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THE PEOPLE EX REL. TUCKER v. RUCKER.**No Number in Original.****Supreme Court of Colorado***5 Colo. 455; 1880 Colo. LEXIS 89***December, 1880 [December Term]****PRIOR HISTORY:** [**1] QUO warranto.**CASE SUMMARY:**

PROCEDURAL POSTURE: Relator citizen filed a petition in the nature of a quo warranto to affirm the appointment of a criminal judge to the newly established criminal court in Lake County, Colorado. Respondent, the judge appointed to the position by the county's board of commissioners, demurred to the petition.

OVERVIEW: Respondent judge demurred to the petition on the ground that under the constitution and laws of Colorado, the appointment of a criminal judge by the governor was null and void; and because the board of county commissioners of Lake County, Colorado had full power and authority to appoint respondent to said office. The court was unable to find either express terms or necessary implication to support the proposition that all judicial officers were to be elected, and held that the office of criminal judge at issue came within the provisions of *Colo. Const. art. VI, § 26*. The court further held that because there was a vacancy and the office was judicial, *Colo. Const. art. VI, § 29* was applicable,

providing that the vacancy should be filled by the county commissioners of the county where the vacancy occurred. In so far as the act of assembly provided that vacancies in the office of judge of the criminal court at issue were to be filled by the governor, the court concluded that it was in conflict with the provisions of the constitution, and that the constitution had to be enforced as the paramount law.

OUTCOME: The court sustained the demurrer and entered judgment for the judge appointed by the county board.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > The Judiciary > Jurisdiction > Concurrent Jurisdiction

Governments > Courts > Creation & Organization

[HN1] *Colo. Const. art. VI, § 24* provides that the

General Assembly shall have power to create and establish a criminal court in each county having a population exceeding 15,000, which court may have concurrent jurisdiction with the district court in all criminal cases not capital; the terms of such courts to be as provided by law.

***Governments > Legislation > Enactment
Governments > State & Territorial Governments > Legislatures***

[HN2] When the people, by their constitution, created the Colorado General Assembly and declared that the legislative power should be vested therein, they conferred the full and complete power as it existed and rested in themselves, subject only to the restraints and limitations of their own constitution and the Constitution of the United States.

***Civil Procedure > Appeals > Standards of Review > De Novo Review
Governments > State & Territorial Governments > Legislatures***

[HN3] The people, in framing the Constitution, committed to the legislature the whole lawmaking power of the state, which they did not expressly or impliedly withhold. Plenary powers in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a particular statute is constitutional, it is for those who question its validity to show that it is forbidden.

***Governments > Legislation > Enactment
Governments > State & Territorial Governments > Legislatures***

[HN4] Every positive direction contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of the provision, the frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance; but, independently of these restraints, expressed or implied, every subject within the scope of civil government is liable to be dealt with by the legislature.

***Constitutional Law > Separation of Powers
Governments > Legislation > Enactment
Governments > State & Territorial Governments > Legislatures***

[HN5] The judicial department and the legislature are co-ordinate departments of the government, of equal dignity. Each is alike superior in the exercise of its proper function. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and the Constitution must be enforced as the paramount law. It is nevertheless apparent in such a case that the decision of a co-ordinate department is indirectly overruled. Accordingly, courts have uniformly held that while the duty in a proper case can not be declined, the power is to be exercised with caution and reluctance.

***Constitutional Law > State Constitutional Operation
Governments > Legislation > Interpretation***

[HN6] The leading rule in regard to the judicial construction of constitutional provisions is a wise and sound one, which declares that in cases of doubt, every possible presumption and intendment will be made in favor of the constitutionality of the act in question, and that the courts will only interfere in case of clear and unquestioned violation of the fundamental law. It has been repeatedly said that the presumption is that every state statute, the objects and provisions of which are among the acknowledged powers of legislation, is valid and constitutional, and such presumption is not to be overcome unless the contrary is clearly demonstrated.

***Governments > Courts > Judges
Governments > Local Governments > Elections***

[HN7] Colo. Const. art. VI, § 29, provides that Judges of the Supreme, district and county courts appointed under the provisions of this section, to fill vacancies, shall hold office until the next general election, and until their successors elected thereat shall be duly qualified.

