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January 20, 2005

*Via Hand Delivery*

The Honorable John E. Bridges  
Chelan County Superior Court  
Department No. 3  
401 Washington Street  
Wenatchee, WA 98807

**Re:** *Borders v. King County, et al.*  
Chelan County Superior Court Cause No. 05-2-00027-3

Dear Judge Bridges:

Pursuant to LR 5(d)(5), enclosed with this letter are the out-of-state authorities relied on by Washington State Democratic Central Committee in its Motion to Strike Petitioners' Requested Relief. Thank you.

Yours truly,

William C. Rava

cc: All parties and counsel of record via email service

WCR:ccs

Enclosures

[15934-0006/SL050180.008]

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**H**

Supreme Court of Georgia.

J. Barton JONES et al.

v.

Ben W. FORTSON, Secretary of State et al.

No. 23919.

Jan. 6, 1967.

Action to enjoin Secretary of State from submitting to Senate returns of incomplete election for Governor. The Superior Court, Fulton County, Claude D. Shaw, J., denied relief, and plaintiffs appealed. The Supreme Court, Almand, P.J., held that in view of constitutional provisions for selection of Governor by Legislature when no candidate has a majority, statute providing for runoff elections did not apply to election of Governor.

Affirmed.

Duckworth, C.J., and Cook, J., dissented.

## West Headnotes

**[1] Constitutional Law**  1292k12 Most Cited Cases

Constitutional provision which expressly prescribes manner of doing particular thing is exclusive in that regard and impliedly prohibits performance in substantially different manner.

**[2] Constitutional Law**  3892k38 Most Cited Cases

State Constitution is superior to act of Legislature in conflict therewith, and when there is any conflict between statutes and Constitution, provisions of latter control. Const. art. 12, § 1, par. 2.

**[3] Elections**  237144k237 Most Cited Cases

In view of constitutional provisions for selection of Governor by Legislature when no candidate has a majority, statute providing for runoff elections did not apply to election of Governor. Code, § 34-1514; Const. art. 5, § 1, pars. 2-4.

**\*\*848** Syllabus by the Court

**\*7** Art. V, Sec. I, Par. IV of the Constitution of 1945 (Code Ann. s 2-3004) requires that if, upon the canvass by the General Assembly of the general

election returns in the race for Governor, it appears that no person has received a majority of the whole number of votes cast in such election, the General Assembly shall immediately elect a Governor from the two persons having the highest number of votes in such election. The provisions of Sec. 34- 1514 of the Georgia Election Code (Ga.L.1964, Ex. Sess., pp. 26, 174; Code Ann. s 34-1514) that '\* \* \* In instances where no candidate receives a majority of the votes cast, a runoff primary or \*8 election shall be held, between the two candidates receiving the highest number of votes, on the 14th day after the day of holding the first primary or election, unless such runoff date is postponed by court order. The candidate receiving a majority of the votes cast in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner \* \* \*' being in irreconcilable conflict with the aforementioned provision of the Constitution, has no application in this case.

Harry S. Baxter, Thomas E. Joiner, Alex W. Smith, Hoke Smith, Atlanta, William H. Schroder, Milton A. Carlton, Jr., Atlanta, for appellants.

Arthur K. Bolton, Atty. Gen., G. Ernest Tidwell, Executive Asst. Atty. Gen., Harold N. Hill, Coy R. Johnson, Asst. Atty. Gen., Atlanta, Marion O. Gordon, Asst. Atty. Gen., Alexander Cocalis, Deputy Asst. Atty. Gen., Joseph Jacobs, Atlanta, for appellees.

Marvin O'Neal, Jr., David W. Krasner, Atlanta, for parties at interest not parties to record.

N. Krasner, in pro. per.

ALMAND, Presiding Justice.

We are called upon by this appeal to review the order of the trial judge denying the prayers of the appellants that Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, be enjoined 'from causing to be laid before the Senate of the State of Georgia the returns of the incomplete general election for Governor held on November 8, 1966; from causing to be laid before the Senate of the State of Georgia any such returns which do not include the returns of a runoff held as required by law; and, from issuing a commission of election to any candidate for the office of Governor until a runoff is held' and that 'the court enter its order that a runoff election for Governor shall be held between the two

candidates receiving a highest number of votes in the voting on November 8, 1966, and fix the date for such run off election,' and sustaining the appellee's motion to dismiss.

Error is enumerated on this order.

This case is an action by qualified voters and taxpayers in \*9 equity against Ben W. Fortson, Jr., as Secretary of State of Georgia. The appellants' statement of the case and the issue therein made and here for review is fair and accurate, and we adopt it.

**\*\*849** 'The trial court had before it plaintiffs' prayer for an interlocutory injunction and defendant's motion to dismiss. The case below was heard on the basis of the facts stated in the verified petition of plaintiffs and four stipulations as stated in the trial court's order. These facts from the petition and stipulation are summarized as follows.

'Plaintiffs are residents of Fulton County, Georgia, and are citizens of Georgia. All of plaintiffs are duly registered and qualified electors qualified to vote in the general election held on November 8, 1966, and in any runoff that might be held in order to complete the election process with respect to the office of Governor. The defendant is Ben W. Fortson, Jr., as Secretary of State of the State of Georgia.

'On November 8, 1966, a voting took place as a part of the process provided by law for the election of a Governor. On the ballots of said voting were the names of two candidates, Howard H. Callaway and Lester G. Maddox. Neither of said candidates nor any other said candidate received a majority of the votes cast on November 8, 1966. Out of a total of more than 958,177 votes cast, Mr. Callaway received 453,685 votes, Mr. Maddox received 450,900 votes, Ellis Arnall received 52,898 votes and others received a total of at least 691 votes. These figures are matters of public records maintained in the offices of the Ordinaries in the various counties of this State as required by law.

'No runoff for the office of Governor has been held and defendant Fortson has taken no affirmative steps toward holding a runoff.

'Defendant Fortson has publicly stated his intention to cause to be laid before the Senate of Georgia on January 10, 1967, the returns of the incomplete election instead of the returns of the runoff and will do so unless enjoined. When the returns of the incomplete election are laid before the Senate of the State of

Georgia, the General Assembly will then, in accordance \*10 with the announced intention of legislative leaders and members in general, proceed to elect a Governor. Defendant Fortson will then, unless enjoined, issue a commission to the candidate so chosen by the General Assembly.

'Defendant Fortson, as duly elected Secretary of the State of Georgia, has served as Secretary of the State of Georgia continuously since February 5, 1946, and has served as an ex officio member of Election Laws Study Committees and was elected and served as Chairman of such Committees.

'Attached to Stipulation 3 is a copy of part of Senate Bill Number 1 introduced in the May-June 1964 Extraordinary Session of the Georgia General Assembly (Georgia Election Code) with certain marginal notations.'

Stipulation 3 sets out the procedure pursuant to which the returns for election of Governor and certain other State officers are made by the Ordinaries, transmitted (sealed, in the case of the Governor) to the Secretary of State, and, finally, transmitted by the Secretary of State to the Senate. Exhibit 'B' to said stipulation is a copy of the Consolidated County Returns form and envelope used in the transmission of these returns in the election of Governor.

'The specific issues presented are whether the trial court erred in refusing to grant an interlocutory injunction as prayed, and in dismissing the petition and motion. The legal questions involved are as follows: A. Does the runoff provision of the Georgia Election Code, construed in relation to other pertinent statutory provisions, apply to the election of Governor? B. Is such provision as so applied prohibited by Paragraphs II, III and IV of Article V, Section I, of the Georgia Constitution? \* \* \*

The controlling question is whether Sec. 34-1514 of the Georgia Election Code (Ga.L.\*\*850 1964), Ex.Sess., pp. 26, 174; Code Ann. s 34-1514), providing for the rules and regulations in the election of the Governor, is in irreconcilable conflict with Art. V, Sec. I of the Georgia Constitution of 1945. (Code Ann. Ch. 2-30). To find this answer we lay them side by side.

First, the provisions of the Constitution:

'The first election for Governor, under this Constitution, shall be held on Tuesday after the first Monday in November \*11 of 1946, and the Governor-elect shall be installed in office at the next

session of the General Assembly. An election shall take place quadrennially thereafter, on said date, until another date be fixed by the General Assembly. Said election shall be held at the places of holding general elections in the several counties of this State, in the manner prescribed for the election of members of the General Assembly, and the electors shall be the same.' Ga.Constitution, Art. V, Sec. I, Par. II (Code Ann. s 2-3002).

'The returns for every election of Governor shall be sealed up by the managers, separately from other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to the Secretary of State, who shall, without opening said returns, cause the same to be laid before the Senate on the day after the two houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives.' Constitution, Art. V, Sec. I, Par. III (Code Ann. s 2-3003).

