In re SENATE RESOLUTION NO. 10.

(Supreme Court of Colorado. March 13, 1905.)

SUPREME COURT—OPINION WHEN REQUIRED BY LEGISLATURE—ELECTIONS — GOVERNORSHIP—CONTEST—JURISDICTION OF GENERAL ASSEMBLY.

1. Const. art. 6, § 3, declaring that the Supreme Court shall give its opinion on important questions upon solemn occasions when required by the Senate or House of Representatives, requires the Supreme Court to give an opinion on request of the Senate as to whether on a contest over the office of Governor the General Assembly may adopt a report to the effect that it is impossible to separate the legal from the illegal votes, and that no person was elected Governor, and declare a vacancy in the office of governor.

2. Const. art. 4, § 3, provides that contested elections for the office of Governor shall be determined by the Senate and House of Representatives on joint ballot, as may be prescribed by law, and Mills' Ann. St. §§ 1657–1660, relative to such a contest, points out the steps to be taken in determining the issues between the contestor and the contestee. *Held*, that on a contest the General Assembly had no authority to adopt a report to the effect that the frauds perpetrated at the election were of such character as to render it impossible to determine who had been elected, and that no person was elected Governor, and to pass a resolution declaring a vacancy in the office.

In the matter of Senate Resolution No. 10, concerning the governorship contest. Interrogatories propounded to the Supreme Court. Interrogatories answered.

The Honorable Senate of the Fifteenth General Assembly has transmitted to this court certain interrogatories for opinion and answer. From the statement and resolution accompanying them the following appears:

At the last general election the Honorable Alva Adams and the Honorable James H. Peabody were rival candidates for the office of Governor for the term beginning on the second Tuesday of January last. At the time provided by the Constitution and laws of the state, the General Assembly convened in joint session. The election returns were thereupon duly opened and published, and it was then declared by the presiding officer of the joint assembly that the Honorable Alva Adams had received the highest number of votes; that he was then and there declared elected to the office of Governor for the term commencing on the second Tuesday in January, 1905; that he thereafter qualified and entered into the possession of the office, and ever since has been, and now is, discharging the duties of Governor. The Honorable James H. Peabody had been elected to the office of Governor for the term beginning on the second Tuesday in January, 1903, and at the time of the general election in 1904, and down to the date when the Honorable Alva Adams was inducted into office, was acting Governor by virtue of his election in 1902. At the general election in 1904, Hon. Jesse F. McDonald was duly elected and thereafter qualified as Lieutenant Governor for the term beginning on the second Tuesday in January last, and is now acting in that capacity. After the Honorable Alva Adams was inducted into the office of Governor, a contest was duly initiated against him for the office of Governor by the Honorable James H. Peabody before the General Assembly, claiming that in fact he had received the highest number of legal votes cast at the general election in 1904 for the office of Governor. Thereafter the two houses of the General Assembly jointly assembled for the purpose of hearing and determining the contest. Testimony has been taken and introduced on behalf of both contestor and contestee. Among the proceedings had was the appointment of a committee, from the members of the two houses upon which was imposed the duty of submitting a report for the consideration and judgment of the joint assembly of the two houses on the contest proceedings. This committee has filed four reports; that is to say, one reciting, in substance, that the contestor had received the highest number of legal votes; another report, signed by certain members, reciting that the contestee had received the highest number of votes, and recommending that the contest be dismissed; a further report, signed by certain members of the committee, to the effect that the charges of the contestor were in part established, but that sufficient fraud and illegality had not been shown in the conduct of the election to justify a decision in favor of the contestor; and a fourth report, signed by Morton Alexander, to the effect that the frauds perpetrated at the election were of such a nature as to render it impossible to separate the legal from the illegal votes for the office of Governor, and therefore impossible to determine whether the contestor or contestee had been elected. The report then declares that no person was elected Governor, and proposes a resolution to the effect that the action declaring the Honorable Alva Adams elected be rescinded, and a vacancy declared to exist in the office of Governor.

