of the term and the total rent to fall due in the future. The covenants appearing in the leases in question cannot be made the basis of a proof of debt against the estate.

The judgments are

Affirmed.

BOOTH v. UNITED STATES.*

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 656. Argued January 17, 1934.—Decided February 5, 1934.

1. A district or circuit judge of the United States who retires pursuant to § 260 of the Judicial Code, as amended, continues in office within the meaning of § 1 of Art. III of the Constitution, and his compensation may not be diminished. P. 348.
2. In the light of the evident purpose of the Act that a retiring judge shall continue to hold office and perform official duties, its provision for the appointment of a "successor" can not be construed as vacating the office. P. 351.
3. A diminution after an increase of compensation, even though not a reduction below the rate at date of appointment, is a diminution within the meaning of § 1 of Art. III. P. 352.

CERTIFICATES from the Court of Claims in two cases involving the validity of an Act reducing the pay of retired federal judges.

Messrs. William D. Mitchell and *John S. Flannery*, with whom *Mr. Carl Taylor* was on the brief, for petitioners.

To resign an office is to give it up. To retire from active service is something less. To retire from regular active service is still further removed from resignation. By retiring, a federal judge does not retire from office or wholly from active service, but in the words of the statute, only "from regular active service." The service he does per-

* Together with No. 657, *Amidon* v. *United States*, certificate from the Court of Claims.

form is active, though it may not be regular. He is not disqualified to perform the same service as before retirement. Cf. *United States* v. *Tyler*, 105 U.S. 244; *Kahn* v. *Anderson*, 255 U.S. 1, 6.

If a retired judge ceases to hold office, he may not constitutionally serve as a judge. This statute has now been in effect fourteen years, and during that time retired federal judges have performed a vast amount of judicial labor. It is too late to say that by retirement they ceased to hold office and that this judicial service has been without authority of law.

The Act was intended to allow retired judges to continue in office. It merely grants them a surcease of that amount of judicial labor too exacting for men of their age and long service. It reduces their labors but not their powers. When they sit as judges, they are clothed with all the powers of judicial office. It provides two judges for the work previously done by one. It prescribes the rule of seniority between active and retired judges, and thus treats both as judges, holding the same office. Retirement makes little legal difference between the functions of active and retired judges. The provision for designating retired judges for certain service finds a counterpart in the law relating to active judges (§ 13, Jud. Code, 36 Stat. 1089). Even an active judge is under no more than a moral obligation to perform all of the judicial duties which his health permits and the business of his court demands. Retired judges do not receive new commissions. They continue to act under their original commissions. Retired district judges, without any designation from the senior circuit judge, may continue to function in their own districts. *Maxwell* v. *United States*, 3 F. (2d) 906, aff'd, 271 U.S. 647. See *McDonough* v. *United States*, 1 F. (2d) 147.

Some words in § 260 of the Judicial Code, relating to retirement, are not carefully chosen. It speaks of the

appointment of a "successor" to a retired judge, and in the last paragraph, of "vacancies" caused by retirement. These words mean "successor" as regular active judge, and "vacancies" in the regular active list.

Concerning the intent of the Act, see Cong. Rec., 65th Cong., 3d Sess., Vol. 57, Pt. 1, pp. 368–369, 428; Ruling of the Comptroller General of July 13, 1932 (unpublished).

A diminution after an increase of compensation, even though not a reduction below the rate at date of appointment, is a diminution within the letter and spirit of § 1, Art. III, of the Constitution. *Evans* v. *Gore,* 253 U.S. 245, 253; The Federalist (No. 79); *O'Donoghue* v. *United States,* 289 U.S. 516; Protest by Chief Justice Taney, 157 U.S. 701; *James* v. *United States,* 202 U.S. 401; *Miles* v. *Graham,* 268 U.S. 501; *Long* v. *Watts,* 183 N.C. 99; *New Orleans* v. *Lea,* 14 La. Ann. Rep. 197; *Commonwealth ex rel. Hepburn* v. *Mann,* 5 W. & S. 403.