'The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice.' Constitution, Art. V, Sec. I, Par. IV (Code Ann. s 2-3004).

Second, the provisions of the Georgia Election Code of 1964: 'This Code shall apply to any general or special election in this State to fill any Federal, State or county office, and to any general or special primary to nominate candidates for any such office, and to any Federal, State or county election or primary \*12 for any other purpose whatsoever: Provided, however, it shall not apply to any municipal primary or election.' Ga.L.1964, Ex.Sess., pp. 26, 28 (Code Ann. s 34-102).

'No candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office. In instances where no candidate receives a majority of the votes cast, a runoff primary or election shall be

held, between the two candidates receiving the highest number of votes, on the 14th day after the day of holding the first primary or election, unless such runoff date is postponed by court order. The candidate receiving a majority of the votes cast in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner. Only the electors entitled to vote in the first primary or election shall be entitled to vote in any runoff primary or election resulting therefrom; \* \* \* Ga.L.1964, Ex.Sess., pp. 26, 174 (Code Ann. s 34-1514).

Neither counsel for the appellants nor for the appellee dispute the rules of law that (a) the General Assembly of this State has the power to enact any legislation affecting the people of Georgia which is consistent with the Constitution of \*\*851 Georgia and not repugnant to the Constitution of the United States, or (b) that a statute of the General Assembly which is in plain and irreconcilable conflict with an express provision of the State Constitution must yield to the Constitution as the supreme law. So we look to Article V of the Constitution to determine whether Election Code Sec. 34-1514 is in harmony with or in irreconcilable conflict with said article.

Over a long period of years this court and other courts in the several states have considered and laid down rules which have been accepted as correct and proper in determining if there is or is not an irreconcilable conflict between the constitution and a statute. In 16 Am.Jur.2d 228-229, Constitutional Law, s 56, it is stated: 'It is the obvious duty of the legislature to act in subordination to the state constitution, for with reference to the subjects upon which the constitution assumes to speak, its declarations and necessary implications are conclusive \*13 upon the legislature. Thus, constitutional provisions prevent the enactment of any law which extinguishes or limits the powers conferred by the constitution.'

[1] In 16 C.J.S. Constitutional Law s 70, p. 208, it is stated: 'A provision which expressly prescribes the manner or doing a particular thing is exclusive in that regard and impliedly prohibits performance in a substantially different manner. Thus, where the manner in which, or the means by which, a power granted shall be exercised are specified, such manner or means are exclusive of all others, and the right or power to use other means does not arise by implication even though considered more convenient or effective. Where the constitution defines the circumstances under which a right may be exercised, the specification is an implied prohibition against legislative interference to add to the condition. A

constitutional provision directing the legislature to enact particular legislation carries no authority to enact something not included therein.' In support of this conclusion the following cases are cited: Weinberger v. Board of Public Instruction of St. Johns County, 93 Fla. 470, 112 So. 253 which holds that the legislature does not have the power to enact a law which by its own terms conflicts with a provision of the state constitution prescribing the doing of an act or arriving at a decision, the constitutional method being exclusive; In re Opinion of the Justices, 294 Mass. 610(7), 3 N.E.2d 12 which holds that where the constitution gives clear and minute directions as to the performance of a specific duty it can be performed in that way alone; Sturgis v. Spofford, 45 N.Y. 446, which holds that constitutional provisions for organizing the three departments of government exclude any other mode.

[2] Under our Constitution and the decisions of this court, the State Constitution is superior in authority to an Act of the legislature in conflict with the constitution, so where there is any conflict between a statute and the constitution the provisions of the latter control. Constitution, Art. XII, Sec. I, Par. II (Code Ann. s 2-8002).

This court, in Copland v. Wohlwender, 197 Ga. 782, 787, 30 S.E.2d 462, 465, stated: 'It is insisted that the Code, s 24-2903, \*14 is controlling. This section provides that 'vacancies occur and are filled as prescribed in cases of the judges of the superior courts, and the manner of proceeding is in every respect the same.' This section of the Code is a part of the chapter dealing with solicitors general. If this Code section is in conflict with the provisions of the constitution relative to filling vacancies in the office of solicitors general, it must yield to the constitution. 'The provisions of the constitution are fundamental and controlling.' Wood v. Arnall, 189 Ga. 362, 6 S.E.2d 722, 727. Therefore, this Code section is not applicable to the case under consideration.'

In Massenburg v. Commissioners of Bibb County, 96 Ga. 614, 617, 23 S.E. 998, this court held: 'A constitutional office may \*\*852 become such either by virtue of its creation as such by express provisions of the constitution, or, being already in existence as a legislative office, it be established and recognized, and the term and mode of selection be prescribed, by a constitution adopted subsequent to its creation by the legislature; it then becomes a constitutional office, and thereafter not subject to control or modification by legislative enactment. Where the constitution prescribes the manner in which a particular public

functionary is to be elected, or prescribes the terms during which he shall hold office, the legislature is thereafter powerless to modify, enlarge, or diminish that which is established by the constitution. It has no power to shorten the term of a constitutional office (Howard v. State, 10 Ind. 99; Cotton v. Ellis, 7 Jones (N.C.) 545; State v. Askew, 48 Ark. 82, 2 S.W. 349); nor practically abolish the office by repealing provision for salary (Reid v. Smoulter, 128 Pa. 324, 18 A. 445, 5 L.R.A. 517); nor extend the constitutional term (People v. Bull, 46 N.Y. 57; Goodin v. Thoman, 10 Kan. 191; State v. Brewster, 44 Ohio St. 589, 9 N.E. 849); nor provide for the choice of officers a different mode from that prescribed by the constitution (People v. Raymond, 37 N.Y. 428; Devoy v. New York, 35 Barb. 264, 22 How.Pr. 226; People v. Blake, 49 Barb. 9; People v. Albertson, 55 N.Y. 50). If, therefore, the people in their sovereign capacity, in convention assembled, sembled, do by the terms of an organic law, established by them and for them, reserve unto themselves the right of \*15 election to particular offices, the legislature cannot thereafter interfere with this reserved right, and provide other means than those established by the constitution for the election of incumbents to such offices, even though there be no negation of this right of legislative interference expressly stated in the terms of the constitution. The reservation of the right itself is a sufficient safeguard against the encroachments of legislative power, inasmuch as such reservation of itself operates as a denial to the legislature of the right of interference. The legislative powers, with respect to subjects left under the legislative control, are coextensive with the limits of the state, and are circumscribed only by the wise discretion of the general assembly itself; but, respecting those rights and those things concerning which the constitution has itself made provisions, the legislature is without power.'

In Morris v. Glover, 121 Ga. 751, 754, 49 S.E. 786, 787, it was said: 'Likewise, an office created by statute, but not defined in or recognized by the Constitution, may be abrogated by statute. But where an office is created or guarded by express constitutional provision, its scope cannot be enlarged or lessened by statute, nor can the office be filled in any manner other than that prescribed by the Constitution.'

An election for Governor of Georgia was held on Tuesday after the first Monday in November 1966, as provided in Par. II of Sec. I of Art. V of the Constitution of 1945. Paragraphs III and IV of that section and article provide that the returns for the election of Governor 'shall be sealed up by the

managers, separately from other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to the Secretary of State' (Par. III), who without opening them shall cause them to be laid before the Senate on the day after the two houses shall have been organized, the Senate shall transmit them to the House of Representatives, and on such day the Senate and House shall convene in joint session and open and publish the returns. If it shall be determined that a person has a majority of the whole number of votes he shall be declared the duly elected Governor of the State, 'but, if no person shall have such majority, then from \*16 the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce' (Par. IV) by a majority of the members present. (Emphasis supplied.)

**\*\*853 [3]** In our opinion it is plain and certain that where the canvassed returns show no person received a majority of the votes cast in the general election held on the date appointed by the Constitution, Art. V reserves to the General Assembly the power and right, by the vote of a majority of the members present on the date the returns from such election are submitted to it, to elect a Governor from the two persons having the highest number of votes. The provisions of section 34-1514 of the Georgia Election Code of 1964 do not apply to the election of Governor where no person in the general election receives a majority of the votes-the 'runoff' or selection between the two highest being reserved by the Constitution to the members of the General Assembly.

The court did not err in denying an injunction and dismissing the petition.

Judgment affirmed.

All the Justices concur, except DUCKWORTH, C.J., and COOK, J., who dissent.

DUCKWORTH, Chief Justice (dissenting).

This day will stand in history as one on which all the voters in free Georgia were, for the first time since 1824 deprived of their right to choose with their votes the Governor who will rule over them. This was done by a majority of the Supreme Court which has a long and proud record of guarding and upholding the rights of the individual. They base their decision upon what they sincerely believe the Constitution demands. But I,

with equal sincerity, believe they are wrong and I shall set forth in this dissent my reasons for so believing and which I have urged upon my honorable colleagues as strongly as I know how.