Governments > Courts > Creation & Organization

[HN8] *Colo. Const. art. VI, §§ 22 and 23*, establish county courts; provide for the election of a county judge in each county, who shall be judge of the county court; declare them courts of record, and prescribe their jurisdiction under this distinctive name, title and designation. This distinguishes it as "the county court" of

the constitution, and fixes with certainty the courts intended in Colo. Const. art. VI, § 29.

Governments > Legislation > Interpretation

[HN9] Courts are not at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the constitution, but not expressed in words.

Governments > Courts > Judges

Governments > Local Governments > Administrative Boards

[HN10] Colo. Const. art. VI, § 29, provides that vacancies occurring in any of the offices provided for in this article shall be filled by appointment, as follows: Of judges of the Supreme and district courts, by the governor; of district attorneys, by the judge of the court of the district for which such attorney was elected; and of all other judicial officers by the board of county commissioners of the county wherein the vacancy occurs.

Governments > Legislation > Interpretation

[HN11] The words of the constitution must be taken in their ordinary and general acceptance.

Governments > State & Territorial Governments > Employees & Officials

[HN12] The term "vacancy" may apply to an existing office without an incumbent, although it has never before been filled.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Interpretation

[HN13] Where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separate, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If

when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being enforced in accordance with the apparent legislative intent, wholly independent of that which is rejected, it will be sustained.

COUNSEL: Messrs. CLINTON REED, A. S. WESTON & J. B. BISSELL, for relator.

Messrs. C. S. THOMAS, M. L. RICE & H. B. JOHNSON, for respondent.

JUDGES: Before ELBERT, C.J.

OPINION BY: ELBERT

OPINION

[*456] ELBERT, C.J. This is an information in the nature of a *quo warranto*, and is submitted on demurrer to the petition. The controversy arises under an act passed by the last General Assembly creating and establishing a criminal court in Lake county.

Warrant for the act is found in Sec. 24, Art. VI of the Constitution: [HN1] "The General Assembly shall have power to create and establish a criminal court in each county having a population exceeding fifteen thousand, which court may have concurrent jurisdiction with the district court in all criminal cases not capital; the terms of such courts to be as provided by law."

The first section of the act establishes in the county of Lake a criminal court, to be called "the criminal court of Lake county."

The second section provides that "The judge of said court shall possess the qualifications prescribed by law for judges of the district court; that he shall be appointed by the governor by and with the consent and advice of the Senate; [**2] also that all vacancies occurring during the recess of the Senate may be filled by appointment by the governor."

The act was approved March 4, 1881, after the adjournment of the Assembly. On the same day the governor appointed Henry A. Day judge of the court, who qualified upon the 5th of March. Thereafter, and on the 7th of March, the county [*457] commissioners of Lake county, appointed A. W. Rucker, the respondent, judge of said court, who also qualified.

To the petition showing these facts, two grounds of demurrer are stated:

First. That under the constitution and laws of the State, the appointment of criminal judge by the governor was null and void.

Second. That under and by virtue of the constitution and laws of the State, the board of county commissioners of the county of Lake had full power and authority to appoint defendant to said office.

This calls in question the constitutionality of the act of the General Assembly, which, the respondent claims, violates two distinct and separate constitutional provisions, to wit: Sec 29, Art. VI (as amended), and Sec. 9, Art. XIV. They will be given in full when we come to consider them.

Before entering into the inquiry [**3] as to the constitutionality of the act in question, a recurrence to, and clear understanding of, two leading propositions will aid in clearing the way to correct conclusions.

(1) Touching the powers of the General Assembly, it must be remembered that, [HN2] when the people by their constitution created that body, and declared that the legislative power should be vested therein, they conferred the full and complete power as it existed and rested in themselves, subject only to the restraints and limitations of their own constitution and the Constitution of the United States. Cooley Con. Lim. 87.

