court in said fourth judicial circuit should be held as follows: "On the first Monday in February, the third Monday in April, the first Monday in September and the third Monday in November of each year," to remain in session while the business of the court required. Acts 1891, p. 68. And at said date the county of Jefferson alone constituted the fifth judicial circuit of the state of Indiana, and it was provided by law that the terms of court in said fifth judicial circuit should be held as follows: "On the first Monday in January, the first Monday in April, the first Monday in September, and the first Monday in November of each year;" said terms to continue in session as long as the business of the court required. On the 4th day of March, 1893, the legislature of Indiana approved an act, which purports to abolish the fifth judicial circuit and annex territory heretofore constituting the fifth judicial circuit, and change of time of holding the courts in the countries of Clark and Jefferson. The act will be found in the Acts of 1893, on page 359, and is entitled "An act Defining the Fourth Judicial Circuit of the State of Indiana, Fixing the Times of Holding Courts in Said Circuit, Prescribing the Limits of the Terms thereof, Providing for the Judge thereof, and Abolishing the Fifth Judicial Circuit of the State of Indiana, and Repealing All Laws in Conflict therewith."

It will be observed that this title has no reference to or mention of courts in the fifth judicial circuit. The first section reads as follows: "Be it enacted by the general assembly of the state of Indiana, that on and after the first day of August, 1893, the fifth judicial circuit of the state of Indiana, which is now constituted of the county of Jefferson, shall be abolished." The second section provides that on and after the first day of August, 1893, the counties of Clark and Jefferson shall constitute the fourth judicial circuit of the state of Indiana, as the same is now constituted, shall be the judge of the fourth judicial circuit of the state of Indiana, as thereafter constituted by this act, and until his successor is elected and qualified.

This proceeding was instituted as a friendly one, with a view to testing the following questions:

1. What is the legal effect of the Act of March 4, 1893, in view of the fact that the act abolishes the appelle's entire circuit, the term for which he was elected and qualified not having expired?

2. If the Act of March 4, 1893, is unconstitutional or inoperative in so far as it undertakes to abolish the term for which appellee was elected, viz., from October 22, 1891, to October 22, 1897, will the same still have the effect of changing the terms of court in the counties of Clark and Jefferson?

At the time the Act of 1893 was approved, the relator, George H. D. Gibson, was the sole judge of the fourth judicial circuit, and the appellee, William T. Friedley, was the sole judge of the fifth judicial circuit. The appellee having declined to recognize the validity of the last-mentioned act of the legislature upon the ground that the same is unconstitutional and void, or, at any rate, is inoperative, has continued in possession of said office and in the discharge of the duties thereof in the county of Jefferson, and has declined to surrender the same to the relator.