There can be no escape from the fact that the amendment of 1824 (Ga.L.1824, p. 41) had but one intent and purpose, which was-to empower the people to elect their Governor by their votes in a State-wide election for that purpose. It repealed outright art. II, sec. 2 of the 1798 Constitution which empowered \*17 the General Assembly to elect a Governor and adopted the provision for election by the people. It also provided for election by the General Assembly in case no one had received a majority in the election, all of which has been kept in the Constitution, and is now found in Art. V, Sec. I, Par. II, III, and IV, of the present Constitution (Code Ann. ss 2-3002, 2-3003, 2-3004; Const. of 1945).

The majority base their decision on the provisions for sealing and transmitting the returns for the election, and if no one has a majority, 'then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election \* \* \* the General Assembly shall immediately, elect a Governor.' If this foundation does not support the decision as I confidently believe I shall demonstrate then the judgment they render is clearly erroneous. I shall call to my support, some of the most eminent Justices who ever served here by quoting their exact words.

It is suggested that if we allow to stand as valid Code Ann. s 34-1514 (Ga.L.1964, Ex.Sess., p. 26) which provides that the indispensable requisite to any election is that someone receive a majority of the votes, and it prescribes the procedure for securing such majority, and hence avoid a no election by requiring the two receiving the highest number of votes in all cases where there is no majority to oppose each other in a runoff, then there would never be a need for the constitutional provision for the General Assembly to elect. One complete answer is that when it was put in the Constitution, there was no statute requiring a majority to elect, consequently, should the election fail to produce a person receiving a majority as the Constitution demanded, election by the General Assembly was the only way left to obtain a Governor. And since the question of ever having legislation requiring election by a majority was and still is a matter over which the Constitution, Art. III, Sec. I, Par. I (Code Ann. s 2-1301; \*\*854 see also s 2-1920; Const. of 1945) gives the General Assembly exclusive jurisdiction, it could not then be seen if such

legislation would ever be enacted; consequently, the provision for election by the General \*18 Assembly was intended as a safety measure, and unquestionably was not intended to undo and nullify the sole purpose of the 1824 amendment which was indisputably to take from the General Assembly and place in the hands of the people the right to choose a Governor. Another obvious answer is that if in the runoff the candidates receive the same number of votes, there might be a need for it; and another complete answer would be: Well, what? No one would suffer, but the voters will have elected a Governor as the Constitution intends.

Another argument is advanced that the Constitution, Art. V, Sec. I (Code Ann. Ch. 2-30; Const. of 1945), after fixing the term and time of electing a Governor, states further that the date there fixed shall be the time for the election 'until another date be fixed by the General Assembly' in some mysterious way restricts the legislature to fixing only one day when the election shall be held and completed. This contention is so obviously without substance or merit that no argument is necessary to refute it. Ample authority is there given to designate a week or even a month, or longer, if necessary to complete the election. But I take that constitutional provision as conclusive evidence that the Constitution intends for the legislature to have absolute control in setting forth essentials to an election and procedure by which such essentials may be met as provided by the 1964 act for a run-off as well as when.

Finally, the argument is made that the requirement that the returns for the election for Governor be sealed up by the managers, separate from other returns, and sent to the President of the Senate and Speaker of the House, through the Secretary of State, precludes a discovery of whether or not someone received a majority of the votes. The fatal fallacy in such contention is a lack of recognizing what are election returns. Obviously, no returns from a portion of an incomplete election would be election returns. There can be no completed election under the 1964 act until the procedure there prescribed for completing an election has been followed when necessary to secure someone with a majority. Too, the Constitution contains precisely the requirement in election of all the executive offices, and if that argument is sustained, all these offices will \*19 be vacant if the General Assembly finds none of them has a majority, since there is no provision for the General Assembly to elect them and the statute says-no majority, no election. This strawman is knocked down when the truth is recognized, which is, that the Constitution refers only

to returns from an election that has been completed as required by law. This means that the law requires counting the first votes and determining if a runoff is necessary to secure candidates with majorities, and if so, go forward with the election by runoffs, and only when this has been done can there be produced 'returns for every election of Governor,' which can be lawfully sealed and directed as the Constitution requires.

With the foregoing contents of the Constitution and the election law before it, this court's first duty is to apply and scrupulously observe certain rules for construction which this court has adopted by countless unanimous decisions. The cardinal rule requires diligent judicial search for the intent as disclosed by the Constitution or statute, and once this is discovered, render judgment giving it full effect. Among such cases are: Henderson v. Alexander, 2 Ga. 81, 85; Erwin v. Moore, 15 Ga. 361; Atlantic Coast Line R. Co. v. Postal Tel. Co., 120 Ga. 268, 276, 48 S.E. 15; Gazan v. Heery, 183 Ga. 30, 187 S.E. 371; Carroll v. Ragsdale, 192 Ga. 118, 15 S.E.2d 210; Thacker v. Morris, 196 Ga. 167, 173, 26 S.E.2d 329; and Thompson v. Eastern Airlines Inc., 200 Ga. 216, 39 S.E.2d 225.

Listen to what the late Chief Justice Russell wrote for the court in Gazan v. Heery, 183 Ga. 30, 187 S.E. 371, supra: 'In the construction of a statute, a court may decline to \*\*855 give a legislative act such construction as will attribute to the General Assembly an intention to pass an act which is not reasonable, or as will defeat the purpose of the proposed legislation.' (Emphasis supplied) Here is what Chief Justice Reid in Thacker v. Morris, 196 Ga. 167, 26 S.E.2d 329, supra, quoted from Columbus South. Railway Co. v. Wright, 89 Ga. 574, 586, 15 S.E. 293. 'The law is too wise, too just, and too important to be defeated by sticking in the bark, and adhering to the literal meaning of words, when by so doing we would not only set at naught the legislative will, but impute \*20 to our lawmakers the folly of making a provision at once mathematically absurd and legally impracticable.' Our duty is to follow those teachings. If done we would allow the literal meaning of no words in either the Constitution or statute to defeat the undeniable intent of both, that the voters elect the Governor, and that the elective process be carried out to secure persons receiving a majority of the votes cast. There can be no challenge to the statement that the courts have a solemn duty if the statute will bear it to hold statutes constitutional, and if they are susceptible to more than one construction, give them that construction which will render them constitutional rather than unconstitutional. Gazan v. Heery, 183 Ga.

30, 187 S.E. 371, supra; Moore v. Robinson, 206 Ga. 27, 55 S.E.2d 711; Barge v. Camp, 209 Ga. 38, 70 S.E.2d 360.

Far from censuring the brilliant Mr. Hill, the Assistant Attorney General representing the appellee, I praise him for while acting in his capacity of a partisan advocate, 'flyspecking' and pointing out every provision of the Constitution and statute that when taken at its literal meaning, with complete disregard for the duty to effectuate the intent-to sustain rather than strike down as unconstitutional, all statutes-and the old law and the remedy, that might raise questions of validity. But a different duty is inescapably imposed upon every Justice of this court who must be neither partisan nor advocate. We can not escape the duty we bear to effectuate the intent if possible, and to consider the old law, the mischief, and the remedy, and render a construction that 'represses the mischief and advances the remedy.' On this last duty I wish to quote what Judge Nisbet, one of this courts most capable jurists wrote in Henderson v. Alexander, 2 Ga. 81, at page 85, supra. He said: 'It is the duty of Judges so to construe remedial statutes as to repress the mischief and advance the remedy. 11 Coke, 71b; 1 Kent, 464; and in the application of this rule they are to consider the law as it stood before the act-the mischief against which it did not provide-the remedy which the legislature has provided, and the reason of the remedy.' See also Code s 102-102(9), and cases annotated thereunder such as Walsh v. City Council of Augusta, 67 Ga. 293; \*21Barrett & Caswell v. Pulliam, 77 Ga. 552(2); Board of Tax Assessors of Decatur County v. Catledge, 173 Ga. 656, 658, 160 S.E. 909; and Gazan v. Heery, 183 Ga. 30, 187 S.E. 371, supra.

