No. 13078

Supreme Court of Illinois

People, ex. rel.

---

vs.

Bangs

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

THE PEOPLE on relation, &c.
MARTIN BALLOU,
vs.
MARK BANGS.

I. THE Constitution, Article 5, Sec. 7, provides that the state shall be divided into nine judicial circuits, in each of which one circuit judge shall be elected ~~annually,~~ once in six years, &c. The same section also provides that the legislature may increase the number of circuits, but the constitution does not prescribe the duties of a judge, nor does it prohibit the election of more than *one* judge in each circuit.

The sovereign power of the state is in the legislature, and that body may enact such laws as are not prohibited by the constitution. The constitution is a restriction upon the legislature, and not a grant of power. It follows, then, that the legislature may prescribe by law the duties of the judges, and may also provide for the election of any number of circuit judges in each judicial circuit. It may diminish the extent of the circuit, it may abolish the circuit, it may provide that one judge shall perform duties in chambers while another holds courts, it may provide that the circuit judges shall sit with the supreme judges as advisers, or with the county judges for a similar purpose.

People *vs.* Marshall, 1 Gil. 685

In some instances it might be eminently proper to have more than one circuit judge in the same circuit—one for the purpose of holding courts, one for the purpose of hearing motions, granting orders and issuing injunctions, &c. Take, for instance, the city of Chicago, where no one judge could do the half that would be required of him.

There can be no doubt that when a judge is elected he can perform all the duties appertaining to his office; he can grant writs, issue injunctions, hear motions, try causes, and he holds his office for the term prescribed by the *constitution*, because the legislature is prohibited from altering the term; but not so of his duties.

In the present instance, then, it follows that Judge Ballou is a judge, having power to grant writs, hear injunctions, try cases, bind over criminals, and to hold courts. He is not legislated out of office and cannot be. It is admitted that he is judge, but the question is, whether the legislature had power to repeal his circuit, erect the territory into another circuit and order a new election.

It has been already stated that the legislature may do whatever is not prohibited by the constitution of this state or the United States. That body cannot, however, destroy vested rights, and it becomes necessary to enquire what were the rights of Judge Ballou in the premises.

He had, then, by his election, a right to the office of judge, a right to its honors, privileges and emoluments, and a right to hold the office during the term for which he was elected. *This was all.* He had no

right in the territory, no right to say that the legislature should not increase or diminish his duties, no right to demand that the legislature should not alter the laws of practice or increase his jurisdiction.

His rights were confined to the *office*, its privileges and emoluments. Now, by what clause of the constitution is the legislature prohibited from altering or abolishing judicial circuits?

No such provision can be found. The right to create new circuits is expressly given in the constitution, and it follows that if the legislature may create it may abolish its own creation, unless rights of other persons intervene. The legislature does not make the judge, and hence cannot remove him; but it does make the circuit and hence it may unmake it. *Ex parte* McCollum, 1 Cowen, 566–7.

The legislature, on the 10th of February, 1857, created the 23d judicial circuit, and the relator was duly elected and commissioned as judge thereof.

On the 5th day of April, 1859, the law creating the 23d judicial circuit was repealed by the legislature. And we insist,

1st. That the repeal of the act creating the 23d judicial district did not repeal the judge out of office or in any manner abridge his rights, but it simply left him a judge without a circuit, like unto a bishop without a church, or a king without a realm.

Still he was a judge; still he was a bishop; still he was a king.

2d. The legislature may yet require him to hold court either in Princeton or Chicago, in Cairo or Galena. He is just now a supernumerary, but when the legislature calls he must go, as a bishop must go at the call of the church, or a king at the call of his people.

3d. By the same act which repealed the law of 1857, a new circuit was created embracing other counties not included in the original circuit; it was still called the 23d judicial circuit, and a new judge and prosecuting attorney were to be elected. The county of *Bureau*, in which the relator, Judge Ballou, resided, was attached to the 9th judicial circuit; so, that county was not included in the new circuit, and he could not be the judge of such new circuit. Here there was a new circuit without a judge, and the old circuit in which Judge Ballou resided was no longer in existence.