The first question that naturally arises is as to the alleged error of the court on overruling the demurrer to appellee's answer; but as the questions attempted to be raised in all the assignments of error are the same, they may be disposed of together. The answer, omitting the caption and purely formal parts, reads thus: "The said defendant hereby enters his appearance to the above action, waives the issuing and service of process herein, and for answer to said information and complaint, says that he, said defendant, is a bona fide resident of Jefferson county, Indiana, and has been for more than thirty years last past; that he is now fifty-eight years old, and has been a voter and elector of said county aforesaid for the last thirty years or more, and during all of said time he has been eligible to be voted for, and to be elected to the office of circuit judge of the fifth judicial circuit of the state of Indiana, and eligible to take and hold said office; that prior to the general election of November, 1884, the fifth judicial circuit was composed of the counties of Jefferson and Switzerland, and so continued until February 4, 1891, when Switzerland, Ohio, and Dearborn counties were erected into the fifth judicial circuit; That on the 28th day of February, 1889, the county of Clark alone was created the fourth judicial circuit, and the relator was elected circuit judge of said fourth judicial circuit by the electors of Clark county alone, on the—day of November, 1892; that this defendant was duly and legally elected circuit judge of the fifth judicial circuit on the 4th day of November, 1884, for the term which was to commence on the 22nd day of October, 1885; that he was duly commissioned for said term, qualified and entered upon the discharge of the duties of said judge as aforesaid, and served the full term thereof; that he was again a candidate for election to said office of circuit judge of said fifth judicial circuit, at the general election held November, 1890, and had no opposition, and was the only person voted for to fill said office; that there were cast 2894 votes in Jefferson county, and 2100 votes in Switzerland county for Judge of the fifth judicial circuit of Indiana, at said election, and he received all of said votes so cast, and was duly elected circuit judge of said fifth judicial circuit of Indiana, at said election, for the term of six years, commencing October 22, 1891, and ending October 22, 1897; that said defendant accepted said office and commission, and took the oath of office, which is indorsed on his commission, and a certified copy thereof was forwarded to the secretary of state, and by him filed in his office, to wit, Nov...., 1890; that at the expiration of defendant's first term, he entered upon the discharge of the duties of the office aforesaid, and has tried to discharge the duties of said trust to the best of his skill and ability; that he accepted said office in good faith, and entered into the possession of it peaceably and as a matter of right, and has not forfeited, surrendered, nor resigned the same, but is still acting in the capacity as aforesaid. And he says that, at all times, he has discharged said duties of circuit judge as aforesaid, within the bonds of Jefferson county, Indiana, since it alone has been created into a circuit, and that at no time has he attempted to exercise any of the duties of the judge of the Clark circuit court (the fourth judicial circuit) since the relator has been judge as aforesaid. The defendant further avers that by an act approved March 4, 1893, the legislature attempted to abolish the fifth judicial circuit aforesaid, and consolidated Jefferson and Clark counties into the fourth judicial circuit, and provided that the judge of the fourth judicial circuit (of Clark county) should discharge the duties of circuit judge in the circuit court attempted to be formed by said act, (to wit, in the counties of Jefferson and Clark:) And they further provided that said act should not go into effect until the first day of August, 1893.

The defendant avers that said legislature utterly failed to provide by said act any circuit or county for defendant, in which he could exercise the functions of said office of circuit judge, or in which he could discharge the duties thereof, and attempted by said act to deprive him of his vested right to said office and its functions, in violation of the constitutional rights of the defendant,

which he had by virtue of said election, commission, and acceptance of said office and constitutional guarantees in reference thereto. The defendant says that the sole and only cause of complaint which the relator has against the defendant is, that the defendant has exercised the duties of circuit judge within Jefferson county (only) since the first day of August, 1893, claiming that such duties in said court devolve upon him, relator, by virtue of said Act of March 4, 1893, and said actions of this defendant are the same wrongful and unlawful acts of usurpation and intrusion into relator's office complained of, and none other. The defendant says that as to all other matters in said information and complaint, not controverted in this paragraph of the answer, he denies. He further says that said relator is assuming that he is the proper person to discharge the duties of circuit judge within Jefferson county, Indiana, and that defendant is not, and that by reason of said assumption, a cloud has been cast upon the title of defendant to said office and the functions thereof. Wherefore, he asked that the relator take nothing by this action; that said Act of March 4, 1893, be declared and adjudged void; that defendant's title to said office be quieted to him, and for all other proper relief as may be equitable and just."

In order to determine the sufficiency or insufficiency of this answer, an inquiry is involved as to what is the legal effect of the aforesaid Act of March 4, 1893. It is conceded by the appellant that, unless the said act was a valid and legal enactment, and became operative from and after the 1st of August, 1893, the relator's claim to the office of judge, in so far as Jefferson county is concerned, is not well founded. On the contrary, it is conceded by the appellee that his title to the office of judge of said court is based upon his previous election thereto, and the claim upon his part that the Act of March 4, 1893, is unconstitutional, or at least that the same is inoperative during the term for which he was elected.

