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FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

SEP 20 1976

Richard D. Tinelli

IN THE SUPREME COURT

OF THE STATE OF COLORADO

THE CITY OF GLENDALE, a municipal corporation; GEORGE T. GARSON, individually and as Mayor of the City of Glendale; RALPH CHAMBERS, JOSEPH KAISER, TIM GREER, JOHN JOHNSON, ROBERT GILMOUR, individually and as City Councilmen of the City of Glendale; and FRANK P. MAC FADDEN,

Plaintiffs-Appellees,

vs.

MARY ESTILL BUCHANAN, Secretary of State, State of Colorado; JOHN P. MOORE, Attorney General, State of Colorado; IRVING MEHLER, Reporter to the Supreme Court of the State of Colorado; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE,

Defendants-Appellees,

CITY AND COUNTY OF DENVER,

Defendant-Appellant.

CHERRY CREEK SCHOOL DISTRICT NO. 5,

Intervenor-Appellee.

CITY AND COUNTY OF DENVER,

Third-party Plaintiff-Appellant,

vs.

MARY ESTILL BUCHANAN, Secretary of State, State of Colorado; JOHN P. MOORE, Attorney General, State of Colorado; IRVING MEHLER, Reporter to the Supreme Court of the State of Colorado; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTIES OF ADAMS, JEFFERSON, ARAPAHOE, DOUGLAS, WELD, BOULDER, GILPIN, and CLEAR CREEK; ALL THE BOARDS OF COUNTY COMMISSIONERS OF ALL OTHER COLORADO COUNTIES, as a class; and the CITIES OF AURORA AND LAKEWOOD,

Third-party Defendants-Appellees.

No. 27243

BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT, CITY AND COUNTY OF DENVER

APPEAL
FROM THE DISTRICT COURT,
CITY AND COUNTY OF DENVER

HONORABLE ZITA L. WEINSHIENK, JUDGE

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Herman J. Atencio,
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September 20, 1976

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ISSUES PRESENTED FOR REVIEW

1. Did the ballot title for Amendment No. 1 in the 1974 general election correctly and fairly express the true intent and meaning of the amendment itself?

2. Does the failure of the ballot title to correctly and fairly express the true intent and meaning of the amendment void the approval of the amendment?

3. Can the right to question the validity of the amendment be waived by failure to act before the election?

4. Did the trial court err in ruling there had been no factual showing that sufficient electors were misled to change the outcome of the 1974 election on amendments 1 and 5?

STATEMENT OF THE CASE

This is an action for declaratory judgments, requesting that Amendment No. 1, adopted by the electorate at the 1974 general election be declared void, and for related declaratory judgments. Additionally, a third-party complaint filed by the Appellant Denver, requested declaratory judgments that both Amendments Nos. 1 and 5, 1974 general election, be declared void. (The issue of Amendment No. 5 was later withdrawn.) On March 3, 1975, the District Court, Judge Zita L. Weinshienk, entered an Order holding, among other things, that the ballot title for Amendment No. 1 was misleading. However, on April 8, 1976, the District Court entered an Order holding and declaring Amendment No. 1 to be valid. Post-trial motions were filed by both Denver and Jefferson County, and were denied on April 26, 1976. On April 30, 1976, Denver filed its Notice of Appeal.

The Complaint in this action (ff. 1-21) was filed in the District Court, City and County of Denver, on November 11, 1974. The Plaintiffs are the City of Glendale, a home rule city in

Arapahoe County; its mayor and councilmen, in their official capacities, and as individual electors in Arapahoe County; and an elector from Boulder County. (ff. 1-3) The Defendants were the City and County of Denver, and three state officials: the Secretary of State, Attorney General and Supreme Court Reporter. These three officials comprised the statutory board created by Section 1-40-101, C. R. S. 1973, to "fix a proper fair title" for initiated measures. 1/ The relief sought was a declaratory judgment that Amendment No. 1, voted upon in the 1974 general election, was void. Alternatively, Plaintiffs sought a declaratory judgment that "only so much of the amendment as was reasonably specified in the ballot title" was valid. Again, alternatively, Plaintiffs sought a declaratory judgment that if Amendment No. 1 was valid, it had not affected the provisions of Article XX, § 1, Constitution of Colorado. (ff. 11-12) Amendment No. 1 was commonly referred to as the Poundstone Amendment. (f. 32) The state officials answered, through the Attorney General, denying the material allegations of the Complaint, and pleading the "failure to state a claim" defense. (ff. 55-58) Denver answered, admitting "every allegation of fact as set out in the Complaint." Denver, further, in a "Request for Affirmative Relief", alleged that Amendment No. 1, the Poundstone Amendment,