4th. The constitution, Art. 5, Sec. 11, provides that no person shall be eligible to the office of judge unless he shall have resided *in the circuit for two years next preceding his election.* The county of Bureau, where Judge Ballou resided, was not in the circuit thus created, and thus it became absolutely necessary to elect a judge who did reside in the circuit. Judge Bangs was duly elected, commissioned and qualified, and has thus far discharged the duties of his office with fidelity, ability, and success.

We now submit that there is not room for a reasonable doubt, that the legislature had the power to create a new circuit and order a new election, and having the power, no one conversant with the facts will deny that it acted wisely in so doing.

H. M. & J. J. WEAD,
For Respondent.

No 243. - 45

People ex rel Baker

vs

Mark Bangs

Respondents Appeal

Filed Apr 27. 1865

L. Pelton

Clerk

In Supreme Court; Third Grand Division,

April Term, A. D., 1860.

The People of the State of Illinois on the Relation of Martin Ballou, vs. Mark Bangs. } **Appeal from Marshall.**

This is an information in the nature of a *Quo Warranto* filed in the Marshall Circuit Court, May Term, 1859, by the States Attorney on the relation of Martin Ballou, against Mark Bangs. The facts in the case are set forth in the following agreed case between the parties:

State of Illinois, Marshall County, } ss. *Of the May Term of the Circuit Court of said County, A. D.,* 1859.

The People of the State of Illinois, on the Relation of Martin Ballou, vs. Mark Bangs. } *Information in nature of Quo Warranto.*

Pages 5, 6, 7 and 8.

It is agreed by the parties in this cause that under and by virtue of the provisions of an act entitled "An Act to establish the Twenty-third Judicial Circuit, and to fix the time for holding Courts in the Ninth Judicial Circuit," approved February 10th, 1857, at a regular election for Judge and States Attorney for the Twenty-third Judicial Circuit, held in the counties of Bureau, Putnam and Marshall in said State, on the 14th day of March, A. D., 1857, Martin Ballou, the relator, was duly elected to the office of Judge of the said Twenty-third Judicial Circuit, and that in pursuance of his said election, afterwards, to wit, on the 31st day of March, A. D. 1857, he was duly commissioned by the Governor of said State as Judge of said Judicial Circuit, and that thereupon, on the fourth day of April in the year last aforesaid, the said Ballou duly qualified himself by subscribing and taking the several oaths in manner and form as required by the constitution and laws of said State, and that he thereupon entered upon the discharge of the duties of said office, and that he has discharged the duties thereof from that time until the present time, and now still claims to hold said office.

That at the time of said Ballou's election as aforesaid, he then did reside, and for more than five years prior thereto had resided in said Bureau county, at which place he ever since has and still does reside.

That at an election for Judge and States Attorney for the Twenty-third Judicial Circuit held in the counties of Putnam, Marshall and Woodford, on the fifth day of April, A. D., 1859, under and by virtue of the provisions of an act entitled "An Act to repeal a certain act herein named, and to establish the Twenty-third Judicial Circuit," approved February 11th, 1859, said defendant Mark Bangs was elected to the office of Judge of the Twenty-third Judicial Circuit in said State, that in pursuance of his said election he was thereupon commissioned by the Governor of said State as such Judge, and duly qualified by subscribing and taking the several oaths in manner and form required by the constitution and laws of said State, and entered upon the discharge of the duties of said office, and still exercises the duties thereof, and at the time of the filing the information in this cause he was executing the duties and rights of said office.

That at the time of said Bang's election as aforesaid, he then did reside, and for more than five years prior thereto had resided in said Marshall county, at which place he ever since has and still does reside.