The judge and prosecuting attorney are constitutional officers. They are also designated in the organic law, and are neither state nor county officers. The Constitution, (art. 3, Rev. Stat. 1881, par. 96) separates into three departments the powers of the state government as follows: legislative, executive, including administrative, and the judicial. Article 7 of the Constitution, (Rev. Stat. 1881, par. 161,) vests the whole judicial power of the state in the supreme court, in circuit courts and in such other courts as the general assembly may establish. Section 168, Rev. Stat. 1881, provides that the circuits courts shall each consist of one judge. Section 169, Rev. Stat. 1881, is as follows: "The state shall, from time to time, be divided into judicial circuits, and a judge for each circuit shall be elected by the voters thereof. He shall reside within his circuit, and shall hold his office for the term of six (6) years, if he so long behave well." Section 171, Rev. Stat. 1881, reads: "There shall be elected, in each judicial circuit, by the voters thereof, a prosecuting attorney, who shall hold his office for two (2) years." Section 172, Rev. Stat. 1881, reads: "Any judge or prosecuting attorney who shall have been convicted of corruption or other high crime, may, on information in the name of the state, be removed from office by the supreme court." Section 173 provides that the compensation of the judges of the supreme court or circuit courts shall not be diminished during their continuance in office. The first section of the act in controversy abolishes in express terms the fifth judicial circuit of this state, which circuit the section itself declares to be composed of the county of Jefferson alone; necessarily having a judge to preside over its courts, and a prosecuting attorney to prosecute the pleas of the state therein. The other four sections are builded upon the validity of the first section. If the first section be unconstitutional and void, then, all the other sections are likewise void. 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. Section 172, *supra*, which provides that judges and prosecuting attorneys may be removed from office by "conviction for corruption or other high crime," defines a plan which in itself involves a trial, a hearing by the accused, a day in court, and then the removal on information in the name of the state may be adjudged by the Supreme court. This section, however, provides that a removal may be effected in such other manner as may be provided by law. But the state has thus far failed to provide any other manner than the constitutional mode. The legislature, under this latter clause, we think, has the power to provide for the removal of judges and prosecuting attorneys in some additional or other manner than that prescribed in this constitutional section. It could only do so, however, by enacting a general law applicable to all judges and all prosecuting attorneys, and to be valid must provide for a trial, and must give to the accused a day in court, an opportunity to be heard and make defense, or the act would be unconstitutional for the failure to give the accused such opportunity and right. This clause does not authorize the legislature to enact a law, removing the judge or prosecutor from office, at its will, without giving him a day in court, Section 169, *supra*, is the only authority that can be found on which to base the legislative right of removal. But to give the first clause of that section such construction would nullify that part of the same section which provides that the judge of a circuit, when elected, shall hold his office for a term of six years, if he so long behave well. To construe this section to mean that the legislature can, at its own will, abolish the circuit, and thus legislate the judge and prosecuting attorney out of office, in addition to being in direct conflict with the other provisions of our organic law, would also put the official life of every judge and every prosecuting attorney of the state at the mercy of the legislature. It would subject the judiciary to the legislative power, and utterly destroy all judicial independence. Judges and prosecutors would be at the whim or caprice of the senators and representatives in their tenure of office. 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 section 96, *supra*, was enacted, dividing 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 ill-will they may have incurred.

The office of circuit judge, as well as prosecuting attorney is a public trust, committed by the public to an individual the duties and functions of which he is bound to perform for the benefit of the public, and entitles him to exercise all the duties and functions of the office, and to take the fees and emoluments belonging to it. 2 Bovier, Law. Dict. title, *Office*. "Officers are required to exercise the functions which belong to their respective offices. The neglect to do so may in some cases subjects the offender to an indictment. 1 Yeates, 519."

There can be no such thing as an office without responsive duties and functions to be performed by the officer. It is not the mere right to receive an annual compensation without the exercise of any corresponding duties. 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 so do 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." Such division 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 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. This act abolishes the circuit on and after the first day of August, 1893, and therefore must be effectual to abolish the circuit and the offices on the day named, or not at all. As stated, the offices of judge and prosecuting attorney of the fifth judicial circuit expire on the 22nd day of October, 1897, and to abolish the circuit, it must be by law to take effect on the date last named. These positions are in line with the authorities. The judges and prosecuting attorneys are not state, county, or township officers. They are constitutional officers. *State* v. *Tucker*, 46 Ind. 359.

