

COURTS: Where Judge of Circuit Court dies, Judge of another Circuit Court cannot hold term of court in circuit where vacancy is.

July 26, 1938

7-27

Hon. Roy W. McGhee
Prosecuting Attorney
Wayne County
Greenville, Missouri



Dear Sir:

This will acknowledge receipt of yours of the 18th which reads as follows:

"This office and Hon. Robert I. Cope, judge of the 33rd circuit would appreciate an opinion from you regarding the holding of the regular August Term of court in Wayne County, Missouri.

"As you no doubt know, Hon. E. M. Dearing, judge of the 21st judicial circuit of which Wayne County is a part, died recently and the Governor has not seen fit to make an appointment or tell us when he will make the appointment, except to say that it will be after August 1.

"I talked to judge Cope today and he said that he would be glad to hold the term of court for us if he could legally do so and asked that I secure an opinion from you in that regard. Our court meets on August 1, but Judge Cope says that he cannot sit until August 8.

"Please give us your opinion as to whether under the circumstances Judge Cope has the authority to hold our term of court and outline the procedure."

There is no statute of this state which makes any provision for holding court in a circuit after the death of the judge of that circuit and before the appointment of his successor. However, Section 29, Article 6 of the Constitution of Missouri provides as follows:

"If there be a vacancy in the office of judge of any circuit, or if the judge be sick, absent, or from any cause unable to hold any term or part of term of court, in any county in his circuit, such term or part of term of court may be held by a judge of any other circuit; and at the request of the judge of any circuit, any term of court or part of term in his circuit may be held by the judge of any other circuit, and in all such cases, or in any case where the judge cannot preside, the General Assembly shall make such additional provision for holding court as may be found necessary."

The answer to your question, therefore, turns upon the effect of the first part of the foregoing constitutional provision. If that part of said constitutional provision is self enforcing, then the judge of another circuit can hold court during the vacancy caused by the death of the judge of another circuit.

Whether said part of the constitutional provision above mentioned is self-executing must be determined by well known rules of construction of constitutional provisions in that regard. The general rule as to determining whether constitutional provisions are self-executing has been stated in 12 C.J. 729 in the following language:

"Constitutional provisions are self-executing when there is a manifest intention

that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed."

Again the rule has been stated in 11 Am. Jur. 692 in the following language:

"Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action."

The courts of this state have laid down the rule for construction in this particular in the case of Sharp v. National Biscuit Co., 179 Mo., l.c. 563 in the following language:

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. (Cooley's Const. Lim. (7 Ed.), p. 121.)"

Our question then is, does the first part of the constitutional provision under discussion supply a rule by means of which the right given thereby may be enjoyed and exercised? That part of the constitutional provision grants the right or power to the circuit judge of another circuit to hold a term or part of a term of court in another circuit when there is a vacancy in the office of judge of such other circuit. However, that part of the constitutional provision does not set out any rule or method by means of which that right or power may be exercised. There are a large number of circuit judges in the State of Missouri. If one of such judges should die, which one of the other circuit judges of the state can exercise the power granted by said constitutional provision? Shall it be the judge of a next adjoining circuit, or could a circuit judge from a far distant corner of the state appear upon the scene and proceed to hold court in the circuit where the vacancy exists? Is it left merely to the discretion or willingness of the other judges as to whether one of them shall hold court in the circuit where the vacancy exists? Suppose several of the other circuit judges of the state should arrive at the circuit where the vacancy exists and insist upon their right to hold court in that circuit. In the latter case, which of the judges could actually hold the court?

We have suggested the foregoing questions to emphasize the fact that the constitutional provision does not set out any method by which the right granted can be enjoyed. That part of the constitutional provision evidently requires enabling legislation by the Legislature to put it into operation. It would be within the province of the Legislature to say in a case where a circuit judge dies how another circuit judge should be called in or designated to hold court in the circuit where the vacancy existed. The Legislature has not passed any such enabling legislation, and therefore, the power granted to other circuit judges in such cases cannot be exercised by them. In the case of *Cowart v. State*, 111 Pac. 672, the court was considering a constitutional provision of the State of Oklahoma which reads as follows:

"In the event any judge shall be disqualified for any reason from trying

any case in his district, the parties to such case may agree upon a judge pro tempore to try the same, and if such parties cannot agree, at the request of either party a judge pro tempore may be elected by the members of the bar of the district, present at such term. If no election for judge pro tempore shall be had, the Chief Justice of the state shall designate some other district judge to try such case."