Now it is hereby agreed to submit this cause to the Court here on the foregoing stated facts, to be decided in the same way as if the cause was now at issue by due form of pleading, the said defendant entering his appearance in this cause and waiving process and service thereof, and also waiving all questions of form either in relation to the mode of proceedings or otherwise.

Now, if the Court shall be of opinion that the defendant, Mark Bangs, is legally and rightfully Judge of the said Twenty-third Judicial Circuit of said State, then the Court is to decide the cause in favor of said defendant and against the relator for costs—but if the Court shall be of opinion that said defendant, Mark Bangs, is not legally and rightfully Judge of the said Twenty-third Judicial Circuit and that said relator is legally and rightfully Judge of said Twenty-third Judicial Circuit, then the Court is to decide against said defendant, and in favor of said relator, and give Judgment of Ouster against said defendant and for costs. It is further agreed that either party may take an appeal from such Judgment, to the Supreme Court, upon his own bond without other security.

MARTIN BALLOU.
MARK BANGS.

Pages 8 and 9. The Court gave Judgment for the defendant and against the relator for costs.

POINTS AND AUTHORITIES RELIED UPON BY THE PLAINTIFF.

1st. Sec. 1, of Article 2 of the Constitution of this State vests the powers of government in three distinct departments, viz: Legislative, Executive and Judicial. Circuit Courts or the Judges thereof, comprise a part of the Judicial department of the Government, and consequently are not subject to the dictation or control of either of the other departments thereof.

Sec. 1 of Art. 5, of Const.—Purple's Statutes, 57, do do 45.

2d. Sec. 15 of Art. 5, provides that on the first Monday of June, 1855, and every six years thereafter, an election shall be held for Judges of Circuit Courts; provided, whenever an additional Circuit is created, such provision may be made as to hold the second election of such additional Judge at the regular election herein provided: Consequently the Legislature had no Constiutional power to authorize an election of Judge under the act of Feb. 11th, 1859, as there was no "*additional Circuit*" thereby created.

Purples Statutes, page 58. Sess. Laws 1859, page 56 and 57. 6 Cowen R. 642.

3rd. By the Constitution and laws of this State, a Circuit is designated and known only by its *number*, and not by its territory, because the territory of a Circuit is liable to be changed and varying.

Sec. 7 of Art. 5, of Const.—Purples Statutes, pp 57.

4th. The Act of Feb. 11th, 1859, did not increase the number of Circuits, but only redistricted the former 23rd Circuit; consequently such "exigency of the State" contemplated in the 6th sec. of Art. 5 of the Constitution, in the opinion of the Legislature, did not then exist as would authorize it to "increase the number of Circuits;" it is therefore evident that the Legislature did not intend by that act to make an additional or new Circuit; and as there was no vacancy in the office of Judge of that Circuit, the relator being then an incumbent in said office, so much of the aforesaid act as provides for the election of a Judge, is therefore void.

Purple's Statutes, page 58. 6 Ind. R., 496. 7 Ind. R., 326. 1 Sumner C. C. R., 277. 9, Watts, 200.

Leland & Leland
Att'ys for Plaintiff.

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The People &c. on the relation of Martin Ballou

vs.

Mark Baugs

Abstract of Record, Points & Authorities

Filed Apr 18. 1860

L Leland

Clerk

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4th. The constitution, Art. 5, Sec. 11, provides that no person shall be eligible to the office of judge unless he shall have resided *in the circuit for two years next preceding his election.* The county of Bureau, where Judge Ballou resided, was not in the circuit thus created, and thus it became absolutely necessary to elect a judge who did reside in the circuit. Judge Bangs was duly elected, commissioned and qualified, and has thus far discharged the duties of his office with fidelity, ability, and success.

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H. M. & J. J. WEAD,
For Respondent.

No 243.-45

People and Bullon

vs

Mark Bangs

Respondents Argument

13078

Filed Apr 27, 1860
L. Leland
Clerk