As to the 1824 amendment to the Constitution of 1798, allowing the General Assembly to elect a Governor, the Constitution was mischievous because it disfranchised the voters, and the amendment was the remedy to enfranchise them. According to Judge Nisbet by whose opinion every present Justice is bound, our duty is crystal clear-'repress the mischief' which was legislative election of a Governor, and 'advance the remedy,' which is the 1824 amendment to allow the people to choose whom they wish to be Governor. Application of the rule announced by Nisbet, J., to the 1964 election code and particularly Sec. 34-5414 (Code Ann. s 34-1514; Ga.L.1964, Ex.Sess., pp. 26, 174) thereof, it seems to me, gives this court no choice but to recognize the mischief of no law requiring a majority for someone for Governor in the election and the consequent choosing of a Governor by the General Assembly, and the remedy

by the 1964 act by requiring that someone receive a majority of the votes cast before there is an election, and then proceeding to stipulate the further procedure in that same election \*\*856 to find a candidate who received a majority which is required by the Constitution. I pose the question with all due respect to each of my respected Associates of the majority, do you have even a shadow of doubt as to the mischief of both the old Constitution and the old statutes, which indisputably contained the potentials for robbing the people of Georgia of their right to choose by their own votes, the person who should rule over them as Governor? That question is followed by the question as to whether the remedy for that mischief is abundantly found in Sec. 34- 1514 of the 1964 Act? Finally, has the duty imposed by law upon each of us to 'supress the mischief and advance the remedy' been performed by the majority opinion? Subsequent enactments that are in irreconcilable conflict with previous statutes repeal previous statutes by implication; also the 1964 statute being expressly intended to constitute a comprehensive treatise of the entire election laws would likewise repeal by implication previous laws \*22 on the subject. Leonard v. State of Ga. ex rel. Lanier, 204 Ga. 465, 50 S.E.2d 212; Mosley v. Lanier, 213 Ga. 373, 99 S.E.2d 118. This disposes of all previous statutes cited by counsel and the majority.

There are two more questions that have raised. (1) Did the Supreme Court in Fortson v. Morris, 385 U.S. 231, 87 S.Ct. 446, 17 L.Ed.2d 330, decide this case? The answer is so plainly, no, that even a law student could give this answer. (2) Does failure to call the runoff within 14 days stated in the 1964 Act, supra, prevent a runoff? The object of this clause is to elect someone by a majority, and the time stipulation is incidental and merely directory. To effectuate the intent if necessary the 14 day provision may be disregarded. The 'tail can not wag the dog.' In Wood v. Arnall, 189 Ga. 362, 371, 6 S.E.2d 722, it is said: 'The question here involved is not whether an official regularly elected by the people at the time and place prescribed by law could be deprived of his office by virtue of the mere failure of the General Assembly to canvass and declare the result as directed by the constitution, for manifestly the will of the people could not be thus defeated.' (Emphasis supplied.)

The foregoing constitutes my legal reasons for dissent. But when this court does as the majority, in my opinion, has done here, turned the clock back 143 years to 1824, and takes from the hands of the Georgia voter, his ballot, which is the only sure defense against dictatorship, it thereby snatches it from the hands of

the brave Georgia soldiers, airmen and sailors, who are now wading the swamps of Vietnam and facing death in the skies over that country, bleeding and dying, to place the ballot in the hands of the Vietnamese, although their own State denies by court judgment that privilege to them at home. Strip the citizen of his right to vote and you render him a helpless victim of a dictator. I cherish as my priceless blessing the confidence Georgia citizens have manifested in me by freely electing me as their humble servant as a Justice of their highest court five times, and I would suffer my arms severed from my body before I would betray their trust, or deprive them of their liberty to freely choose all officers that rule over them in the absence of compelling law that demands such after a \*23 soulsearching examination fails to reveal any way to find by observance of established rules of law a way to hold such inhuman law did not require a judgment so openly in defiance of freedom and liberty.

Holding as I do the foregoing unshakable convictions, I am allowed no choice but an emphatic dissent.

I am authorized to state that COOK, J., concurs in this dissent.

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Supreme Court of North Carolina.

J. Max THOMAS, Petitioner,  
 v.  
 STATE BOARD OF ELECTIONS, David M.  
 McConnell, Chairman; Warren R. Williams,  
 Joseph E. Zaytoun, Robert S. Ewing, Dan S. Judd,  
 Members of the State Board of  
 Elections; and Raymond C. Maxwell, Executive  
 Secretary, Respondents.

No. 452

Feb. 28, 1962

Mandamus proceeding to compel State Board of Elections to accept petitioner's filing fee and to certify him as a candidate for office of lieutenant-governor in primary election to fill unexpired term of deceased lieutenant-governor. The Superior Court, Wake County, Wm. Y. Bickett, J., dismissed the proceeding, and the petitioner appealed. The Supreme Court, Denny, J., held that the succession of governor and lieutenant-governor is fixed by the constitution and a vacancy in the office of lieutenant-governor may not be filled at an election for any portion of unexpired term.

Affirmed.

West Headnotes

[1] States ⇨41  
 360k41 Most Cited Cases

[1] States ⇨42  
 360k42 Most Cited Cases

The succession of governor and lieutenant-governor is fixed by the Constitution and a vacancy in the office of lieutenant-governor may not be filled at an election for any portion of unexpired term. Const. art. 2, §§ 1 et seq., 19, 20; art. 3, §§ 1 et seq., 2, 11, 12, 13; G.S. § 163-7.

[2] States ⇨42  
 360k42 Most Cited Cases

Governor has no authority to appoint a successor to

fill out vacancy existing by reason of death of lieutenant-governor. Const. art. 2, §§ 1 et seq., 19, 20; art. 3, §§ 1 et seq., 2, 11, 12, 13; G.S. § 163-7.

[3] States ⇨42  
 360k42 Most Cited Cases

When vacancy occurs in office of lieutenant-governor, the powers, duties and emoluments of such office devolve upon president of senate for unexpired portion of the lieutenant-governor's term. Const. art. 2, §§ 1 et seq., 19, 20; art. 3, §§ 1 et seq., 2, 11, 12, 13; G.S. § 163-7.

[4] Mandamus ⇨1  
 250k1 Most Cited Cases

[4] Mandamus ⇨3(1)  
 250k3(1) Most Cited Cases

[4] Mandamus ⇨10  
 250k10 Most Cited Cases

Mandamus is a proceeding of a civil nature and it can be maintained only when there is no other adequate remedy and when right sought to be enforced is not in doubt.

**\*\*165 \*402** This is a proceeding instituted in the Superior Court of Wake County by the petitioner, J. Max Thomas, who seeks to have the court issue in his behalf a writ of mandamus compelling respondent State Board of Elections to accept his filing fee and certify him as a candidate for the office of Lieutenant-Governor of North Carolina in the primary election to be held in the year 1962, to fill the unexpired term of the late H. Cloyd Philpot as Lieutenant-Governor of North Carolina.

The petitioner tendered a notice of candidacy and a filing fee of \$21.00 to the respondents on 15 December 1961. Petitioner is seeking to become a candidate of the Democratic Party for the office of Lieutenant-Governor in the primary to be held in May 1962.

Respondents answered the petition and denied the legal right of the petitioner to become a candidate for such office and alleged that said office was not open for the filing of candidates and would not be until the primary to be held in 1964.

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The respondents filed a demurrer ore tenus to the petition and the matter was heard before his Honor, William Y. Bickett, Resident Judge of the Tenth Judicial District, in Chambers in the Wake County Courthouse in Raleigh, North Carolina, on 20 January 1962.

There were no questions or issues of fact to be determined or passed upon. It was admitted that the petitioner tendered the proper filing fee, and that he is eligible in all respects to become a candidate of the Democratic Party for the office of Lieutenant-Governor of this State if, under the Constitution and laws of this State, the year 1962 and the primary to be held in said year is the proper time for the election of a candidate to fill such office. Therefore, the matter was heard upon the pleadings and the demurrer interposed by the respondents and upon argument of counsel.

His Honor sustained the demurrer ore tenus, ordered that no writ of mandamus issue, and dismissed the proceeding. Judgment was entered accordingly.

The petitioner appeals to this Court, assigning error.

R. Floyd Crouse, Sparta, Joe Branch, Enfield, Irving E. Carlyle, Winston-Salem, for petitioner.

T. W. Bruton, Atty. Gen., Ralph Moody, Asst. Atty. Gen., for respondents.

DENNY, Justice.

The question presented for determination arises out of the following factual situation: The Honorable H. Cloyd Philpot was **\*403** elected Lieutenant-Governor of this State for a term of four years in the general election in November 1960, and took the oath of office and entered upon the duties of the office in January 1961. He died on 19 August 1961.

**\*\*166** As a matter of history, the Honorable Tod R. Caldwell was elected Governor and the Honorable Curtis H. Brogden was elected Lieutenant-Governor of North Carolina for four-year terms in 1872. Governor Caldwell died on 11 July 1874. Lieutenant-Governor Brogden took the oath of office as Governor on 14 July

1874. See Governor's Message to the General Assembly, reported in the Journal of the House, Session 1874-75, beginning on page 21.

It might be well to note that the succession of Lieutenant-Governor Brogden to the office of Governor is the only instance in the history of this State since the office of Lieutenant-Governor was created by the Constitutional Convention of 1868, when the Lieutenant-Governor succeeded to the Governorship before the midterm general election. In each other instance in which a Lieutenant-Governor has succeeded to the Governorship in this State, the vacancy in the office of Governor occurred after the midterm general election had been held. However, Governor Caldwell having died on 11 July 1874, less than thirty days prior to the next general election held on 6 August 1874, the question now before this Court has never been, nor could it have been, raised until the death of Lieutenant-Governor Philpot.

