

JOURNAL OF THE SENATE [September 9, 1969]

STATE OF WISCONSIN

Senate Journal

Seventy-Ninth Session

TUESDAY, September 9, 1969.

2:00 o'clock P.M.

The senate met.

The senate was called to order by the clerk.

Upon motion of Senator Rasmusen, with unanimous consent, Senator Hollander was selected as presiding officer.

Senator Hollander in the chair.

Prayer was offered by Senator Swan.

The calling of the roll was dispensed with, upon motion of Senator Roseleip, with unanimous consent.

INTRODUCTION OF BILLS

Senate Bill 671

Changing the general sales tax rate to 3%, establishing an income tax credit refund and eliminating certain sales tax exemptions.

By Senators Swan, Dempsey, Keppler, Hollander, Meunier and Roseleip; co-sponsored by Assemblymen Alfonsi, Martin, Thompson, Wackett, Merkel and Wilger.

Read first time.

To joint committee on Finance.

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COMMITTEE REPORT

The committee on Labor, Taxation, Insurance and Banking reports and recommends:

The appointment by the Governor of Donald Corr, of Kenosha, as a member of the Savings and Loan Review Board, to serve for the term ending May 1, 1973.

Confirmation; Ayes, 5; Noes, 0.

The appointment by the Governor of Hilding Haag, of Madison, as a member of the Consumer Credit Review Board, to serve for a term ending May 1, 1974.

Confirmation; Ayes, 5; Noes, 0.

The appointment by the Governor of Al C. Steinhauer, of Madison, as a member of the Savings and Loan Review Board, to serve for the term ending May 1, 1973.

Confirmation; Ayes, 5; Noes, 0.

Senate Bill 549

Relating to assessment of partial improvements to land. Indefinite postponement; Ayes, 5; Noes, 0.

Senate Bill 551

Relating to assessment of personal property for purposes of computing the personal property tax owing.

Indefinite postponement; Ayes, 5; Noes, 0.

Senate Bill 607

Relating to labor negotiators in cities.

Introduction of senate amendment 1; Ayes, 5; Noes, 0 and passage as amended; Ayes, 4; Noes, 1.

Assembly Bill 348

Relating to state income tax appeals.

Non-concurrence; Ayes, 5; Noes, 0.

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Assembly Bill 815

Relating to permitting registration of municipal bond interest.

Concurrence; Ayes, 5; Noes, 0.

GERALD D. LORGE,
Chairman.

To calendar.

PETITIONS AND COMMUNICATIONS

The State of Wisconsin
Department of Justice
Madison

August 29, 1969.

The Honorable, The Senate
State Capitol
Madison, Wisconsin 53702

Gentlemen:

Senate Resolution 18 (1969), dated July 8, 1969, requests my opinion on the constitutionality of an act which would result from enactment of Assembly Bill 57 (1969) which changes the commencement and expiration dates for the office of the newly created 2nd branch of the 3rd judicial circuit. A new judge has been elected to the post, but has not taken office.

Section 252.015 (1) (bm), Stats., provides that the 3rd judicial circuit shall have two branches. This section was created by sec. 2, ch. 275, Laws of 1967.

Section 16, ch. 275, Laws of 1967, provided for the election of a circuit judge for such branch, as follows:

“SECTION 16. A judge for the 2nd branch of the 3rd judicial circuit shall be elected in Winnebago and Calumet counties in the spring election of 1969. The term of office for the judge chosen at this election shall commence on the first Monday in January 1970 and expire on the first Monday in January 1976.”

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At that time and at present the general statute relating to terms of circuit judges was and is set forth in sec. 252.01, Stats., which provides:

"The term of office of every elected circuit judge is 6 years, and until his successor is elected and qualified, which term commences with the first Monday in January next succeeding his election."

Assembly Bill 57 (1969), introduced January 23, 1969, would amend sec. 16, ch. 275, Laws of 1967, to provide:

"A judge for the 2nd branch of the 3rd judicial circuit shall be elected in Winnebago and Calumet counties in the spring election of 1969. The term of office for the judge chosen at this election shall commence on ~~the first Monday in January 1970~~ July 1, 1969, and expire on the first Monday in January ~~1976~~ 1975."

The bill also provides an appropriation for the July 1, 1969, to December 31, 1969, period.

At the spring election of 1969 one Edmund P. Arpin was elected judge of the 2nd branch. This opinion assumes that he has been issued a certificate of election and is otherwise qualified, but has not taken and filed an oath or entered on the duties of the office.

Assembly Bill 57 is an apparent effort to accelerate the effective date of the branch because of the press of judicial business in the circuit. The commencement of term date is proposed to be advanced from the first Monday in January 1970 to July 1, 1969. The bill if enacted would in fact, however, shorten the term of the judge elected at the spring election to five and one-half years, as the expiration date is advanced from the first Monday in January 1976 to the same date in 1975. One of the reasons for this advancement is that the term of the judge of the 1st branch of the 3rd circuit expires on the first Monday in January 1976.