1. At the time the statutory board met, the Secretary of State was Byron A. "Andy" Anderson. Between that time and the date of the 1974 general election, Mr. Anderson died. Governor John D. Vanderhoof appointed Mary Estill Buchanan as Secretary of State and she was elected to the office in 1974. At the time the action was commenced John P. Moore was Attorney General, but he was replaced in January, 1975, by J. D. MacFarlane, who was elected to the office in 1974.

and Amendment No. 5 [2], which was also adopted at the 1974 general election, were irreconcilable. The relief sought was a judgment declaring both amendments void. (ff. 60-79)

The Board of County Commissioners of the County of Arapahoe (hereinafter "Arapahoe County") then filed a Motion to Intervene, pursuant to Rule 24 (a), C. R. C. P., (ff. 80-90) and a proposed Answer (ff. 91-92). The parties stipulated to the joinder of Arapahoe County as a party defendant (ff. 103-107), and on January 13, 1975, this action was approved by the then-presiding judge, the Honorable James C. Flanigan. (ff. 108-110) The caption was amended to show Arapahoe County's Answer (ff. 91-92) sought dismissal of the Complaint.

On January 15, 1975, Cherry Creek School District No. 5 (hereinafter "Cherry Creek) filed its Motion for Order Granting Leave to Intervene (ff 133-141, and a pleading titled "Complaint and Answer in Intervention". (ff. 111-127) Cherry Creek requested dismissal of the Complaint and Denver's Request for Affirmative Relief; a judgment declaring that Amendment No. 1 was "valid in its entirety"; and a further judgment declaring that Amendment No. 1 "does not have the result or effect of the immediate annexation of territories enclaved by . . . Denver into . . . Denver." (f. 127)

Trial had been set for February 13, 1975, and on that date the trial court (now Judge Zita L. Weinshienk) granted Cherry Creek's request to intervene. (f. 494) Judge Weinshienk heard arguments on February 13 and 14, 1975, and then continued the case to February 24, 1975, for her ruling. (ff. 494-497)

2. Amendment No. 5 was submitted to the electors of the state by Senate Concurrent Resolution No. 7, Second Regular Session, Forty-ninth General Assembly (1974). SCR 7 is found at Session Laws 1974, pp. 457-458.

On February 24, 1975, Judge Weinshienk ruled orally (ff. 539-540), and on March 3, 1975, entered a written Order nunc pro tunc as of February 24, 1975. (ff. 541-556) The February argument and the ruling were limited to "issues raised by the Complaint for Declaratory Judgment only." (f. 542) In summary, the written Order contained the following rulings:

1. The case was a proper one for relief under Rule 57, C. R. C. P.

2. All parties before the Court at that point (Plaintiffs, statutory board, Denver, Arapahoe County and Cherry Creek) had standing to "contest the issues raised by the Complaint." However, the parties were to be re-aligned and the claims restated.

3. Entry of judgment declaring that Amendment No. 1 did not cause the annexation of Glendale or any unincorporated enclave to Denver.

4. There was no proof that the individual Plantiffs did not have notice of the ballot title for Amendment No. 1 in time to challenge it.

5. The State of Colorado has no burden to publish initiated proposals. On the contrary, citizens interested in challenging ballot titles have the burden of informing themselves.

6. Amendment No. 1 was not invalid because it amended both Articles XIV and XX of the Colorado Constitution, since changes to both dealt with annexation.

7. The ballot title for Amendment No. 1 was misleading.

8. Resolution of the question whether the two parts of Amendment No. 1 were severable should await the joinder of other interested counties as parties, by way of third-party complaint to be filed by Denver.