[1] Therefore, the determinative question presented on this appeal is simply this: Is the succession of Governor and Lieutenant-Governor fixed by our Constitution, thereby excluding the right to have the vacancy in the office of Lieutenant-Governor filled by election prior to November 1964?

In considering the question presented, it is well to keep in mind that the offices of Governor and Lieutenant-Governor, aside from the powers and duties, are treated in the same constitutional manner. For example: The offices of the Executive Department of the State government were established and the terms fixed by the provisions of Article III, Section 1 of the Constitution of North Carolina, which read as follows: 'OFFICERS OF THE EXECUTIVE DEPARTMENT; TERMS OF OFFICE.--The executive department shall consist of a Governor, in whom shall be vested the supreme executive power of the State; a Lieutenant-Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly **\*404** are elected. Their term of office shall

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commence on the first day of January next after their election, and continue until their successors are elected and qualified: Provided, that the officers first elected shall assume the duties of their office ten days after the approval of this Constitution by the Congress of the United States, and shall hold their offices four years from and after the first day of January.'

The eligibility requirements of the Governor and Lieutenant-Governor are set out in the Constitution and are the same. Article III, Section 2 of the Constitution is as follows: 'QUALIFICATIONS OF GOVERNOR AND LIEUTENANT-GOVERNOR.--No person shall be eligible as Governor or Lieutenant-Governor unless he shall have attained the age of thirty years, shall have been a citizen of the United States five years, and shall have been a resident of this State for two years next before the election; nor shall the person elected to either of these two offices be eligible to the same office more than four years in any term of eight years, unless the office shall have been cast upon him as Lieutenant-Governor or President of the Senate.' (Emphasis added.)

There is certainly no denial of the fact that when the office of Governor becomes vacant, there is a constitutional plan of succession other than by an election, to fill the vacancy for the unexpired term. It is necessary, therefore, to examine the several sections of the Constitution bearing on the **\*\*167** duties of the Lieutenant-Governor and the procedure to be followed when the 'powers, duties and emoluments of the office of Governor shall devolve ' upon the Lieutenant-Governor and he is unable to act.

Article III, Section 11 prescribes the duties of the Lieutenant-Governor as follows: 'DUTIES OF THE LIEUTENANT-GOVERNOR.--The Lieutenant-Governor shall be President of the Senate but shall have no vote unless the Senate be equally divided. He shall receive such compensation as shall be fixed by the General Assembly.'

Article III of the Constitution deals with the Executive Department of our State government. The Lieutenant-Governor is an officer of the Executive Department. Even so, Article II of our

Constitution which deals with the Legislative Department of the government, in Section 19, provides as follows: 'PRESIDENT OF THE SENATE.--The Lieutenant-Governor shall preside in the Senate, but shall have no vote unless it may be equally divided.' Article II further contains the following provisions in Section 20: 'OTHER SENATORIAL OFFICERS.--The Senate shall choose its other officers and also a speaker (protempore) in the absence of the Lieutenant-Governor, or when he shall exercise the office of Governor.'

The constitutional method of succession is set out in Article III, **\*405** Section 12 of our Constitution which reads as follows: 'IN CASE OF IMPEACHMENT OF GOVERNOR, OR VACANCY CAUSED BY DEATH OR RESIGNATION.--In case of the impeachment of the Governor, his failure to qualify, his absence from the State, his inability to discharge the duties of his office, or, in case the office of Governor shall in anywise become vacant, the powers, duties and emoluments of the office shall devolve upon the Lieutenant-Governor until the disabilities shall cease or a new Governor shall be elected and qualified. In every case in which the Lieutenant-Governor shall be unable to preside over the Senate, the senators shall elect one of their own number president of their body; and the powers, duties and emoluments of the office of Governor shall devolve upon him whenever the Lieutenant-Governor shall, for any reason, be prevented from discharging the duties of such office as above provided, and he shall continue as acting Governor until the disabilities be removed, or a new Governor or Lieutenant-Governor shall be elected and qualified. Whenever, during the recess of the General Assembly, it shall become necessary for the President of the Senate to administer the government, the Secretary of State shall convene the Senate, that they may elect such president.'

We think the provisions of our Constitution clearly point out upon whom the powers, duties and emoluments of the offices of Governor and Lieutenant-Governor shall devolve in the event of a vacancy in either or both of said offices. We think this view is further supported by the provisions of Section 13 of Article III in our Constitution which reads as follows: 'DUTIES OF OTHER

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EXECUTIVE OFFICERS.--The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance shall be prescribed by law. If the office of any of said officers shall be vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in the first section of this article: Provided, that when the unexpired term of any of the offices named in this section in which such vacancy has occurred expires on the first day of January succeeding the next general election, the Governor shall appoint to fill said vacancy for **\*\*168** the unexpired term of said office.' This last proviso was authorized by Chapter 1033 of the North Carolina Session Laws of 1953, **\*406** and submitted to and approved by a vote of the people at the general election held on 2 November 1954.

It will be noted that the offices of Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance, have been created since the adoption of the Constitution in 1868 and Sections 1 and 13 of Article III of the Constitution amended to include these offices in the Executive Department of the State government.

The petitioner contends that his petition for a writ of mandamus is clearly supported by the provisions of G.S. s 163-7, reading as follows: 'FOR VACANCIES IN STATE OFFICES.--Whenever any vacancies shall exist by reason of death, resignation, or otherwise, in any of the following offices, to wit, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Solicitor, Justices of the Supreme Court, judges of the superior court, or any other State officer elected by the people, the same shall be filled by elections, to be held in the manner and places and under the same regulations and rules as prescribed for general elections, at the next regular election for members of the General Assembly which shall occur more than thirty days after such

vacancy, except as otherwise provided for in the Constitution.'

In our opinion, when the General Assembly enacted the foregoing statute, it clearly recognized that the Governor and the Lieutenant-Governor were not subject to its provisions and that is the reason the statute contains the provision, 'except as otherwise provided for in the Constitution.'

Moreover, the Constitution does not otherwise provide except as to the offices of Governor and Lieutenant-Governor.

If it had been the intent of the framers of the Constitution to authorize or require the election of a successor to fill a vacancy in the office of Lieutenant-Governor, as required with respect to the offices named in the Constitution in Section 13, Article III, then we can think of no sound reason why the framers of the Constitution did not include the office of Lieutenant-Governor in Section 13, Article III of the Constitution. Every office in the Executive Department of the State government created by the Constitutional Convention of 1868, was named in Section 13 of Article III of the Constitution, and the manner of succession in the event of a vacancy in any of said offices is explicitly set out therein, except the offices of Governor and Lieutenant-Governor.

Moreover, in each of the offices named in Section 13, Article III of the Constitution in which a vacancy is required to be filled, the duty is imposed upon the Governor to appoint another to fill the office until a successor is elected and qualified.

[2] **\*407** Consequently, if the contentions of the petitioner are correct, we can think of no valid reason why the Governor should not have appointed a successor to Lieutenant-Governor Philpot immediately after his death, to serve until the next general election. We hold, however, there is no constitutional provision which authorizes the Governor to appoint a successor to Lieutenant-Governor Philpot, to fill out the vacancy now existing by reason of his death. Furthermore, no Governor has ever attempted to appoint another to fill a vacancy in the office of Lieutenant-Governor.

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Here, again, we think the framers of the Constitution deliberately and advisedly provided for the succession of Governor and Lieutenant-Governor otherwise than by election, thereby withholding from the Governor the power to name his potential successor. On the other hand, whenever it becomes necessary for a President of the Senate to be elected, upon whom the powers, duties and emoluments of the office of Governor or Lieutenant-Governor may devolve, the power and responsibility for electing a President of the Senate is vested **\*\*169** by the Constitution in that body. Section 12, Article III of the Constitution of North Carolina.

The factual situation involved in this appeal is not controlled by the decision in *Rodwell v. Rowland*, 137 N.C. 617, 50 S.E. 319.

We hold that the Constitution provides for the succession of the Governor and the Lieutenant-Governor and does not authorize a vacancy in either office to be filled at an election for any portion of an unexpired term. Section 12, Article III of the Constitution of North Carolina.

[3] We further hold that when a vacancy occurs in the office of Lieutenant-Governor, the powers, duties and emoluments of the office of Lieutenant-Governor devolve upon the President of the Senate who shall discharge the duties and powers of the office of Lieutenant-Governor for the unexpired portion of the term to which the Lieutenant-Governor was elected.