Chief Justice DENIO says: [HN3] "The people, in framing the Constitution, committed to the legislature the whole lawmaking power of the State, which they did not expressly or impliedly withhold. Plenary powers in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a particular statute is constitutional, it is for those who question its validity to show that it is forbidden. [*458] I do not mean that the power must be expressly inhibited. * * *

[HN4] Every positive direction contains an implication [**4] against everything contrary to it, or which would frustrate or disappoint the purpose of the provision, the frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority

as strong as though a negative was expressed in each instance; but, independently of these restraints, expressed or implied, every subject within the scope of civil government is liable to be dealt with by the legislature." *People v. Draper*, 15 N.Y. 543.

(2) Touching the relation which the judicial department sustains to the legislative, it must be remembered that [HN5] they are co-ordinate departments of the government, of equal dignity. Each is alike superior in the exercise of its proper function. "If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and the Constitution must be enforced as the paramount law." (Cooley Con. Lim. 160.) It is nevertheless apparent in such a case, that the decision of a co-ordinate department is indirectly overruled. [**5] Accordingly, courts have uniformly held, that while the duty in a proper case can not be declined, the power is to be exercised with caution and reluctance.

Mr. Sedgewick thus states the doctrine: [HN6] "The leading rule in regard to the judicial construction of constitutional provisions is a wise and sound one, which declares that in cases of doubt, every possible presumption and intendment will be made in favor of the constitutionality of the act in question, and that the courts will only interfere in case of clear and unquestioned violation of the fundamental law. It has been repeatedly said that the presumption is that every State statute, the objects and provisions of which are among the acknowledged powers of legislation, is valid and constitutional, and such presumption [*459] is not to be overcome unless the contrary is clearly demonstrated." Sedgewick Stat. and Com. Law, 409.

These well-settled propositions of legislative power and judicial practice will be found to simplify the inquiry as we advance.

Counsel for the respondent, in their argument, challenge the constitutionality of the act in question upon two grounds: (1) That under the constitution the office of criminal [**6] judge must be elective, not appointive. (2) That in either case the power to fill vacancies in the office could not be vested in the executive, as by the terms of the constitution it is vested in the board of county commissioners.

It would, perhaps, be sufficient for the purposes of

this case to determine the last point only. In view, however, of the public interest, as well as the interests of the parties, we consider both. Less than this might result in the necessity for another action.

Whether judicial positions should be filled by election or appointment, has long been a matter of much controversy. It is a question upon which great contrariety of opinion exists, and upon each side of which the ablest pens have been employed.

It would be difficult to believe that any convention of delegates convened for the purpose of framing a constitution for a new State would adopt either the elective or appointive system without a contest. Any adoption of one or the other system could scarcely be casual or accidental, but the result of deliberation and debate.

In this view counsel for the respondents presented a most able and ingenious argument, to the effect that there is sufficient [**7] in the constitution to justify the inference of a declaration by the people in favor of an exclusively elective judiciary.

To ascertain the will of the people in respect to their judiciary, we turn to that subdivision of their constitution. There, if anywhere, it is fair to expect to find it declared.

[*460] It is not contended that there is any provision in express terms declaring all judicial officers elective.

Judges of the Supreme Court, judges of the district courts, judges of the county courts, district attorneys and justices of the peace, are all made elective in express terms, but here the constitution ceases to speak upon the subject. Criminal courts and police magistrates are provided for, but whether they are to be elected or appointed the constitution does not say, unless by implication.

The last clause in section 29 of this article is as follows: [HN7] "Judges of the Supreme, district and county courts appointed under the provisions of this section, to fill vacancies, shall hold office until the next general election, and until their successors elected thereat shall be duly qualified."

Had the Constitution failed to provide elsewhere for the election or appointment [**8] of the Supreme,

district and county judges, there would have been found in the language of this provision concerning vacancies, a necessary implication that they were to be elected. It would be a necessary implication, because the constitutional provision could only be operative by their being elected.

If the term "county courts," as used in this provision, is to be regarded as a general term, including the criminal court as well as the county court, so-called, then this implication attaches to it, and it must be held as an elective office. We are satisfied, however, that the term "county court" as here used, was not intended to designate or include the criminal court. The criminal court may be in a certain sense a county court, but such is not its constitutional name.