Also on March 3, 1975, Judge Weinshienk signed and filed a "Notice of Pendency of Class Action" which was addressed to "the Boards of County Commissioners of all Counties in the State of Colorado". (ff. 553-556) The Notice was to be served with Denver's Third-party Complaint, which was filed on March 5, 1975. (ff. 557-582) The Third-party Complaint sued, as Third-party Defendants, the statutory board created by § 1-40-101, C. R. S. 1973, [3] the boards of county commissioners of the counties neighboring Denver (Adams, Arapahoe, Boulder, Clear Creek, Douglas, Gilpin, Jefferson and Weld), the boards of county commissioners of all remaining Colorado counties "as a class; and two cities which border Denver, Aurora and Lakewood. The demand for judgment in the Third-party Complaint (f. 565) requested the same relief as had Denver's original Request for Affirmative Relief (f. 74); that both Amendment No. 1 (Poundstone Amendment) and Amendment No. 5 (SCR 7) be declared void.

In response to the Third-party Complaint the counties of Mesa, Montezuma and Morgan filed requests for exclusion from the class of Third-party Defendants. (ff. 583, 605 and 606) The three state officials (Buchanan, Moore and Mehler) filed a Motion to Dismiss (ff. 607-610), which was joined in by

3. The Third-party Complaint named the following: 1) Mary Estill Buchanan, Secretary of State, who had succeeded the late Byron A. "Andy" Anderson; 2) John P. Moore, Attorney General who held that office at the time the ballot title was fixed, at the time of the 1974 general election, and at the time this action was commenced, but who was succeeded by J. D. MacFarlane on January 14, 1975; and Irving Mehler, Supreme Court Reporter, who held such position at all times pertinent hereto.

Arapahoe County (ff. 633-635), and denied by the Court (f. 673). The statutory board thereafter filed an Answer (ff. 695-707) and a Motion for Partial Summary Judgment (ff. 748-749). Arapahoe County filed an Answer. (ff. 708-715)

The counties of Boulder, Douglas and Gilpin and the City of Aurora filed entries of appearance. (ff. 639, 642-643, 650 and 657) The Counties of Clear Creek, El Paso, Jefferson and Weld filed answers pleading various defenses. (ff. 589-598, 678-683, 725-727 and 794-798) The City of Lakewood initially informed the Court that it did not wish to appear (ff. 604-604), but later filed a "Responsive Pleading". (ff. 686-692) Lakewood subsequently filed a Motion to Dismiss its own pleading (ff. 755-757), and the Court granted the Motion. (f. 762) Adams County filed an Answer, Counterclaim and Cross-claim. (ff. 716-719) The Crossclaim was against the three state officials (Buchanan, Moore and Mehler). The officials filed their answer to the cross-claim. (ff. 720-721) Adams County also filed a Motion for Partial Summary Judgment. (ff. 765-766)

On January 28, 1976, the Court entered the following Order:

> IT IS ORDERED that all pending motions for pre-trial summary judgment and for continuance are denied. This Court, having considered the memoranda of parties, rules as follows:
>
> 1) All proper parties are now before the Court.
>
> 2) This Court has previously ruled that the title to Amendment 1 is misleading.
>
> 3) The remaining issue is whether said title is so misleading that it affects the validity of Amendment 1, i.e. whether amendment 1 is valid, partially valid and partially void, or all void.
>
> 4) Said issue is basically an issue of law and can best be decided on written briefs.
>
> IT IS THEREFORE ORDERED that any party desiring to file a brief on the law may do so on or before March 1, 1976. Thereafter, within 15 days, this Court will schedule oral argument if deemed necessary, or issue an opinion. [ff. 811-812]

Denver, the three state officials, Cherry Creek and the Counties of Arapahoe, El Paso, Jefferson and Weld filed briefs. (ff. 818-828, 835-842, 845-883, 886-939, 953-976 and 986-996) The three state officials also filed, on March 10, 1976, a Motion to Dismiss, grounded on lack of subject-matter and jurisdiction and "failure to state a claim". (ff. 999-1000)