On the incoming of these reports the two houses jointly assembled to consider them. A motion was made and seconded to adopt the Alexander report. A controversy then arose concerning the power and authority of the convention to adopt this report, and the legal effect of its adoption on the question as to who would be entitled to the office of Governor in that event. The statement then recites, in substance, that the foregoing motion is now pending and undetermined; that many of the members are undecided as to the authority of the convention to adopt the Alexander report, and its legal effect, if adopted; that such doubt and uncertainty has, in effect, created a deadlock in the disposition of the contest proceedings, and that many members have declared their intention not to decide the contest until judicially advised on the authority of the convention to

adopt the Alexander report, and what the legal effect of its adoption would be on the question as to who would thereafter be entitled to the office of Governor. Under these conditions the joint assembly adopted a resolution requesting the Honorable Senate to submit to this court the following interrogatories:

"Interrogatory 1. Can the two houses of the General Assembly in said joint convention assembled, in said contest proceedings, legally adopt the said Alexander report upon the facts set forth and recited therein?

"Interrogatory 2. Can the said joint convention so assembled legally declare a vacancy to exist in the office of the Governor of the state of Colorado upon the facts recited and set forth in the said Alexander report?

"Interrogatory 3. Can the said joint convention, in the pending contest proceedings, in the event of adoption of said Alexander report, legally decide who is entitled to the office of Governor of Colorado, or does the Constitution of Colorado provide in such event who is entitled to such office, and, if so, what person is so entitled under said Constitution?"

Ed. T. Taylor, amicus curiæ. Geo. L. Hodges and W. H. Bryant, for affirmative. Jno. M. Waldron, for negative.

PER CURIAM. The first proposition to consider is whether or not we should answer the questions propounded. The Constitution provides that: "The Supreme Court shall give its opinion upon important questions upon solemn occasions when required by the Governor, the Senate, or the House of Representatives." Section 3, art. 6. It will be observed that the only limitation imposed upon the authority of the executive and legislative departments as to when either may require the opinion of this court is "upon solemn occasions." Under this provision many questions have been submitted for our consideration, some of which have been answered and others not. Necessarily, it was not intended that the legislative and executive departments of government could call upon this court for an opinion on every question which might arise in the discharge of their functions, but was limited to questions which so vitally affected public interest as to render it necessary for the public welfare to have a declaration from the highest judicial tribunal in the state. The department propounding the question in the first instance determines whether an occasion exists which justifies its submission, but it remains for the court to finally determine that proposition. Most of the questions submitted in the past have been from the legislative department on the subject of pending legislation. One prerequisite required in such matters is that it must appear that the bill which is the subject of inquiry will likely pass the branch of the General Assembly submitting the question, and the particular section of the Constitution to be considered in connection therewith must be pointed out. It has also been held that the title to an office, or the construction of an existing statute, or private rights would not be determined in an ex parte proceeding in answer to a legislative question. It is obvious that neither of these rules is applicable in the present instance. In the passage of bills the preliminary steps indicate whether or not any particular bill is likely to pass, but in contest proceedings there is no provision by which the action of members can be recorded except when voting on the merits. On pending legislation the question of the validity of a bill depends upon whether its provisions violate the Constitution, and therefore, in submitting a question to this court on that subject, the sections of the Constitution supposed to be involved should be pointed out; but that is not this case. Private rights, the title to an office, or the construction of an existing statute will not be determined in an ex parte proceeding in answer to a question from either the legislative or executive departments; but this is not an ex parte proceeding. There are actual litigants, the contestor and the contestee. They are before the General Assembly, and have submitted their respective claims to the determination of that body. The General Assembly has submitted to the court certain questions arising out of that contest, and for the purpose of considering these questions the parties litigant are before this court. The fact that it is asserted that the rights of the Lieutenant Governor are involved does not preclude the court from considering the questions under any decision heretofore announced. It does not appear that he is making any claim to the office of Governor. The questions are the outgrowth of pending litigation, and tribunals to which matters in controversy may be properly submitted cannot refuse to proceed with the litigation and determine the rights between the parties litigant, unless it appears that the presence of other parties is necessary for a complete determination of the controversy. None of the rules we have heretofore announced in determining whether or not questions submitted by the General Assembly should be answered are applicable in the present circumstances, and the remaining question on this subject is whether or not conditions are presented which require this court to answer and give an opinion on the interrogatories submitted.