The case of State v. Noble, 118 Ind. 350, 4 L. R. A. 101, fully establishes the independence of the judiciary. The legislature cannot extend or abridge the term of an office, the tenure of which is fixed by the constitution. *Howard* v. *State*, 10 Ind. 99.

In *State* v. *Johnston*, 101 Ind. 223, which was also an information in the nature of a quo warranto filed by the appellant's relator, Howard, against the appellee, it is decided by the court that 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. This ruling is upon the theory that it is declared and ordained otherwise in section 9 of article 7 of the State Constitution, section 169, *supra*.

In *Hoke* v. *Henderson* (N.C.) 25 Am. Dec. 704, *note* 1, it is said: "It is without the power of the legislature to indirectly abolish the office by adding the circuit of the incumbent to another then existing, and this even if it be within the power of the legislature to create new or alter old circuits, for that power must be so exercised as to leave the incumbent his office." That the framers of the constitution intended that there should be no abridgment of the term of office as fixed by fundamental law, is indicated also by section 176, Rev. Stat. 1881, as follows: "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state other than a judicial office." This section appears, in terms, to guarantee to a judicial officer his term as fixed by the constitution. *People* v. *Bull*, 46 N. Y. 57 Am. Rep. 302; *People* v. *McKinney*, 52 N. Y. 374, 378.

"But if the constitution provides for the duration of an office, the legislature has no power, even for the purpose of changing the beginning of the term, to alter its duration. Where the constitution has created an office and fixed its term, and has also declared the grounds and mode for removal of an incumbent before the expiration of his term, the legislature has no power to remove or suspend the officer for any other reason or in any other mode." 7 Lawson, Rights, Rem. & Pr. p. 5970, par. 3797.

Judges of circuit courts can anly be removed from office by the ordained constitutional provisions. *Lowe* v. *Com.* 3 Met. (Ky.) 237.

The constitutional provision in respect to the terms and tenure of office (except as to duration or length of terms) and commissions of judges and the power of the legislature to create new judicial districts are substantially the same in Pennsylvania as in this state. The constitutional provision in the former state was construed in Com. v. Gamble, 52 Pa. 343. In the opinion, People vs. Dubois, 23 Ill. 547, is cited, in which the supreme court of Illinois holds that although the creation of new judicial districts was expressly authorized by the constitution, yet no new districts could be created by which the judge in commission could be deprived of a right to exercise the functions of his office during the continuance of his commission. The court says: "The question is, can the legislature expel the circuit judge from his office by creating a new district taking from him the territory which constituted his district? The bare reading of the constitution must convince every one that it was intended to prohibit such a proceeding." See also *State* v. *Messmore*, 14 Wis. 163.

In *Com.* v. *Gamble*, *supra*, the following propositions are established: "A judge having been elected and commissioned, is by the constitution to continue in office ten years, if he shall behave himself well; its duration is assured to him, subject to be determined only by death, resignation, or breach of condition. Such breach cannot be determined by the legislature, but only on trial by the senate on impeachment, or, in case the breach amounted to total disqualification, perhaps by address of two thirds of each branch of the legislature. A legislative act which empinges on the tenure of judges is invalid. The power and jurisdiction of a judge constitute the office, are of the essence of it, and inseparable from it. The grant of power is incapable of any limitation but that attached to it. The aggregate amount of the duties of a judge in any district may be diminished by the division of his district. Constitutional grants imply a prohibition of any limitation or restriction by legislative authority."