Solicitor General Biggs, with whom *Assistant Attorney General Wideman* and *Messrs. H. Brian Holland* and *Paul A. Sweeney* were on the brief, for the United States.

A judge "retiring" under Jud. Code, § 260, is under no obligation to perform any judicial duties whatever. Whether or not he renders any service, he receives his former salary, not as compensation for services rendered, but as a pension for past services.

The words of the Constitution are to be taken in their ordinary, natural sense. The word "office" (*Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514; *United States* v. *Hartwell,* 6 Wall. 385, 520; *United States* v. *Maurice,* Fed. Cas. No. 15747; *Clark* v. *Stanley,* 66 N.C. 59, 63; *Bradford* v. *Justices,* 33 Ga. 332, 336; *Throop* v. *Langdon,* 40 Mich. 673, 682; *Reed* v. *Schon,* 2 Cal. App. 55; *State* v. *Griswold,* 73 Conn. 95, 97; *United States* v. *Trice,* 30 Fed. 490, 494; *State Prison* v. *Day,* 124 N.C. 362, 368) implies an obligation to render services—to perform the duties incident to

the position. Indeed, it is difficult to conceive of an office to which no duties are attached. See *Commonwealth* v. *Gamble*, 62 Pa. St. 343, 349.

While the Constitution defines the powers of the federal judiciary, it does not prescribe in detail the duties. Those duties are, in the main, to be found in the nature of the office as it grew up under the common law. Some of the duties, however, are defined by statute. Thus, district judges are required to hold court regularly at stated places in their respective districts. Jud. Code, §§ 70–115, as amended; 28 U.S.C., §§ 142–196. And it is "the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law." Jud. Code, § 118, as amended; 28 U.S.C., § 213. These duties, we submit, although defined by statute as to the time and place of performance, are an integral part of the constitutional office of judge. For refusal to hold court as required by law, a judge may be impeached.

The word "office" appears in both the tenure of office provision and the provision relating to compensation. It must be presumed to have the same meaning in both places. "Tenure of office during good behavior imports not only the length of the term but also the extent of the service." *Opinion of the Justices*, 271 Mass. 575, 580. Congress, therefore, may not compel a judge to retire to part time service against his will, because to do so would be to deprive him of one of the essential elements of office. It would seem to follow that if a judge voluntarily retires from regular, active service, he does not continue in office within the meaning of the Constitution.

It is argued that unless a retired judge remains "in office" he is necessarily without power to exercise judicial authority, and that, conversely, if he has the right to perform judicial duties, as Congress intended he should, it must follow that he remains in office within the meaning

of the Third Article. Since the word "office" is obviously used by counsel for the plaintiffs with respect to the compensation provision, the argument comes down to this,—that the right to receive undiminishable compensation is necessarily and under all circumstances coëxtensive with the privilege to perform judicial duties. Stated another way, the contention is that a judge can not relinquish the right to a protected salary and at the same time have the right, if called upon, to perform judicial duties. We submit that nothing in the Constitution compels this conclusion.

The purpose of the tenure of office and compensation provisions was to prevent the involuntary removal of a judge during good behavior or the diminution of his salary while he continues in office. It is doubtful whether the framers of the Constitution envisaged the somewhat anomalous situation of a judge being in office, in the sense that he retains the power to act in a judicial capacity, and at the same time being relieved of the duties and obligations incident to the office of judge. Nevertheless, while Congress may not deprive a judge of the judicial powers and privileges against his will, there is no constitutional prohibition upon its permitting him to retire from active service of his own volition. The only question is whether, having availed himself of the privilege extended to him, a judge may still claim the benefits and immunities conferred by Art. III.

The language of the Constitution should be interpreted "in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used." *Popovici* v. *Agler,* 280 U.S. 379, 383. While the framers of that instrument were vitally interested in safeguarding the salaries of federal judges, they undoubtedly assumed that so long as a judge remained "in office" he would perform all the duties attached to the position, and that when he found himself no longer able to perform

those duties efficiently, he would resign and cease to be a judge. The Third Article provides that judges shall receive "for their services" a compensation. It can not have been intended that this compensation was to be paid for services to be rendered at will. By accepting the office a judge obligates himself to discharge all the duties of the office. The word "services" must mean the services commonly rendered by a judge—those which it is his duty to render. Thus, although the amount of compensation or salary does not depend upon the *quantum* of service, which may vary from time to time and from place to place, it was beyond reasonable doubt intended as consideration for performance of those duties which a judge is under obligation to perform. Cf. *Benedict* v. *United States,* 176 U.S. 357, 360.

