1962 S.C. Op. Atty. Gen. 54, 1962 S.C. Op. Atty. Gen. No. 1292, 1962 WL 8912 (S.C.A.G.)

Office of the Attorney General
State of South Carolina

Opinion No. 1292

March 7, 1962

Re: Election of Member of General Assembly to Circuit Judgeship of Newly-Created Circuit.

Honorable James B. Morrison
Senator
Georgetown County
State Capitol Building
Columbia, South Carolina

Dear Senator Morrison:

We are of the opinion that Section 30–6 of the Code is unconstitutional and not binding upon the Legislature insofar as it concerns a Circuit Judgeship. The State Constitution, Article I, Section 10, reads as follows:

> 'All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.'

Article II, Section 2 of the Constitution provides, in part, as follows:

> 'Every qualified elector shall be eligible to any office voted for unless disqualified by age, as prescribed in this Constitution.'

Article I, Section 29 of the Constitution is as follows:

> 'The provisions of the Constitution shall be taken, deemed and construed to be mandatory and prohibitory and not merely directory, except where expressly made directory or promissory by its own terms.'

Article V, Section 10 reads as follows:

> 'No person shall be eligible to the office of Chief Justice, Associate Justice or Judge of the Circuit Court who is not at the time of his election a citizen of the United States and of this State, and has not attained the age of twenty-six years, has not been a licensed attorney at law for at least five years, and been a resident of this State for five years next preceding his election.'

Article V, Section 13 provides that the Legislature may divide and elect a Judge for that Circuit to hold for a term of four years and that, at the time of his election, he shall be an elector of the county of, and during his continuance in office, shall reside in the Circuit of which he is Judge.

The above are the constitutional provisions involved. The Legislature, by Section 30–6 of the Code, sought to prevent the election or appointment of any of its members to any civil office of the State which shall have been

created during the time for which the Member was elected to serve in the General Assembly.

Since the Constitution, itself, provides for the qualifications and disqualifications of Circuit Judges, the Legislature cannot legally and to nor subtract from these qualifications and disqualifications of Circuit Judges. A Circuit Judge, without question, is a constitutional officer. The definition of a **constitutional officer** from State v. Hough (a sheriff's case), 103 SC 87, 87 SE 436, is as follows:

> 'When the Constitution creates an office and fixes the term thereof and prescribes the mode of filling it, the **legislature** is without power to abolish the office, or remove or suspend the officer, unless authority for such action can be found in the Constitution. (citing cases).'

As to Judges, see Whipper v. Reed, 9 SC 5;Grimball v. Beatty, 174 SC 422, 177 SE 668;Gaffney v. Mallory, 186 SC 337, 19 SE 840.

***2** In several cases, our Supreme Court has held that the Legislature cannot add to nor take from any citizen the right to hold constitutional public office if the qualifications for the office are set in the Constitution. See State v. Williams, 20 SC at page 16, where the following appears:

> 'This being a right guaranteed to every voter by organic law, cannot certainly be taken away or abridged by any mere legislative provision. It is not pretended that the defendant labored under any one of the disabilities mentioned in the constitution, and it follows necessarily that any act of the General Assembly designed to impose upon him any other disability would be unconstitutional and void.'—
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> 'The language of the constitution is affirmative, not negative merely. It in effect declares that every qualified voter shall be eligible to any elective office, unless he labors under some one of the disabilities mentioned in the constitution; and hence any attempt on the part of the legislature to add any other disability, would be in direct conflict with the positive mandate of the constitution and void.'

This case has been followed in the case of McLure v. McElroy, 211 SC 106, 44 SE 2d. 101;Lee v. Clark, 77 SE 2d. 485, 224 SC 158; and Redfearn v. Board of Canvassers, 234 SC 113, 107 SE 2d. 10.

Very truly yours,
James S. Verner
Assistant Attorney General

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