In the last-named case, the reasoning is so clear and strong that we copy the following extracts therefrom: "The Pennsylvania legislature established the twenty-ninth judicial district by the Act of the 28th of February, 1868, under which James Gamble was elected and commissioned president judge of the district. By an act passed March 16, 1869, the former act was repealed and the district was abolished . . . . The powers, authority, and jurisdiction of an office are inseparable from it. The legislature may diminish the aggregate amount of the duties of the judge but must leave the authority and jurisdiction pertaining to the office intact . . . . I see not how, for another reason, that the commission of a president judge could exist after the total abolition of his district. Every judge is elected in and for a district, defined and fixed by law, and then he is commissioned, and is required by the constitution to reside within the district. It seems to me it would be a logical conclusion to hold that, if no district exists to which the judge would be bound to reside, that there could not exist a commission for any purpose. This I think would be the inevitable deduction from such premises, and it would therefore follow, that if the legislature could blot out a district, it could limit the duration of the commission granted to a less period than ten years, if it might so choose. That it cannot shorten the tenure of the office of a judge, as fixed by the constitution, is certain and this ought to establish that it can pass no act to do by indirection that which may not be done directly." "Notwithstanding the constitutional provisions referred to, the legislature has not only attempted, by the act of the assembly in question, to expel *Judge* Gamble from his district, but, in fact, has appointed other judges to hold the courts therein, who were neither elected nor commissioned for that purpose. The legislature has, undeniably, by this act of assembly, assumed the power of appointment and removal of the judge for the district. The act displaces *Judge* Gamble as the president judge, and appoints Judge White and his law associate to hold the court therein. If such a thing can be done in one district, it can be done in all, and thus not only would the independence of the judiciary be destroyed, but the judiciary as a coordinate branch of the government be essentially annihilated."

Applying this reasoning and these fundamental principles to the case under consideration we do not see how the constitutionality of the Act of March 4, 1893, can be upheld, as much as we may desire to do so, it being in the interest of economy and retrenchment in public expeditures. But it is enough for this case to say that it was not in force to abolish the fifth judicial circuit, not being abolished by the act, is not attached to and made a part of the fourth judicial circuit. The provisions of the Act of March 4, 1893, changing the terms of court and the times of holding the

same in the counties of Clark and Jefferson are so interwoven with and dependent upon the other provisions therein that they do not have the effect of changing the terms of court or the times of holding the same, as provided by law prior to March 4, 1893. In other words, the terms of court and times of holding the same as fixed by the act in question were not intended for the counties of Clark and Jefferson as constituting separate judicial circuits; but were intended for them when both these counties constituted the fourth judicial circuit as provided by the act.

Judgment affirmed.

III

STATE V. MABRY
Supreme Court of Tennessee, Nov. 20, 1943
(178 S.W. 2d 379)

1. CONSTITUTIONAL LAW; ACT PURPORTING TO ABOLISH OFFICE OF COUNTY JUDGE INVALID. — Private Act purporting to abolish the office of County Judge by repealing the private act creating the court and undertaking to create and establish a new county court of Clay County and naming a chairman thereof was invalid as an attempt to defeat the right of the judge thereto elected and holding office in accordance with the existing law.

2. IBID.; A JUDGE CANNOT BE LEGISLATED OUT OF OFFICE. — We cannot close our eyes to the palpable effort to legislate the relator Bailey out of office and substitute in his place and stead another person who is designated in another private act to perform same official duties. Chapter 53 of the Private Acts of 1943 purports to abolish the office of County Judge by repealing the act that created it. Eight days after the repealing act was approved by the Governor the Re-Districting Act was passed in which defendant Mabry was named as "Chairman of the County Court." The duties of this office were identical with that of county judge under the act which was sought to be repealed. The jurisdiction was the same in all respect.

3. IBID.; LEGISLATURE CANNOT REMOVE A JUDGE BY ABOLISHING THE OFFICE. — The legislature cannot remove a county judge by abolishing the office and devolving the duties upon a chairman of the county court.

4. IBID.; DISTINCTION BETWEEN STATUTE INEFFECTIVE TO REMOVE A JUDGE FROM OFFICE AND STATUTES THAT ACCOMPLISH REMOVAL BY ABOLISHING THE TRIBUNAL. — The distinction between statutes ineffective to remove a judge from office, and statutes that accomplish removal by abolishing the tribunal and transferring its business to another was made clear by Mr. Justice Wilkes in Judges' Cases, 102 Tenn. 509, 560, 53 S.W. 134, 146, 46 L.R.A. 567.