It is, we submit, palpably unsound to say that the duty devolving upon a judge, who has accepted office and taken an oath faithfully to discharge and perform all the duties incumbent upon him as judge according to the best of his abilities, is the same as or in any way analogous to the obligation of a retired judge who has been relieved of the performance of the duties which he was required to perform prior to his retirement.

Since a retired judge is under no obligation other than that imposed by conscience, his salary can not be regarded as compensation in the usual sense. We submit, despite the statements quoted by the plaintiffs from the debates in Congress, that in reality retired pay is more analogous to a pension than to the compensation of a judge in regular active service. Such retired pay is not given by way of consideration for the discharge of duties *in praesenti,* but rather in recognition of services rendered in the past.

The provision that the President shall appoint a "successor" shows that the retirement creates a vacancy which must be filled. Since the new judge is a successor to the old one, there was no need to make provision for or

against the appointment of another judge upon the death or resignation of the one who has retired, for there is then no vacancy to be filled, the vacancy having occurred when the retirement took place. These provisions are in striking contrast to those authorizing the appointment of an additional judge when a judge who is eligible for retirement and unable to discharge efficiently all the duties of his office "shall nevertheless remain in office and not resign or retire." In such a case the new judge is in no sense a "successor." He can not succeed to an office which is still occupied. A vacancy does not occur until the death, resignation, or retirement of the disabled judge, but the Act recognizes that there is a vacancy at that time and expressly provides that when such vacancy occurs it shall not be filled. See *People* v. *Duane,* 121 N.Y. 367.

The word "successor" is a word of fixed meaning.

The effect of the retirement provisions has been considered in only two cases, neither of which, we submit, has any direct bearing upon the question here involved. *Maxwell* v. *United States,* 3 F. (2d) 906, aff'd, 271 U.S. 647; *McDonough* v. *United States,* 1 F. (2d) 147, cert. den., 266 U.S. 613.

The limitations upon the power of Congress appearing in § 1 of Article III were designed to protect the judiciary as a whole rather than to benefit any individual member or members thereof. *Evans* v. *Gore,* 253 U.S. 245, 253.

For more than eighty years after the ratification of the Constitution, there was no provision for the payment of pensions to resigned judges, and even at the present time the privilege of retirement is not open to Justices of this Court.

A diminution after an increase in compensation, even though the compensation is not reduced below the amount fixed by law at the date of the judge's appointment, would seem to be contrary to the intent of the Third Article of the Constitution. *James* v. *United States,* 202 U.S. 401;

Evans v. *Gore*, 253 U.S. 245; *Commonwealth ex rel. Hepburn* v. *Mann*, 5 W. & S. 403. See also *New Orleans* v. *Lea*, 14 La. Ann. 197.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Court of Claims has certified two questions:

"1. Does a United States District or Circuit Judge who, having served continuously for ten years and attained the age of seventy years, does not resign but retires under the provisions of section 260 of the Judicial Code, as amended, continue in office within the meaning of section 1 of article III of the Constitution which forbids diminution of the compensation of Judges during their continuance in office?

"2. Where the salary of a United States District or Circuit Judge is increased by law after his appointment and he has subsequently retired in full compliance with the provisions of section 260 of the Judicial Code, as amended; is a reduction of his compensation as a retired Judge to an amount not below that fixed by law as his salary at the time of his appointment a diminution of his compensation within the meaning of section 1 of article III of the Constitution?"