Sections 22 and 23 of this article [HN8] establish county courts; provide for the election of a county judge in each county, who shall be judge of the county court; declare them courts of record, and prescribe their jurisdiction under this distinctive name, title and designation. This distinguishes it as "the county court" of the constitution, and fixes with certainty the courts intended in the 29th section. Having [**9] a distinct meaning, [*461] and designating a distinct court in sections 22 and 23, we cannot by any rule of interpretation assign it another meaning and make it include another court in section 29.

Counsel for respondent cite section 9, article XIV, in support of their proposition.

This article is entitled "counties," provides for the removal of county seats, the establishment of new courts, the election of county commissioners, clerk and recorder, sheriff, coroner, treasurer, superintendent of schools, county surveyor and assessor. It concerns officers which are peculiarly county officers, by reason of their connection with and administration of county affairs. Far removed from the article concerning "the judiciary," in section 9, of an article concerning "counties," concealed under the general term "county offices," counsel for the respondent discover the criminal court, and that it is elective. The rule that we stated at starting, "lays its axe at the roots" of this argument. Any implication that could be justly drawn from this article falls far short of that clear and necessary implication demanded by the rule. So, too, any implication drawn from what counsel call [**10] the "whole spirit of the Constitution," falls far short of the same imperative requirement.

It has been decided [HN9] that courts are not at liberty to declare an act void, because in their opinion it is opposed to a spirit supposed to pervade the constitution, but not expressed in words. *People v. Fisher*, 24 Wend. 220; *State v. Staten*, 6 Cald. 233; Cooley's Con. Lim. 171.

After a careful examination, we are unable to find either express terms or necessary implication to support the proposition that all judicial officers are to be elected. Both of these essentials are wanting; and in the absence of constitutional restraint under the rule laid down, the power of the General Assembly was plenary, to declare the office of criminal judge either elective or appointive, at their discretion. In this respect the act in question is free from constitutional objection.

In respect to the second objection made to the act, I do not [*462] understand counsel to question the power of the General Assembly to vest in the governor authority, with the advice and consent of the Senate, to fill the office of criminal judge originally. The question made involves alone the power to [**11] fill vacancies during the recess of the Senate.

The act provides that "The governor shall, immediately after this act takes effect, appoint, with the advice and consent of the Senate, a person possessing the necessary qualifications as judge of said court, and all vacancies in said office shall be filled in the same manner; provided that all vacancies occurring during the recess of the Senate, may be filled by appointment by the governor, but such appointment shall expire at the end of the next session of the Senate."

Section 29, article VI of the constitution, provides that [HN10] "vacancies occurring in any of the offices provided for in this article, shall be filled by appointment, as follows: Of judges of the Supreme and district courts, by the governor; of district attorneys, by the judge of the court of the district for which such attorney was elected; and of all other judicial officers by the board of county commissioners of the county wherein the vacancy occurs,"

Two questions arise: first, is the office of criminal judge provided for in the preceding sections of article VI? Second, was there a vacancy in the office at the date of the respective appointments by the governor [**12] and county commissioners?

Both points are contested.

By preceding sections of article VI, Supreme, district and county courts are created and established. They became existing courts upon the adoption of the constitution, with defined jurisdiction and power. Section 24 of the article declares that "The General Assembly shall have power to create and establish a criminal court," etc. Because the power to create and establish a criminal court is vested in the General Assembly instead of being created and established by the article, as are the other courts, it is contended that it is not "provided for."

[*463] [HN11] The words of the constitution must be taken in their ordinary and general acceptance, and it would be difficult to say that this section, in every plain and natural use of the phrase, did not provide for a criminal court.

We are asked to say that "provided for" means created or established, and that it includes only the courts created and established by the article. This would be substitution, not interpretation.

Upon examination, however, we find that the section interprets itself in this respect.

The first paragraph of the section declares in the same language [**13] that "all officers provided for in this article, excepting judges of the Supreme Court, shall respectively reside in the district, county, precinct, city or town for which they may be elected or appointed." It follows that the framers of this article regarded city and town officers as provided for by this article, otherwise they would not have declared where they should reside.

