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Constitutional Law--Power to Appoint Prosecuting Attorney

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RECENT CASE COMMENTS

CONSTITUTIONAL LAW — POWER TO APPOINT PROSECUTING ATTORNEY. — Upon the resignation of the incumbent prosecuting attorney, both the circuit court and county court appointed a successor. For a fifty-year period this power of appointment was vested by statute in the circuit court. In 1931, however, the power was transferred to the county court,¹ only to be re-vested in the former body of the legislature in 1933.² The petitioner, the circuit court appointee, brought both prohibition and mandamus proceedings against the county court. *Held*, the act authorizing the circuit court or judge to fill the vacancy is unconstitutional, and consequently the statute of 1931 empowering the county court to perform the appointing function remains in force. Petitions dismissed. *Poling v. Barbour County Court*.³

In view of the express constitutional mandate that "The Legislature shall not confer upon any court or judge, the power of appointment to office, further than the same is herein provided for",⁴ that part of the decision which declares unconstitutional the statute reposing that power in the circuit court seems unimpeachable. True, sound political economy may argue for the opposite result. But the voice of the fundamental law is more authoritative than the most urgent public policy, and where, as here, the language of the command is specific and reasonably unambiguous, the court has little choice other than to obey. Under this view, the present case is remarkable only because of the peculiar circumstance that a legislative enactment participated in by several of the constitutional fathers and administratively acquiesced in for fifty years⁵ is held violative of the constitution. Few of such cases may be found in the books. Uncontrovertibly, continued

answer.....(name plaintiffs).....in an action of.....
to the plaintiff's damage \$....., and have then and there this writ.

Witness,, Clerk of our Circuit Court, at the Court House of said County, on the.....day of....., 19....., and of the State the.....year.

....., Clerk.

Forms substantially similar to the one here submitted are now in current use in the following counties: Berkeley, Braxton, Brooke, Gilmer, Grant, Hampshire, Hancock, Hardy, Jefferson, Lewis, Marshall, McDowell, Mercer, Mineral, Morgan, Ohio, Preston, Raleigh, Tucker and Wirt.

¹ W. VA. REV. CODE (1931) c. 3, art. 10, § 10.

² W. Va. Legis. Acts 1st Ex. Ses. 1933, c. 51.

³ 132 S. E. 778 (W. Va. 1935).

⁴ W. VA. CONST. (1872) art. 6, § 40.

⁵ For history of this legislation, see opinion of the principal case, *supra* n. 3.

acquiescence in a contemporaneous legislative exposition of the constitution is entitled to weight in fixing its construction.⁶ The persuasiveness of contemporaneous legislative and subsequent administrative interpretation, however, decreases in direct proportion to the degree of language clarity of the pertinent constitutional provision.⁷ Although the constitutional word is but the imperfect vehicle of an idea, it must of necessity be accorded primary consideration in fixing the constitutional intent. Here, the language meaning seems reasonably plain.⁸ A rule, therefore, which is born of doubt and ambiguity, loses force in the presence of certainty.

That part of the decision which vests the appointing power in the county court⁹ under a previous statute is more difficult to sustain. It is arguable that the same considerations which impelled the court to declare the circuit court constitutionally incapacitated to appoint a prosecuting attorney apply here with equal force. The court leaps this hurdle, however, by restricting the interpretation of the word "court" to a primarily judicial tribunal. This construction gathers strength from the fact that at the time when the disputed constitutional provision was adopted the county court as well as the circuit court was seemingly essentially judicial. In consequence, it is not unreasonable to assume that judicial courts only were contemplated by the restriction. Subsequently, however, the county courts' functions became largely non-judicial.¹⁰ Arguably, therefore, that body is no longer within the constitutional limitation upon the appointing power of a "court".

⁶ *State Road Commission v. Kanawha County Court*, 112 W. Va. 98, 163 S. E. 815 (1932); *State v. Rocke*, 91 W. Va. 423, 113 S. E. 647 (1922); *State v. Kittle*, 87 W. Va. 526, 105 S. E. 775 (1921); *J. W. Hampton et al. Co. v. United States*, 276 U. S. 394, 48 S. Ct. 348 (1928); *Myers v. United States*, 272 U. S. 52, 47 S. Ct. 21 (1926).

⁷ *Bee v. City of Huntington*, 114 W. Va. 40, 171 S. E. 539 (1933); *Berry v. Fox*, 114 W. Va. 513, 172 S. E. 896 (1934); *Fairbanks v. United States*, 181 U. S. 283, 310, 21 S. Ct. 648 (1901).

⁸ Had the court desired to say that a prosecuting attorney was an officer of the court, the statute of 1933, *supra* n. 2, might have been upheld. *State v. Mounts*, 36 W. Va. 179, 184, 14 S. E. 407 (1892).

⁹ In applying the prior statute upon finding the attempted amendment unconstitutional, the court followed the uniform rule that previously existing statutes survive unconstitutional attempts to change them. It is interesting, however, to speculate upon the courts' action had there not been the brief interlude beginning in 1931 when the appointing power was conferred by statute upon the county court, the original statute of similar nature being superseded one-half century earlier.

¹⁰ For powers of the county courts see, W. VA. CONST. (1872) art. 8, § 24.