We are informed by the certificate in No. 656 that Wilbur F. Booth was appointed United States Circuit Judge for the Eighth Judicial Circuit on March 18, 1925, and qualified March 27, 1925. For many years prior to and up to the time of this appointment he had held the office of judge of the United States District Court for the District of Minnesota, and on November 28, 1931, he had served continuously as District or Circuit Judge for more than seventeen years. January 1, 1932, having attained the age of seventy, he retired, pursuant to the provisions of § 260 of the Judicial Code as amended. Since his retirement he has continued to perform the duties of a

retired United States Circuit Judge in the manner provided by law, and has participated in the hearing and decision of many cases pending in the Circuit Court of Appeals for the Eighth Circuit.

At the time of Judge Booth's appointment as Circuit Judge the annual compensation was fixed by law at $8,500 per annum. It was subsequently increased to $12,500 per annum, at which figure it stood when he retired. By § 13 of the Independent Offices Appropriation Act of June 16, 1933 [c. 101, 48 Stat. 283, 307] it was provided:

"For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum."

By reason of this Act the plaintiff was paid during the period from June 15, 1933, to October 1, 1933, at the rate of $10,625 per annum. The amount withheld from him during that period was $697.93. He duly protested against the reduction, and brought suit in the Court of Claims, asserting that the Act violates the provision of the Constitution which forbids diminution of the compensation of federal judges during their continuance in office. The Government demurred to the petition.

The relevant facts certified in No. 657 are that Charles F. Amidon was appointed Judge of the United States District Court for the District of North Dakota on February 18, 1897, and qualified on February 27, 1897. From the date last mentioned to June 2, 1928, he served continuously in that capacity. Having attained the age of seventy years he retired June 2, 1928, pursuant to § 260 of the Judicial Code as amended, and has ever since continued to perform the duties of a retired United States District Judge in the manner required by law, and has, as conditions permitted and the business of the

court demanded, performed judicial acts as such retired judge.

At the date of his appointment the salary of the office was fixed by law at the rate of $5,000 per annum. It has been increased from time to time and at the date of plaintiff's retirement was at the rate of $10,000 per annum. Pursuant to § 13 of the Independent Offices Appropriation Act, *supra,* he received, during the period from June 15, 1933, to October 31, 1933, compensation at the rate of $8,500 per annum. He protested against the reduction and brought suit in the Court of Claims to recover the sum of $558.34, the amount withheld during the period mentioned. The Government demurred to the petition.

The pertinent portion of § 1 of Article III of the Constitution is:

"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

1. The first question asks, in effect, whether a United States Judge, upon retirement, relinquishes or retains his office. The answer is to be found in the Act of Congress authorizing retirement.[1] That Act provides for resigna-

[1] Judicial Code, § 260, as amended by the Act of February 25, 1919, c. 29, § 6, 40 Stat. 1157, U.S.C. Title 28, § 375; and the Act of March 1, 1929, c. 419, 45 Stat. 1422:

"When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years, continuously [or otherwise], and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon

tion and for retirement. In referring to the former it uses the expression "When any judge . . . resigns his office . . .," and provides for continuance of compensation after resignation. In contrast it declares, "But,

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the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake.

"In the event any circuit judge, or district judge, having so held a commission or commissions at least ten years, continuously [or otherwise], and having attained the age of seventy years as aforesaid, shall nevertheless remain in office, and not resign or retire as aforesaid, the President, if he finds any such judge is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character, may, when necessary for the efficient dispatch of business, appoint, by and with the advice and consent of the Senate, an additional circuit judge of the circuit or district judge of the district to which such disabled judge belongs. And the judge so retiring voluntarily, or whose mental or physical condition caused the President to appoint an additional judge, shall be held and treated as if junior in commission to the remaining judges of said court, who shall, in the order of the seniority of their respective commissions, exercise such powers and perform such duties as by law may be incident to seniority. In districts where there may be more than one district judge, if the judges or a majority of them can not agree upon the appointment of officials of the court, to be appointed by such judges, then the senior judge shall have the power to make such appointments.

