

OFFICIAL OPINION NO. 35

May 11, 1953.

Mr. R. R. Wickersham, Examiner,
State Board of Accounts,
Room 304, State House,
Indianapolis, Indiana.

Dear Sir:

I have your request for an official opinion in which you ask the following questions:

"1. What amount of salary will the prosecuting attorney, serving Spencer and Perry Circuit Courts, receive on and after May 1, 1953?

"2. Will such prosecuting attorney be paid from funds of Spencer and Perry Counties respectively pursuant to the provisions of Sec. 5, Ch. 6, Acts 1953, or

"3. Will such prosecuting attorney receive the salary provided by Sec. 4 or Sec. 6, Ch. 270, Acts 1953 to be paid from state funds according to the population of the judicial circuit?"

In order to answer your questions it is first necessary to determine the effectiveness of Chapter 6 of the Acts of 1953. The pertinent parts of that Act read as follows:

"SECTION 1. The County of Perry shall be and constitute the seventieth judicial circuit of the State of Indiana, and the County of Spencer shall be and constitute the eighty-fourth judicial circuit of the State of Indiana."

"SEC. 3. * * * the first term of court in the eighty-fourth judicial circuit after the passage of this act shall commence on the first Monday following the taking effect of this act, and the organization of said Court, * * *."

"SEC. 4. Upon the taking effect of this act, it is hereby declared that there is a vacancy in the office of the judge of the eighty-fourth judicial circuit, and the governor shall forthwith appoint and commission a

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judge for the eighty-fourth judicial circuit, as created by this act, to hold office until the next general election and until his successor is elected and qualified. The present judge of the seventieth judicial circuit heretofore composed of the counties of Spencer and Perry shall be judge of the seventieth judicial circuit as defined by this act."

"SEC. 5. Insofar as this act shall affect the prosecuting attorney for the seventieth judicial circuit, heretofore composed of Spencer and Perry counties, this act shall become and be effective from and after the first day of January, 1955, and until such time and until his successors are elected and qualified, the present prosecuting attorney for the seventieth judicial circuit as heretofore composed shall continue to serve as such prosecuting attorney for the counties of Spencer and Perry, and shall be paid the salaries for said counties and mileage as now provided by law."

"SEC. 7. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage."

There are several provisions of the Constitution of Indiana which affect this question:

Art. VII, Section 8:

"The Circuit Courts shall each consist of one Judge, and shall have such civil and criminal jurisdiction as may be prescribed by law."

Art. VII, Section 9:

"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 the Circuit, and shall hold his office for the term of six years, if he so long behave well."

Art. VII, Section 11, as amended by the action of the 86th General Assembly, Chapter 298 of the Acts of 1949 (S. J. R. 4) and the action of the 87th General Assembly, Chapter 343 of

the Acts of 1951 (H. J. R. 6) and as ratified by a majority of the electors of the State of Indiana in the General Election of 1952:

“There shall be elected in each judicial circuit by the voters thereof a prosecuting attorney, who shall hold his office for four years, and whose term of office shall begin on the first day of January next succeeding his election. The election of prosecuting attorneys under this section shall be held at the time of holding the general election in the year 1954 and each four years thereafter: Provided, That any such officer whose term is abridged by virtue of this section shall continue to serve until January 1, 1959.”

Art. VII, Section 13:

“The Judges of the Supreme Court and Circuit Courts shall, at stated times, receive a compensation, which shall not be diminished during their continuance in office.”

You will note from these provisions that there is specific authority to create new Judicial Circuits. In this regard it was held soon after the adoption of our present Constitution that this could be done during the term of incumbent officers and that there was no necessity to wait for the expiration of the term of an officer before dividing a circuit which he served.

See *Stocking v. The State* (1855), 7 Ind. 326, 328 in which it was said:

“The position taken is, that the subdivision of the state into circuits can be made only every six years; that no division can be made or new circuits created at any intermediate time. There is nothing in the section itself requiring such a construction. The words ‘from time to time’ do not import any particular period. Certainly these words will admit, and the common sense of the case would seem to require, that the legislature might create new circuits from ‘time to time’, as in their opinion the exigencies of business might require. Nor is it objectionable as a local law. It is not one of those enumerated in the constitution, on which local

legislation is inhibited. Section 22, article 4. If objectionable at all, it must come under the general provision in the next session, that all laws should be general, whenever a general law could be made applicable. Section 23, article 4. This does not seem to us such a case; and even if we doubted, we should be bound to throw the benefit of the doubt in favor of the constitutionality of the law. *Maize v. The State*, 4 Ind. R. 342.