In the case of *State v. Emery*, 224 N.C. 581, 31 S.E.2d 858, 157 A.L.R. 441, Stacy, C. J., speaking for the Court, said: 'The will of the people as expressed in the Constitution is the supreme law of the land. *Warrenton v. Warren County*, 215 N.C. 342, 2 S.E.2d 463. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. \* \* \*'

When the provisions of our Constitution bearing on the question now before us are properly interpreted, we think they support in letter and spirit the conclusion we have reached.

[4] '\* \* \* Mandamus is an action or proceeding of a civil nature, extraordinary **\*408** in the sense that it can be maintained only when there is no other adequate remedy and designed to enforce clear legal rights or the performance of ministerial duties which are enjoined by law; but the writ will not be issued to enforce an alleged right which is in doubt. Not only must the plaintiff show that he has a clear legal right; he must show that the opposing party is under legal obligation to perform the act or to grant the relief for the performance or enforcement of which the action is prosecuted. \* \* \*' *McIntosh*, North Carolina Practice and Procedure, Second Edition, Volume 2, Section 2445.

In our opinion, the petitioner is not entitled to the writ he seeks and we so hold; therefore, the judgment from which this appeal was taken is

Affirmed.

WINBORNE, C. J., not sitting.

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C

Supreme Court of Nebraska.

LAVERTY

v.

COCHRAN, GOVERNOR, ET AL.

No. 30029.

Jan. 30, 1937.

\*355 Syllabus by the Court.

1. The legislature may not impose judicial power upon the executive officers or delegate to them legislative power.
2. Generally, judicial power is the authority to hear and determine a controversy as to rights and upon such determination to render a judgment binding upon the disputants.
3. The authority to hear and determine controversies between public officers, the state, counties, cities and other municipal corporations, subdivisions of the state and the state bonding board is a judicial power.
4. The board of the state bonding fund is the board of educational lands and funds, composed of the governor, the treasurer, the secretary of state, the attorney general, and the commissioner of public lands and buildings, all executive officers of the state, and is purely administrative in character.
5. A constitutional officer can only be removed by impeachment as provided in the Constitution (Const. art. 3, § 17).
6. It is beyond the power of the legislature to provide for the removal or suspension of a constitutional officer, where the Constitution creates the office, fixes its terms, and the grounds and manner of removal.
7. The bond required of public officers by the Constitution may be defined as a contractual obligation that such officer will faithfully discharge the duties of his office.
8. An official bond is an obligation to pay upon a breach of the conditions thereof.
9. The Constitution requires all constitutional state officers to give a bond for the faithful performance of official duties, and the legislature is without power to nullify this plain mandatory provision of the Constitution.
10. Although a statute may be invalid or unconstitutional in part, the other part will be sustained where it can be separated from the part which is void.
11. The parts of the statute which are valid must be capable of being executed independently of the invalid parts in order to be operative.
12. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation.
13. Where sections constituting an inducement for the passage of an act are invalid, the entire act must fall, notwithstanding the saving clause.
14. Where the connection between the invalid parts and the other parts of a statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative.
15. The state bonding act was a scheme of legislation to accomplish a particular purpose, and when said purpose fails because of invalid provisions, the entire act is unconstitutional.
16. Questions presented on appeal but not necessary to a decision need not be determined.

Appeal from District Court, Lancaster County;

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Shepherd, Judge.

Suit by Alexander Lavery against Robert L. Cochran and others. From the judgment the plaintiff appeals, and the defendants file a cross-appeal.

Reversed.

West Headnotes

**Administrative Law and Procedure** ⤵9

15Ak9 Most Cited Cases

**Constitutional Law** ⤵80(2)

92k80(2) Most Cited Cases

Provisions of State Bonding Act authorizing administrative board of state bonding fund to remove public official from office and cause office to be vacant by cancellation of bond held unconstitutional delegation of judicial authority to executive officers, notwithstanding provision for appeal from judgment of board. Comp.St.Supp.1935, §§ 12-202, 12-213, 12-214, 12-215; Const. art. 2, § 1; art. 5, § 1.

**Appeal and Error** ⤵843(1)

30k843(1) Most Cited Cases

Question presented on appeal, but not necessary to decision, need not be determined.

**Constitutional Law** ⤵62(1)

92k62(1) Most Cited Cases

Legislature may not delegate legislative power to executive officers. Const. art. 2, § 1; art. 5, § 1.

**Constitutional Law** ⤵67

92k67 Most Cited Cases

"Judicial power," within constitutional provisions for separation of governmental departments and vesting judicial power in courts, is authority to hear and determine controversies as to rights and to render judgment binding on disputants on such determination. Const. art. 2, § 1; art. 5, § 1.

**Constitutional Law** ⤵80(1)

92k80(1) Most Cited Cases

Legislature may not impose judicial power on executive officers. Const. art. 2, § 1; art. 5, § 1.

**Constitutional Law** ⤵80(1)

92k80(1) Most Cited Cases

Authority to hear and determine controversies between public officers, state, counties, cities, and other municipal corporations, subdivisions of state and state bonding board, is "judicial power" and hence not delegable to executive officers. Comp.St.Supp.1935, § 12-213, Const. art. 2, § 1; art. 5, § 1.

**Constitutional Law** ⤵80(2)

92k80(2) Most Cited Cases

Provision of state bonding act providing for the removal or suspension of constitutional officer on judgment of state bonding board held unconstitutional delegation of judicial power to administrative offices in view of constitutional provision for removal of constitutional officers by impeachment. Comp.St.Supp.1935, §§ 12-204, 12-213, 12-214; Const. art. 2, § 1; art. 3, § 17; art. 5, § 1.

**Officers and Public Employees** ⤵37

283k37 Most Cited Cases

"Bond" required of public officers by Constitution is contractual obligation that such officer will faithfully discharge duties of office. Const. art. 4, § 26.

**Officers and Public Employees** ⤵61

283k61 Most Cited Cases

Provision of state bonding act providing for the removal or suspension of constitutional officer on judgment of state bonding board held unconstitutional. Comp.St.Supp.1935, §§ 12-204, 12-213, 12-214; Const. art. 2, § 1; art. 3, § 17; art. 5, § 1.

**Officers and Public Employees** ⤵70.5

283k70.5 Most Cited Cases

Constitutional officer can only be removed by impeachment as provided by Constitution, and Legislature has no power to provide for removal or suspension of constitutional officer where Constitution creates office and fixes its terms and grounds and manner of removal. Const. art. 3, § 17.

**States** ⤵48

360k48 Most Cited Cases

Legislature held without power to nullify mandatory constitutional provision requiring all constitutional state officers to give bond for faithful performance of official duties (Const. art. 4, § 26).

**States** ⤵48

360k48 Most Cited Cases

State Bonding Act, providing for issuance of official bonds by state bonding fund of which payment was to be dependent solely on fund when and if collected as premiums for bonds, held invalid as violative of constitutional requirement that all constitutional state officers give bonds, since "official bond" is obligation to pay on breach of conditions thereof, and bond without obligor is not such a "bond" as is required by the Constitution (Comp.St.Supp.1935, § 12-213, Const. art. 4, § 26).

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**Statutes** ↪64(1)

361k64(1) Most Cited Cases

Although statute may be invalid or unconstitutional in part, valid parts will be sustained where they can be separated from part which is void if valid parts of statute are capable of being executed independently of invalid parts.

**Statutes** ↪64(1)

361k64(1) Most Cited Cases

Provisions of statute expressing legislative intent as to separability of various parts of statute is merely an aid to judicial interpretation.

**Statutes** ↪64(1)

361k64(1) Most Cited Cases

Where sections constituting inducement for passages of statute are unconstitutional, entire act must fall notwithstanding saving clause.

**Statutes** ↪64(1)

361k64(1) Most Cited Cases

Entire statute must be held inoperative where connection between invalid parts and other parts is such as to warrant belief that Legislature would not have passed act without invalid parts.

**Statutes** ↪64(2)

361k64(2) Most Cited Cases

Unconstitutional provisions of state bonding Act authorizing cancellation of bond and removal of constitutional officers from office by administrative board of state bonding fund held to invalidate State Bonding Act in its entirety, where inducement for enactment of act was to provide for bonding of state treasurer, who was constitutional officer, and entire statute was dependent on unconstitutional provisions for cancellation of bond and removal of officers from office (Comp.St.Supp.1935, §§ 12-201 to 12-225, Const. art. 2, § 1; art. 3, § 17; art. 5, § 1).

Peterson & Devoe, of Lincoln, for appellant.

**\*356** John J. Ledwith and Ginsburg & Ginsburg, all of Lincoln, for appellees.

Heard before GOSS, C. J., and ROSE, GOOD, EBERLY, DAY, PAINE, and CARTER, JJ.

DAY, Justice.