Generally an office created by act of the legislature may be abolished in like manner, or the term of the officer otherwise shortened by general legislation, after his election, in the absence of any special provision of the constitution forbidding it. *The State and DeGuenther vs. Douglas* (1870), 26 Wis. 428, 7 Am. Rep. 87.

Circuit judge, however, is a constitutional office and the legislature must comply with the constitutional provisions

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pertaining to it with respect to establishing new circuits, changing circuits, adding new branches, compensation, terms and removal.

It must also be noted that there is a difference between the term which applies to the office and the term of office which is personal to the incumbent.

The first question is whether the beginning date of the term of office may be advanced from the first Monday in January 1970 to July 1, 1969, where the election has already taken place but the judge-elect has not assumed the duties thereof.

I am of the opinion that it cannot be so advanced so as to permit the judge-elect to take office at the earlier date. I am of the further opinion that the term which applies to the office cannot be advanced to the earlier date to permit a gubernatorial appointment of the judge-elect or some other person for the period July 1, 1969, to the first Monday in January 1970.

The additional branch was created by ch. 275, Laws of 1967, and became effective on December 28, 1967, the day following publication. The same chapter provided for the election of the first judge of said branch and there was no vacancy to which appointment could be made until and unless a vacancy occurred after the first judge had been elected and assumed office. We are not here concerned with what would be the law in the event that the first judge-elect should die before taking office.

In *State ex rel. Attorney General vs. Messmore* (1861), 14 Wis. 177, it was held that when a new judicial circuit is created the first judge must be elected by the people. I am of the opinion that the same rule applies to new branches.

Sections 6 and 7, Art. VII, Wis. Const., provide:

“SECTION 6. The legislature may alter the limits or increase the number of circuits, making them as compact and convenient as practicable, and bounding them by county lines; but no such alteration or increase shall have the effect to remove a judge from office. In case of an increase of circuits, the judge or judges *shall be elected* as provided in this constitution and receive a salary of not less than that herein provided for judges of the circuit court.”

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"SECTION 7. For each circuit there *shall be chosen by the qualified electors* thereof one circuit judge, except that in any circuit in which there is a county that had a population in excess of eighty-five thousand, according to the last state or United States census, the legislature may, from time to time, authorize additional circuit judges *to be chosen*. Every circuit judge shall reside in the circuit from which he is elected, and shall hold his office for such term and receive such compensation as the legislature shall prescribe." (Emphasis added.)

The judge-elect was chosen at the spring 1969 election for a term to begin the first Monday in January 1970, and to end the first Monday in January 1976.

The legislature is without power to now alter the term of office for which the judge-elect was elected. It can be argued that if an earlier commencement date were to apply that other qualified persons may have sought the position. Advancement would deprive the electors from electing the first judge for the real term. He was elected for a six-year term, which was the term applicable to other circuit judges.

A second question is whether the legislature can shorten the term of office of circuit judge, where the election has been held and before the term commences.

I am of the opinion that it cannot.

The total effect of the change sought here would be to shorten the term by six months. However, one year would be erased from the term for which the judge-elect was elected. The effect would be removal of the judge from office during the term for which he was elected, and sec. 13, art. VII, Wis. Const., prescribes that circuit judges shall be removed only by impeachment. It is immaterial that the legislative action would have taken place before he had assumed the duties of office.

State ex rel. Kleist v. Donald (1917), 164 Wis. 545, 160 N.W. 1067.

As noted above, Assembly Bill 57 (1969) would have a 5½-year term apply to the first judge to be elected to the branch at a time a 6-year term was applicable to other circuit judges.

While not controlling, the decision in *State ex rel. Pierce v. Kundert* (1958), 4 Wis. (2d) 392, 90 N.W. (2d) 628, in-

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dicates that the legislature would have to have substantial reason for nonuniformity of term. In that case the court stated that the provisions of secs. 2, 5, 6, 7 and 10, art. VII, Wis. Const., show a purpose of the framers of the constitution to provide a system of circuit courts with uniform jurisdiction, compensation and term of office, with salaries to be paid by the state.

Sincerely yours,

ROBERT W. WARREN,
Attorney General.

CAPTION: Act resulting from passage of Assembly Bill 57 (1969) which would advance starting date of office of judge for newly created 2nd branch, 3rd judicial circuit, six months, and advance end of term twelve months, where election has taken place but judge-elect has not taken office would be unconstitutional. Secs. 252.015 (1) (bm), 252.01, Stats., Secs. 6, 7, art. VII, Wis. Const.

To The Honorable, The Senate

Gentlemen: I have the honor to transmit to you, pursuant to Section 13.67 (2), a list of registered lobbyists for the period beginning September 2, 1969 and ending September 8, 1969.

Yours very truly,

ROBERT C. ZIMMERMAN,
Secretary of State.

Name, Address and Occupation of Lobbyist—Name and Address of Employer—Subject of Legislation—Date of Employment—Length of Time of Employment.

Robert J. Kay, Attorney, 433 W. Washington Avenue, Madison, Wis.—The Proprietary Association, 1700 Pennsylvania Avenue, Washington, D. C.—Proprietary drugs—September 4, 1969—Session.

Upon motion of Senator Roseleip, the senate adjourned until 9:00 A.M. Friday, September 12th.