“It is objected that the judge who presided was not properly the judge of that circuit, because appointed by the governor instead of being elected by the people. The objection is not well taken. The act creating the circuit was declared in force from its passage, as a case of emergency. Laws of 1855, p. 69. This it was competent for the legislature to do. Section 28, article 4. We lay no stress on the declaration of the legislature that there was a vacancy in the office of circuit judge of the new circuit. If there was a vacancy, it existed independent of that declaration. If there was no vacancy, that body could not create one by a declaratory enactment. The vacancy flowed as a natural consequence of their doing what they had a right to do—to create a new circuit. There is no technical nor peculiar meaning to the word ‘vacant’, as used in the constitution. It means empty, unoccupied; as applied to an office, without an incumbent. There is no basis for the distinction urged, that it applies only to offices vacated by death, resignation, or otherwise. An existing office, without an incumbent, is vacant, whether it be a new or an old one. A new house is as vacant as one tenanted for years, which was abandoned yesterday. We must take the words in their plain, usual sense. 2 R. S., p. 339, *Id.* pp. 223, 341. The emergency which created the office, would imply that the vacancy in the office of judge in the new circuit should be filled immediately. The 18th section, article 5, provides that the governor shall, by appointment, fill a vacancy in the office of judge of any Court. We think this appointment well made under that section.”

Similarly in the case of *State ex rel. Gibson v. Friedley* (1893), 135 Ind. 119, 131, 34 N. E. 872 it was said:

“In State *ex rel.* 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 can not, 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.*” (Our emphasis)

Furthermore in regard to the salary of a judge it has been held that no particular wording is required in the statute but the Constitution itself will operate to prevent a decrease in the circuit court judge’s compensation during his term. See 1951 O. A. G. 21, Official Opinion No. 8.

In regard to the question of the effect on a prosecutor’s salary of a division of the circuit in the case of State *ex rel.* Wadsworth v. Wright (1936), 211 Ind. 41, 5 N. E. (2d) 504 it was said:

“The salary of the prosecuting attorney is reduced to the extent that his duties and geographical jurisdiction is reduced. He retains the salary which the law provides shall be paid to him from Jennings and Scott counties; he relinquishes the salary from Ripley county, together with the duties of acting as prosecuting attorney in that county. The Constitution does not forbid this reduction in salary and duties: * * *.”

The question presented by Chapter 6 of the Acts of 1953 is when is the 70th circuit, composed of Perry and Spencer Counties divided, if at all? The provisions quoted from Section 3 make it clear that the legislature intended that the 84th Judicial Circuit should commence immediately on the passage of the act, while Section 5 makes it equally as clear that in regard to the prosecuting attorney there shall be no 84th Judicial

Circuit until January 1, 1955. Either there is one circuit or two circuits. If there is one circuit, the provision for two judges is in contravention to Article VII, Section 9 of the Constitution which provides there should be a single judge in each circuit. If there are two circuits, Section 5 is in violation of Article VII which provides that there should be a prosecuting attorney in each Judicial Circuit, or at least the question is presented whether or not a single individual can serve as prosecutor for two separate and distinct circuits.

In the case of *State ex rel. Wadsworth v. Wright, supra*, our Supreme Court, in speaking of a statute similar to the one here involved, said:

“It is well settled that Judges and prosecuting attorneys may serve the constitutional term for which they are elected, and that the legislature cannot, by abolishing or changing a circuit, remove or legislate such officers from office prior to the expiration of their terms. * * *”

In the statute under consideration in the above case it was expressly provided that the judge and prosecuting attorney who had been elected and qualified for the 6th Judicial Circuit, should continue as the judge and prosecuting attorney of that circuit as redefined.