In 1935 the legislature enacted what is commonly known as the state bonding act (Laws 1935, c. 23 [Comp.St.Supp.1935, §§ 12-201 to 12-225]) for the purpose of bonding public officials and employees

of the state and its subdivisions. The validity of this act is challenged by a taxpayer of Lancaster county in this suit to enjoin the proper state officials from putting its provisions into operation. Although the trial court held that certain provisions contravened constitutional provisions, it also held that they were separable and did not constitute an inducement to the passage of the remainder of the act. It sustained most of the provisions of the law. From this judgment, the plaintiff appeals.

The trial court properly determined that section 12 of the act (Comp.St.Supp.1935, § 12-213), in so far as it undertook to vest the governor of the state with power to remove or suspend constitutional state officers without trial, was unconstitutional for the reason that it attempts to delegate judicial power to the governor of the state. A brief consideration of the fundamental and basic law of the state confirms this judgment. Section 1, art. 2 of the Constitution, states:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

This section, common to the state Constitutions of the United States, has an historical background. Governments without this division of powers had been generally oppressive. The political philosophy of Montesquieu in his *Spirit of Laws* probably influenced early framers of American Constitution. "There is no liberty," he wrote, "if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

Nebraska's Constitution contains an absolute prohibition upon the exercise of the executive, legislative and judicial powers by the same person or the same group of persons. It has remained a part of the Constitution unchanged since 1875. It is more certain and positive than the provisions of the

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federal Constitution and those of some of the states, which merely definitely divided the three powers of government.

Not only does the foregoing constitutional provision require the separation, but another section, section 1, art. 5 of the Constitution, places the judicial power in the courts:

"The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law; but other courts may be substituted by law for justices of the peace within such districts, and with such additional civil and criminal jurisdiction as may be provided by law."

[1] The question presented here is of vital importance and challenges our serious consideration. There is, of course, a very strong presumption that a legislative act is valid. There is also a strong inclination of a court not to criticize or interfere with the acts of another department. However, the Constitution is still recognized as the supreme law of the state and as a limitation of power of all departments and all officials. At present, it is the recognized function of the court to trace the line which marks the limits of power. Otherwise, there would be a conflict and overlapping of the various powers of government. This question frequently has been before the court. It is the law of this state that the legislature may not impose either upon the executive or the judiciary duties which do not properly belong to it. *Searle v. Yensen*, 118 Neb. 835, 226 N.W. 464, 69 A.L.R. 257. See, also, *In re Opinion of the Justices* (1935) 87 N.H. 492, 179 A. 357; *Fugate v. Weston*, 156 Va. 107, 157 S.E. 736; *State v. Taylor*, 27 N.D. 77, 145 N.W. 425. As applicable to the case at bar, the rule is that the legislature may not impose judicial power upon the executive officers or delegate to them legislative power.

[2] It has been stated that the phrase "judicial power" is not capable of precise \*357 definition applicable to all cases and all circumstances. 34 C.J. 1183. An examination of the cases demonstrates the difficulty of judicial definition. A sufficient definition for the purposes of this case is that generally judicial power is the authority to hear and

determine a controversy as to rights and upon such determination to render a judgment binding upon the disputants. *Horbach v. Tyrrell*, 48 Neb. 514, 67 N.W. 485, 489, 37 L.R.A. 434; *State v. Blaisdell*, 22 N.D. 86, 132 N. W. 769, Ann.Cas. 1913E, 1089.

The judicial power which this act seeks to confer upon administrative officers is mentioned in sections 12-213 and 12-214, Comp.St.Supp. 1935. Section 12-213 provides that the board may bring an action against a bonded official where it "shall be of the opinion that the interests of the state bonding fund are jeopardized by the misconduct or inefficiency of any public employee. \* \* \* During the pending of such proceedings, such public employee may by the Governor be suspended from performing the duties of his office."

Section 12-214 provides: "The Board may after due investigation at any time, if in its judgment the interests of the state bonding fund require such action, cancel the liability of the bonding fund for the acts of any public employee, to take effect thirty days after written notice of such cancellation. In such case the official whose insurance is cancelled shall be deemed temporarily suspended, as provided in the preceding section, until such time, if any, as the order of cancellation shall be rescinded by the Board, or by order of court as hereinafter provided."

[3] The authority to hear and determine controversies between public officers, the state, counties, cities and other municipal corporations, subdivisions of the state and the state bonding fund is a judicial power.

[4] The administrative board of the state bonding fund is the board of educational lands and funds, composed of the governor, the treasurer, the secretary of state, the attorney general, and the commissioner of public lands and buildings, all executive officers of the state of Nebraska. Laws 1935, c. 23, § 2 (Comp.St.Supp. 1935, § 12-202).

It is for the board to determine when and how the best interests of the bonding fund are jeopardized by misconduct and inefficiency of a public employee and render its judgment accordingly, with the power to remove the public official from office and cause the office to be vacant. True, section 12-215, Comp.St.Supp. 1935, provides for an

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appeal to the courts but does not provide the criterion for reversal, and since the discretion is vested solely in the board as to whether the official misconduct and inefficiency jeopardized the fund, it would seem that a reversal of its judgment would require a finding of the appellate court that there was a clear abuse of discretion on the part of the board. The mere fact that an appeal is provided does not remedy the attempt to delegate judicial power to an administrative board. An inferior court exercises judicial power although there is an appeal from its judgment.

[5] There is, however, a more serious objection to this delegation of judicial power. The act uses the words public employee and public official interchangeably, and each in the act has the same apparent meaning. These terms include the constitutional officers of the state. The record reveals that it was the difficulty in securing a bond for a constitutional officer, the state treasurer, in 1935, which motivated the legislature in the passage of this act. A constitutional officer can only be removed by impeachment as provided in the Constitution. Const. art. 3, § 17. See *Conroy v. Hallowell*, 94 Neb. 794, 144 N.W. 895. In this cited case it was sought to remove a county judge for a statutory cause. The cause was an additional one to those provided by the Constitution. In this respect it was similar to the case at bar. It was held invalid as transgressing the constitutional limitation on the powers of the legislature. This act proposes the removal of constitutional officers for the reason that the state bonding board is of the opinion that the misconduct or inefficiency of an official jeopardizes the fund.

Another authority discusses the question and states the rule as follows: "The Constitution of a state may, however, place beyond the reach of hostile legislation the method and grounds for removing incumbents of public offices; and where the Constitution prescribes the method of removal and the causes for which public officers may be removed the method and grounds established by this instrument are exclusive and it is beyond the power of the legislature to remove them for any other cause or in any other manner." 22 R.C.L. 561, § 265.

\*358 In *Commonwealth v. Williams* (1880) 79 Ky.

42, 42 Am.Rep. 204, it was held: "The constitution has designated the offenses for which certain public officers, including county judges, may be removed from office, and the legislature has no power to prescribe removal from office as a penalty for offenses not so designated." In this case the legislature had attempted to provide an additional ground for removing a constitutional officer to those prescribed by the constitution and attempted to define it as misfeasance in office, which was a constitutional ground of removal. This followed an earlier case, *Lowe v. Commonwealth* (1860) 3 Metc.(Ky.) 237, wherein it was said: "Wherever the constitution has created an office and fixed its terms, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the legislature to remove such officer or *suspend* him from office for any other reason or in any other *mode* than the constitution itself has furnished." In another case it is stated that, where the Constitution provides the method of removing an officer from his office, such method is exclusive. *State v. Gravolet*, 168 La. 648, 123 So. 111. Where the office is especially provided for by the Constitution itself, the constitutional provision for removal must control. In *Re Georges Township School Directors*, 286 Pa. 129, 133 A. 223, it is held: "The constitutional method of removal of officers prescribed by Const. art. 6, § 4, must be resorted to, where applicable, for is it exclusive and prohibitory of any other mode which the Legislature may deem better or more convenient."

[6] Let us now examine the provisions of the law under consideration. Section 4, c. 23, Laws 1935 (Comp.St.Supp. 1935, § 12-204), provides: "Failure to report and remit premium to the Board shall automatically create a vacancy in the office of such public employee; and such vacancy shall be filled in the manner provided by law." Section 13, c. 23, Laws 1935 (Comp. St.Supp. 1935, § 12-214), provides: "The board may \* \* \* if in its judgment the interests of the state bonding fund require such action, cancel the liability of the bonding fund for the acts of any public employee. \* \* \* In such case the official whose insurance is cancelled shall be deemed temporarily suspended."

Other sections provide for the removal or suspension of constitutional officers upon the

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judgment of the state bonding board. It is beyond the power of the legislature to provide for the removal or suspension of a constitutional officer where the Constitution creates the office, fixes its terms, and the grounds and manner of removal.

The trial judge reached substantially the same conclusion as this court upon the questions heretofore discussed. However, the district court held that the provisions were separable, and that these provisions were not an inducement to the passage of the act. The severability of the provisions and the effect as an inducement to the passage of the act will be discussed later in this opinion.