D E C I S I O N

NEIL, *Justice.*

The relator J. B. Bailey was regularly elected to the office of County Judge of Clay County at the general election in August, 1942, for a term of eight years. A certificate of election was accordingly issued to him by the County Election Commissioners. He qualified by giving bond and taking the oath of office. No question is made as to his qualifications. The office to which relator was elected and now holds was created by the General Assembly of this state under Chapter 145 of the Private Acts of 1903. The act prescribed the duties and the jurisdiction of said county judge and fixed the salary of the incumbent. It appears that the term of office of relator will not expire until September 1, 1950.

The Legislature in January, 1943, passed an act, being Chapter 53 of the Private Acts of 1943, which purports to repeal Chapter 145 of the Private Acts of 1903 and to abolish the office of County Judge of Clay County. At the same session of said Legislature there was enacted Chapter 283 of the Private Acts of 1943, called the Re-Districting Act, which undertook to abolish the County Court of Clay County and to create and establish a new County Court for said county. The act named the defendant C. J. Mabry as chairman of said court.

The original bill in this case was filed by the relator attacking the constitutionality of the 1943 act upon the ground that said act was unconstitutional and void as it violated certain provisions of the Constitution of this state. The original bill was filed against defendant C. J. Mabry. The prayers of the bill were that Chapter 53 of the Private Acts of 1943 be declared unconstitutional and void; that an injunction be immediately issued enjoining the defendant from acting or interfering with complainant in the performance of his official duties as County Judge of said county; that at the hearing the injunction be made perpetual.

The defendant filed a demurrer to the bill upon the following grounds: (1) that chapter 53 of the Private Acts of 1943 was a valid and constitutional act and abolished the office of County Judge, now held by the complainant; (2) that the Re-Districting Act, Chapter 283 of the Private Acts of 1943, abolished the County Court of Clay County and created an established a new county court for said county, and named the defendant as chairman of said court in the bill; and that therefore the office of county judge was abolished and a new office of County Chairman was created: (3) that because of the two acts, viz., chapter 53 and chapter 283, the complainant had no right to maintain this suit and no right to restrain the defendant from acting as County Chairman of Clay County.

The cause was heard before the Chancellor, at chambers, by agreement of the parties, upon the demurrer of defendant and motion to hear same and dissolve the injunction therefore issued upon the fiat of the Chancellor. The Chancellor took the case under advisement and shortly thereafter overruled all the grounds of the demurrer, holding that chapter 53 of the Private Acts of 1943 was unconstitutional and void, and declined to dissolve the injunction. He granted a discretionary appeal from the decree.

The defendant duly perfected his appeal and has assigned the following errors:

(1) The Chancellor erred in overruling the first ground of defendant's demurrer, which is as follows:

"The bill shows on its face that Chapter 53 of the Private Acts of Tennessee of 1943, repealing Chapter 145 of the Private Acts of Tennessee of 1903, is a valid and constitutional enactment, and that the effect of said chapter 53 of the Private Acts of 1943 is to abolish the office of County Judge in Clay County, so that it results that the relator can no longer hold said office which is now non-existent."

(2) The chancellor erred in overruling the second ground of the defendant's demurrer, which is as follows:

"The bill shows on its face that Chapter 283 of the Private Acts of 1943, which redistricted Clay County, created and established a new County Court in Clay County, named a County Chairman to preside over said County Court to perform and discharge the duties imposed upon a County Chairman by the general law until the next regular meeting of the County Court, is a valid and constitutional enactment repealing by its express terms all laws or parts of laws in conflict therewith; and also repealing by implication the Act creating the office of County Judge of Clay County, Tennessee; so that it results that the relator under the terms and provisions of said Act is no longer the County Judge of Clay County in that a new County Court for Clay County has been created to be presided over by a County Chairman."

(3) The Chancellor erred in overruling the third ground of