It should be noted that the provisions of Chapter 6 of the Acts of 1953 provide that the present judge of the 70th Judicial Circuit as now composed shall be the judge of the 70th Judicial Circuit as redefined by this act. Section 5 also provides that in effect the prosecutor of the former 70th Judicial Circuit shall in effect serve as prosecutor of the newly created 70th circuit as well as the newly created 84th. This in effect attempts to delay the operation of Chapter 6 of the Acts of 1953, so far as the duties of prosecutor are concerned until 1955. If the legislature creates a new judicial circuit, which is permitted by the Constitution, such judicial circuit once constituted shall be a judicial circuit within the meaning of the Constitution and shall be governed by the rules applicable thereto.

It should be noted that in effect this act creates two distinct lucrative offices, that is the office of prosecuting attorney in the 70th Judicial Circuit and the office of prosecuting attorney

in the 84th Judicial Circuit. If the prosecuting attorney of the now constituted 70th Judicial Circuit serves in all counties now composing the 70th Judicial Circuit which by the terms of this act have been made into two distinct judicial circuits, then he would be holding two lucrative offices within the constitutional prohibition of Article II, Section 9.

Thus it clearly appears that the legislative intent was to do something prohibited by the Constitution. It is therefore my opinion that Sec. 5 of House Enrolled Act No. 55, which appears as Chapter 6 of the Acts of 1953, is in violation of the Constitution and void.

However, "If the unconstitutional portions of a statute can be stricken out and still leave a complete statute, the unconstitutional portions must be regarded eliminated and the remainder of the statute must be enforced," *Taggart, Auditor v. Claypool* (1896), 145 Ind. 590, 594, 44 N. E. 18, and "Where the legislature attempts to do several things one of which is invalid it may be discarded if the remainder of the Act is workable and in no way dependent upon the invalid portion," *Ettinger v. Studevaut* (1941), 219 Ind. 406, 38 N. E. (2d) 1000.

The authorities heretofore cited demonstrate that a prosecutor cannot be deprived of his circuit, *State ex rel. v. Johnston* (1884), 101 Ind. 223, although his circuit may be reduced, *State ex rel. Wadsworth v. Wright* (1936), 211 Ind. 41, 5 N. E. (2d) 504, and that a vacancy in such an office may exist regardless of a declaration by the legislature to that effect when a new circuit is created. The vacancy flows as a natural result of the legislature doing what it had a right to do—to create a new circuit, *Stocking v. The State* (1855), 7 Ind. 326.

I am therefore of the further opinion that the excision of Section 5 from the above Act does no violence to the Act and that the remainder is workable, complete and in no way dependent upon the invalid portion. It follows that the remainder of the Act is valid. The effect of the Act therefore is to create two judicial circuits, each with its own Judge, the Act remaining silent in respect to the prosecutors thereof.

Therefore the incumbent prosecutor of the 70th Judicial Circuit will continue in office for the remainder of his term

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as prosecutor of the, now reduced, 70th Judicial Circuit consisting only of Perry County.

This leaves a vacancy in the office of the prosecuting attorney of the 84th Judicial Circuit and the Governor should appoint a prosecutor to fill this vacancy; Constitution of Indiana, Article V, Section 18.

It also follows that if Section 5 of the above named Act is void said Act contains no provisions for the salaries of the prosecutors of the 70th and 84th Judicial Circuits. Therefore the salary of each prosecutor would be fixed, after May 1, 1953, on the basis of the population of the circuit under House Enrolled Act 263 which is Chapter 270 of the Acts of 1953.

OFFICIAL OPINION NO. 36

May 14, 1953.

Lee Guyant, Secretary,
Indiana State Board of Registration
for Architects,
4th floor, State House,
Indianapolis, Indiana.

Dear Madam:

I have your request for an official opinion to which you attach correspondence raising the question of whether or not a person who passes the examination to be licensed as an architect may delay receiving that license for an extended period of time.

Chapter 62 of the Acts of 1929 provides for licensing of architects and is found in Burns' Indiana Statutes Annotated (1951 Repl.) Section 63-101 *et seq.* Chapter 6 of that act concerns applications to take the architectural examination and reads as follows:

“Any person desiring to engage or continue in the practice of architecture, in this state, shall apply to the board for a certificate of registration authorizing such person so to do, and shall submit evidence to the board that he is qualified to engage or continue in the practice of architecture, in compliance with the requirements of