[7] In the meantime, let us consider the constitutional requirement that constitutional executive state officers give a bond. Section 26, art. 4 of the Constitution, provides: "The officers mentioned in this article [relating to executive state officers] shall give bond in not less than double the amount of money that may come into their hands, and in no case less than the sum of fifty thousand dollars, with such provisions as to sureties and the approval thereof, and for the increase of the penalty of such bonds as may be prescribed by law." Bonds are commonly required of public officers conditioned upon the faithful performance of the duties of their offices. The duties are prescribed by law, and the obligation of the bond is thus fixed. The bond required of public officers by the Constitution may be defined as a contractual obligation that such officer will faithfully discharge the duties of his office. Const. art. 4, § 26. An official bond is an obligation to pay upon a breach of the conditions thereof. Sureties on official bonds are liable for acts done by their principal by virtue of his office. *State v. Porter*, 69 Neb. 203, 95 N.W. 769. The very nature of an official bond implies an absolute obligation to pay upon the occurrence of certain conditions, such as a breach of duty of said official. Who, then, is the obligor on the bonds provided for under the state bonding act? The state is, of course, the obligee, but even if it could also be denominated the obligor, the very provisions of the act negative such an assumption. The act provides (Comp.St. Supp.1935, § 12-202) that a claim under the proposed bond shall never be construed as an obligation of the state and that no tax shall be levied for the payment thereof. Even if the legislature had

attempted to require the state to pay the \*359 losses on the official bonds, it would encounter legal difficulties.

[8] The Constitution requires all constitutional state officers to give a bond for the faithful performance of official duties, and the legislature is without power to nullify this plain mandatory provision of the Constitution. If the state were to pay the losses, the practical effect would be to abolish bonds to indemnify the state for losses caused by a failure of state officials to faithfully perform their duties.

[9] On the other hand, if the legislature substitutes for a bond, with an obligor who is required to pay, one without such an obligor, dependent solely for payment from funds when and if collected as premiums for such bonds, it likewise nullifies the constitutional provision. The fund starts insolvent, and one of the first obligations imposed upon it was that of the state treasurer for a million dollars. In fact, that bond created the emergency which caused the legislature to pass the bill in what is termed the furtherance of a public purpose. It seems to be elementary that a bond without an obligor is not such a bond as required by the Constitution for constitutional executive state officers.

[10][11] But there is a severance clause, section 12-224, Comp.St.Supp.1935, which provides: "Should any section or provision of this Act (C.S.Supp.1935, 12-201 to 12-225) be decided by the Courts to be unconstitutional or invalid, the same shall not affect the validity of the Act as a whole or any part thereof, other than the part so decided to be unconstitutional." The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void. *Muldoon v. Levi*, 25 Neb. 457, 41 N.W. 280. But the parts of the statute which are valid must be capable of being executed independently of the invalid parts in order to be operative. *State v. Ure*, 91 Neb. 31, 135 N.W. 224. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation. *Hubbell Bank v. Bryan*, 124 Neb. 51, 245 N.W. 20.

[12] Where sections constituting an inducement for the passage of an act are unconstitutional, the entire

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act must fall, notwithstanding the saving clause. *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424, 255 N.W. 551; *State v. Price*, 129 Neb. 433, 261 N.W. 894.

[13] Considered in connection with the history of its enactment as disclosed by the record in this case, an unquestioned inducement to the passage of the act was to secure a bond for the state treasurer for a million dollars. In 1935 the state treasury was closed for about 22 days because the treasurer elect could not procure a bond under the then prevailing statutory conditions. It is alleged in the pleading, evidenced by the testimony, and argued both orally and in the briefs filed in this court that an emergency confronted the state in the matter of the state treasurer, and in furtherance of a public purpose this act was passed to the end that the activities of the state might continue. The provision for the bonding of the state treasurer under such conditions was not only an inducement but was the principal inducement for the passage of the act. The state treasurer is a constitutional state officer required by the Constitution to give a bond. Since the provisions are invalid which relate to the treasurer's bond and other constitutional executive officers, and that provision was the inducement for the passage of the act, the entire act must fall.

But there are additional invalid provisions which were an inducement to the passage of the act. The provisions relating to the removal from office by the board of constitutional officers were held invalid by the trial court. They are clearly so. But these provisions were an integral part of the plan of bonding public officials. The bonding fund was safeguarded from loss by these provisions. The act provided for a bond cancelable whenever the board was of the opinion that the fund was jeopardized by the official acts of an officer. A cancellation of the bond removed the officer from his office. In the case of constitutional officers, this was violative of the provisions of the Constitution. The bonds of officials written by private sureties are not cancelable. The rest of the act was dependent upon these provisions for a workable plan. These provisions were integral parts of the entire scheme. The legislative plan was to provide a cancelable bond. To invalidate these provisions and let the rest stand would thereby create an uncancelable bond. Clearly, the legislature had no such intention, and

these provisions were an inducement to the passage of the act.

[14] Where the connection between the invalid parts and the other parts of a statute is such as to warrant the belief that \*360 the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. *Smith v. Thompson*, 219 Iowa, 888, 258 N.W. 190; *State v. Henry*, 218 Wis. 302, 260 N.W. 486, 99 A.L.R. 1267; *Searle v. Yensen*, 118 Neb. 835, 226 N.W. 464, 69 A.L.R. 257.

We are constrained to hold that the state bonding act was a scheme of legislation to accomplish a particular purpose, and when said purpose fails on account of invalid provisions, the entire act is unconstitutional.

[15] It is definitely stated that other sections of the act which have been assailed are not judicially determined hereby to be valid. Sufficient provisions have been discussed to demonstrate that the act is invalid because it contravenes constitutional provisions. But this is not to be understood to be the only respects in which the act may violate constitutional provisions. It is, however, sufficient for a proper decision of this case. A court is neither required nor permitted to do more.

However, this opinion would not be complete without a reference to the two statutes establishing a state bonding fund in North Dakota. Our attention has been directed to them and the decisions of the supreme court of that state thereunder.

The first state bonding act was passed by that state in 1913, Laws 1913, N.D. c. 194. This act was invalidated by the supreme court of that state in *State v. Taylor*, 27 N.D. 77, 145 N.W. 425, decided December 29, 1913. Two years later, the legislature passed another bill providing for a state bonding fund, Laws 1915, c. 62. This latter act was upheld by the court in *State v. Taylor*, 33 N.D. 76, 156 N.W. 561, L.R.A.1918B, 156, Ann.Cas.1918A, 583, decided February 5, 1916. It has been frequently asserted that the act under consideration here was similar to that of North Dakota. A casual examination reveals that there is little similarity between the acts. The last act of North Dakota had for its purpose the creation of a state bonding fund

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in the office of the commissioner of insurance, whose duty it was made to issue official bonds for all county, city, town, village, school district and township officials required by law to furnish official bonds. It did not undertake to bond state officials, including the extremely large bond of the state treasurer. It did not authorize any bond for more than \$50,000. An avowed purpose of the Nebraska act was to assume liability on the bond of the state treasurer for a million dollars. It is further noted that the North Dakota act fixes the premium rate, sets out in detail the form of the bond to be issued, and provides that the officials may procure a bond elsewhere, if they desire. The bond is not cancelable, and the insurance commissioner cannot remove an officer from his office. It also provides that the commissioner may employ additional clerical help and incur incidental office expenses made necessary by the additional work caused by the act, not to exceed \$1,500 to be reserved for the purpose from the premiums paid. On the other hand, the Nebraska act appropriates \$100,000 for expenses, to be repaid from the fund, and places no limit on the amount the board may spend from the premiums for expenses of administration. It specifically provides for a secretary at an annual salary of \$3,000 and an attorney at an annual salary of \$3,600. The Nebraska act does not set out the form of the bond, fix the premiums, or regulate the part of the premiums which may be spent for expenses. This comparison refers to a number of things which the appellant asserts invalidate the act which are not discussed or decided by the court for the reason that a discussion of these issues is unnecessary to a decision of this case. Questions presented on appeal but not necessary to a decision need not be determined. *Goergen v. Department of Public Works*, 123 Neb. 648, 243 N.W. 886. The sole purpose of the comparison was to demonstrate that there is such a difference between the state bonding act of North Dakota and that of Nebraska that the decision of the court of our sister state is scarcely applicable as an authority in the solution of our problem. It has not been called to our attention that any other state has entered the field of bonding public officials.

It is, therefore, the conclusion of this court that the trial court correctly held that the provisions conferring upon the board of the state bonding fund and the governor the power to remove constitutional

officers are contrary to the fundamental law. But we conclude that the invalid provisions are not separable so that the remainder of the act can stand as a complete act, and that such invalid provisions were an inducement to the passage of the entire act. In this last particular, the judgment of the trial court cannot be followed.

Reversed.

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