"Upon the death, resignation, or retirement of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as provided in this section, the vacancy caused by such death, resignation, or retirement of the said judge so entitled to resign shall not be filled." The words enclosed in brackets were added by the Act of March 1, 1929.

instead of resigning, any judge . . . who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, . . ." not, be it noted, from office. The retiring judge may be called upon by the senior circuit judge to perform judicial duties in his own circuit or by the Chief Justice to perform them in another circuit, and be authorized to perform such as he may be willing to undertake. There is provision for appointment by the President of an additional judge for the circuit or district court where a sitting judge is found unable efficiently to discharge all his duties by reason of mental or physical infirmity of a permanent character. In that case the sitting judge unquestionably retains his office; and it is significant that the act declares either a retired judge, or one whose mental or physical condition has caused the President to appoint an additional judge, shall be treated as junior to the remaining judges of the court.

By retiring pursuant to the statute a judge does not relinquish his office. The language is that he may retire from regular active service. The purpose is, however, that he shall continue, so far as his age and his health permit, to perform judicial service, and it is common knowledge that retired judges have, in fact, discharged a large measure of the duties which would be incumbent on them, if still in regular active service. It is scarcely necessary to say that a retired judge's judicial acts would be illegal unless he who performed them held the office of judge. It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge. The Act does not and, indeed, could not, endue him with a new office, different from, but embracing the duties of the office of judge. He does not

surrender his commission, but continues to act under it. He loses his seniority in office, but that fact, in itself, attests that he remains in office. A retired District Judge need not be assigned to sit in his own district. *Maxwell* v. *United States,* 3 F. (2d) 906; affirmed 271 U.S. 647. And if a retired judge is called upon by the Chief Justice or a Senior Circuit Judge to sit in another district or circuit, and he responds and serves there, his status is the same as that of any active judge, so called. *McDonough* v. *United States,* 1 F. (2d) 147. It is impossible that this should be true, and that at the same time the judge should hold no office under the United States.

The Government argues that the holding of an office involves the performance of duties, and since no duties are obligatory on one who has retired under the Act, he cannot be said to hold any office. But Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it. This was the evident purpose; and the statements made by the member in charge of the bill on the floor of the House show that it was expected, as has proved to be the case, that retired judges would render valuable judicial service. Cong. Rec. 65th Cong. 3d Sess. Vol. 57, Part 1, pp. 368–369. It is too late to contend that services so performed were extra-legal and unconstitutional.

Some reference is made to the fact that under the Act a successor to the retiring judge is to be appointed, and it is claimed the direction is inconsistent with his retention of office. The phraseology may not be well chosen, but it cannot be construed to vacate the office of the retiring judge, in the light of the evident purpose that he shall continue to hold office and perform official duties.

2. Does the Constitution prohibit reduction of the compensation which was fixed by law at the time of appointment or that to which the judge was entitled at the date of retirement?

In other words, is a diminution after an increase banned, if the compensation notwithstanding the reduction remains in excess of that payable when the incumbent took office? The answer must be in the affirmative. Several courts, in well-considered decisions, have so interpreted analogous provisions of state constitutions (*Commonwealth ex rel. Hepburn* v. *Mann*, 5 Watts & S. (Pa.) 403; *New Orleans* v. *Lea*, 14 La. Ann. 197; *Long* v. *Watts*, 183 N.C. 99; 110 S.E. 765), and the Solicitor General with commendable candor admits that a contrary construction would be subversive of the purpose of § 1 of Article III.

Question 1 Answered Yes.

Question 2 Answered Yes.

HARTFORD ACCIDENT & INDEMNITY CO. ET AL. *v.* N. O. NELSON MANUFACTURING CO.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 239. Argued January 12, 1934.—Decided February 5, 1934.

1. On appeal from a judgment of the highest court of a State, in a suit in which the validity of a statute of the State is challenged, the decision of the state court as to the meaning of the statute is binding upon this Court. P. 358.
2. A state statute providing that any bond executed after its enactment for the faithful performance of a building contract shall inure to the benefit of materialmen and laborers notwithstanding any provision of the bond to the contrary, is not an arbitrary restraint upon the liberty of contract enjoyed by surety companies under the Fourteenth Amendment. Pp. 358, 359.

So *held* where the bond was not required by the statute and where statutory effects of its voluntary execution were to exempt the building contract and the moneys collected or payable under it from statutory rights that would otherwise exist for protection of