But an examination discloses that they are provided for in the same manner as the criminal courts, by a declaration that "The General Assembly shall have power to provide," etc. Sec. 26, Article VI.

The section thus incidentally clearly declares the sense in which its framers used the disputed words. We must accordingly hold that the office of criminal judge comes within the provisions of the section.

Turning to the second point, it will be found that the legal force of the term "vacancy" has been the subject of adjudications. Upon the point, whether there can be a vacancy before there has been an incumbent, the general

doctrine appears to be that [HN12] the term may apply to an existing office without an incumbent, although it has never before been filled. In the case of *Stocking v. The State*, 7 Ind. [**14] 326, the courts say: "The vacancy followed as a natural consequence of their (the General Assembly) doing what they had a right to do -- to create a new circuit. There is no technical nor peculiar meaning to [*464] 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."

In *Walsh v. Commonwealth*, 89 Penn. St. 419, the court say: "The result is that the word 'vacancy' aptly and fitly describes the condition of an office, where it is first created and has been filled by no incumbent. The need to strain and torture terms would lie in the opposite direction."

To the same effect are Clark No. , 5 Nev. 111; *State ex rel v. County Court*, 50 Mo. 317; *State v. Barcker*, 56 Mo. 7; Dillon Corp. 161; 33 Am. Rep. 777. There is some conflict of authority, [**15] but this appears to be the general and better doctrine.

A distinction however must be taken between the power to fill an office originally, and the power to fill a vacancy. *The People ex rel v. Langdon*, 8 Cal. 3. When a new office is created, a vacancy does not necessarily occur.

It was entirely competent for the General Assembly to create and establish a criminal court, and provide that the judge thereof should be appointed by the governor immediately or within a fixed time. Against this there is no constitutional inhibition. In such case, until the expiration of the time within which the executive was to exercise the appointing power, there would be no vacancy. Upon the expiration of the time fixed without action, a vacancy would immediately occur by reason of the failure to act. Under the act in question, the appointment was to be made "immediately after the act took effect, and with the advice and consent of the Senate." Immediately, would mean within a reasonable time, having reference to the act to be done. The "advice and consent of the Senate" being necessary, the hour of

the adjournment of [*465] that body would mark the extreme limit of time within [**16] which the appointment was to be made. Had the act been signed prior to the adjournment, and no appointment made, immediately upon adjournment there would have been a vacancy, by reason of the failure of the appointing power to exercise it. In this case, the bill not having been signed until after the adjournment, the governor was unable to act under the provision for filling the office, "with the advice and consent of the Senate." Upon approval the act took effect immediately; the time within which the executive was required to appoint had expired, and inability to act was followed by a vacancy, the same as in case of a failure to act.

There being a vacancy, and the office being judicial, all the conditions concurred that were necessary to make the 29th section of Article VI of the constitution, applicable, and it provided that the vacancy should be filled by the county commissioners of the county where the vacancy occurred. In so far as the act of assembly provides that vacancies in the office of judge of the criminal court of the county of Lake are to be filled by the governor, it is in conflict with the provisions of the constitution, and the constitution must be enforced as [**17] the paramount law.

While this is true, the entire act does not necessarily fail.

[HN13] "Where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separate, so that the first may stand though the last fall. The point is not, whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If when the unconstitutional [*466] portion is stricken out, that which remains is complete in itself, and capable of being enforced in accordance with the apparent legislative intent, wholly independent of that which is rejected, it will be sustained." Cooley's Con. Lim. 178.

The General Assembly had full power to create and establish [**18] the criminal court; to provide that the judge thereof should be appointed by the governor, with the advice and consent of the Senate; to fix his term at two years; and to provide that the term of the incumbent appointed to fill a vacancy should expire at the end of the next session of the Senate.

These can all be treated as separate and independent provisions, and remain unaffected by this decision.

That portion of the act deemed unconstitutional is fully supplied by the constitution, and with this exception, the act can be enforced in accordance with the legislative intent.

The demurrer is sustained, and judgment entered for the respondent.

Demurrer sustained.

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