The contest relates to the office of Governor. It is common knowledge that considerable time has been consumed by the General Assembly in hearing this contest, and that the welfare of the public demands that the controversy be speedily settled. It appears that members of the General Assembly desire to be advised as to the power and authority of the joint convention to consider

the Alexander report, and that, until this question is in some way satisfactorily settled, much time, at least, will be consumed in discussing the various phases of the contest proceedings as presented by the respective reports. In short, the General Assembly wishes to be advised with respect to its authority in disposing of this contest so that intelligent action may be taken, or action which might be illegal prevented. Certainly, under these conditions, grave questions are presented, which vitally affect the public interests, and which this court, by virtue of the constitutional provision referred to, should aid as far as possible in having speedily and correctly settled. The majority of the court is of the opinion that questions are presented upon which an opinion should be given. We come, then, to a brief consideration of the questions propounded.

The Constitution provides that contested elections for the office of Governor shall be determined by the two houses on joint ballot, in such manner as may be prescribed by law. Section 3, art. 4. The provisions of the law which have been passed in pursuance of the constitutional provision are brief and clear. They prescribe the manner of initiating the contest, the various steps which shall be taken, and the rules to be observed in conducting the contest. They will be found in sections 1657 to 1660, 1 Mills' Ann. St., both inclusive. Neither the Constitution nor statutory provisions on the subject contemplate giving any power or authority to the General Assembly to decide anything more than the issues between the contestor and the contestee, and render judgment accordingly. We must therefore answer the first and second interrogatories in the negative.

This conclusion renders it unnecessary to answer, or enter upon a discussion of, the legal questions involved in interrogatory 3, because the conditions cannot arise in the present contest proceedings which render that inquiry pertinent to their determination.

Although a majority, only, of the court is of the opinion that the questions propounded should be answered, it having been determined that they should be, in the decision answering them we are in full accord.

SMITH v. MOCK.

(Supreme Court of Colorado. Feb. 6, 1905.)

APPEAL—FAILURE TO EXCEPT—REVIEW—JUDGMENT—MISTAKE—RELIEF.

1. Where plaintiff in ejectment failed to except to the judgment against him, the same could not be reviewed on appeal, notwithstanding that it appeared from a statement of the trial judge attached to the transcript that plaintiff's motion for a voluntary nonsuit would have been granted if the court had known that the statute allowing two trials in ejectment as a matter of course had been repealed.

2. The refusal of the trial court to grant a party relief from a judgment on motion under Mills' Ann. Code, § 75, providing for relief from a judgment rendered through mistake, inadvertence, etc., was not reviewable in the absence of an exception to the ruling.

3. It was proper to refuse a motion for relief from a judgment under Mills' Ann. Code, § 75, providing that the court may relieve from a judgment taken against one through mistake, inadvertence, etc., where the application was not made until after the term, and the only reason for not making application during the term was that plaintiff erroneously believed that he was entitled to a new trial as a matter of right.

Error to District Court, Pueblo County; N. Walter Dixon, Judge.

Action by Frank Clements Smith against John T. Mock. Judgment in favor of plaintiff, and defendant brings error. Writ dismissed.

Allen J. Beaumont and J. Ed. Rizer, for plaintiff in error. E. C. Glenn, for defendant in error.

STEELE, J. On January 25, 1900, a verdict in favor of the defendant and against the plaintiff was returned, and a judgment rendered thereon. No exception was taken to the judgment. January 29th following, a motion for a new trial was filed, stating that plaintiff was surprised in a manner which ordinary prudence could not have guarded against; that material evidence had been discovered, which could not by reasonable diligence have been discovered and produced at the trial; and, further, that the evidence was insufficient to sustain the verdict. The motion was overruled on July 12, 1900. The following 28th of July the plaintiff filed his motion for relief under section 75 of Mills' Ann. Code, which provides that the court may, "upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment order or other proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect." This motion the court overruled. The case is brought here on error, the plaintiff in error alleging that the court erred in not granting the motion of plaintiff for voluntary nonsuit, that the court erred in not granting the motion of plaintiff for relief, that the court erred in denying plaintiff's motion for a new trial, and that the verdict and judgment thereon are contrary to law and the evidence. The abstract fails to disclose that a motion for nonsuit was made, or that any exception was taken to the overruling of this motion. Attached to the transcript is a statement of the trial judge addressed to this court, which states, in substance, that during the progress of the trial a deed was offered in evidence by the plaintiff, which was objected to, and the objection sustained; that the plaintiff thereupon proceeded with other evidence, and rested his case; that the defendant thereupon moved to direct the jury to return a verdict in favor of the defendant, which was argued and submitted; that, after the court had announced that he must order the jury to return a