In discussing said provision the court said, l.c. 674:

"In our opinion the holding of such an election necessitates the provision of some method of voting, of canvassing and tabulating the votes cast, and of declaring and recording the result; and the votes must be canvassed and the result determined and declared by some person or persons designated by law. Provision must be made for the time and place of holding the election, and the notice to be given thereof; and some one must be vested with authority to determine who is entitled to vote in such election. But the Constitution makes provision for none of these matters. It merely declares that at the request of either party a judge pro tempore may be elected. It does not provide the machinery or procedure for holding the election. It contains no provision for notice to the bar of any other person of the time and place of holding it; no provision insuring its fairness, regularity, and legality; no provision insuring the correct declaration of the result. No record is required to be made or kept, and no person is authorized or empowered to determine and declare the result. Without a requirement of notice that such an election is to be held and the time thereof, with no method of voting provided for, with no person

designated to conduct the election and to pass upon and determine the right of any person to vote therein, no one authorized to declare the result, no record required to be made, no minimum limit as to the number whose participation may constitute an election, no provision as to whether a mere plurality or a majority vote is required to elect, and no restrictions upon the right of the interested attorneys to participate therein, all sorts of fraud and wrongdoing could easily be perpetrated in an attempted election, and the appellate court could have no means of telling and no rule for determining whether the election was fairly, honestly, and legally conducted, and whether the person who presided as special judge in the trial was in fact elected. An unseemly scramble for advantage in the election might easily ensue; and one side or the other, by employing three or four attorneys, might by their votes control the election and place on the bench as special judge an unfit, incompetent, or partisan person. In our opinion, by every declared test, this provision is not self-executing. It grants the power and creates the right to elect a special judge, but it provides no means or procedure by which the power may be exercised or the right enforced or protected; and the provision of such means and procedure is necessary to give it effect."

By similar reasoning we think that the first part of Section 29, Article 6 of the Missouri Constitution grants a power and creates a right in other circuit judges of the state to hold court in a circuit where a vacancy exists, but it provides no means or procedure by which the power may be exercised or the right enforced. Therefore, such means and procedure must

be supplied by legislation before the constitutional grant of power can be exercised.

It is to be noted that the second part of the constitutional provision being considered provides that the judge of any circuit may call in the judge of another circuit to hold a term or part of term of court. That grants the power to such other circuit judges and also provides a means or procedure by which such power may be exercised. That part of the constitutional provision is therefore self-executing, and such was the holding of the court in the case of *State ex rel v. Higbee*, 43 S.W. (2d) 1.c. 827 in the following language:

"That part of the section authorizing circuit judges to hold court in other circuits under the circumstances mentioned, if requested to do so by the regular judge, is self-enforcing."

It is to be noted also that said constitutional provision provides that in any case where the judge cannot preside the General Assembly shall make such additional provision for holding court as may be found necessary. The Legislature has passed additional provisions to cover such cases as will be seen by reference to Sections 1942, 1943, 1948, 3649 and 3651, R. S. Mo. 1929. However, the Legislature has not seen fit to make any provision for the exercise by other circuit judges of the state of the right granted them by the first part of said constitutional amendment and in the absence of such enabling legislation there is no way by which this right can be exercised.

CONCLUSION

It is, therefore, the opinion of this office that in case of the death of a circuit judge, the judge of another

Hon. Roy W. McGhee

-8-

July 26, 1938

circuit of the state cannot hold court in the circuit of such deceased judge during the vacancy caused by the death of such judge.

Yours very truly

DARRY H. KAY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

HHK/w