On April 8, 1976, the trial court issued its final judgment in this case. (ff. 1024-1048) The Court dispensed with oral arguments and entered the following order: "It is therefor declared, ordered and adjudged that Amendment 1 as adopted by the people on November 5, 1974 is valid." (f. 1048) The Order set forth five grounds on which the decision was based:

1. "Available pre-election remedies, both statutory and equitable, were not pursued by those parties now challenging the sufficiency of the ballot title." (f. 1027)

2. "Even if the failure to utilize pre-election remedies were not a bar to invalidating Amendment 1, the challengers have not met their burden of showing beyond a reasonable doubt that the title was so misleading as to render the amendment invalid." (f. 1032)

3. "This court is convinced that to invalidate Amendment 1 would do violence to the people's power of initiative which is so basic to our system of government." (f. 1043)

4. Amendment 1 is not severable. (ff. 1044-1045)

5. Amendments 1 and 5 are not in conflict. (ff. 1045-1048)

Jefferson County filed a Motion to Alter or Amend Judgment (ff. 1049-1052), and Denver filed a Motion to Amend Judgment, or, in the Alternative, for a Re-hearing (ff. 1070-1075), both of which were denied on April 26, 1976 (f. 1097).

Denver's Notice of Appeal (f. 1098) was filed on April 30, 1976.

SUMMARY OF ARGUMENT

The ballot title for Amendment 1, as fixed by the statutory board created by § 1-40-101, C. R. S. 1973, did not correctly and fairly express the true intent and meaning of the substance of the amendment. The requirement for a fair and correct ballot title is mandatory, and an improper title affects the results of the election, and thus, voids its apparent approval. The statutory requirement concerning ballot titles is consistent with the initiative provisions of Article V, § 1, Constitution of Colorado.

Having determined that the ballot title for Amendment 1 was misleading, it was error for the trial court to then hold the adoption of the amendment valid, because the people of the State of Colorado failed to pursue pre-election remedies. The people cannot waive their right to a fair ballot title fourteen months in advance of the election. As a result of this Court's decision holding 1-40-102 (1) and (2), C. R. S. 1973, unconstitutional, the remedies provided by 1-40-102 (3) are not exclusive.

It was error for the trial court to hold that there had been no factual showing that a sufficient number of voters were misled to change the results of the election. The trial court consistently ruled there were no issues of fact in the case, and should not have then ruled on a "factual" issue by saying there was "no factual showing" by the challengers to Amendment 1. The trial court also miscalculated the number of votes necessary to change the outcome of the election.

I.

THE BALLOT TITLE OF AMENDMENT 1 DID NOT CORRECTLY AND FAIRLY EXPRESS THE TRUE INTENT AND MEANING OF THE CONSTITUTIONAL AMENDMENT ENACTED BY THE PEOPLE.

Section 1-40-101, C.R.S. 1973, sets forth the requirements for ballot title and submission clauses for initiative constitutional amendments as follows: 4/

> "1-40-101. Title and submission clause - rehearing - appeal. (1) The original drafts of all initiative petitions for proposed laws or amendments to the state constitution to be enacted by the people, before they are signed by the electors or any of them, shall be submitted with a copy thereof to the secretary of state without any title, submission clause, or ballot title providing the designation for or against by which the voters shall express their choice for or against said proposed law or constitutional amendment. Within three days after such submission, the secretary of state shall call to his assistance the attorney general and the reporter of the supreme court, the three of whom, a majority controlling, shall designate and fix a proper fair title for said proposed law or constitutional amendment within five days thereafter, together with its ballot title and submission clause, which shall correctly and fairly express the true intent and meaning of the law or constitutional amendment, . . ." (emphasis supplied)

The ballot title and submission clause for Amendment 1 was as follows:

> "I, MARY ESTILL BUCHANAN, Secretary of State of the State of Colorado, do hereby certify that the following is a true copy of the title, text and ballot title of a certain proposed constitutional amendment.

4. Section 1-40-101, C.R.S. 1973, was amended by the Second Regular Session of the Forty-ninth General Assembly in 1974. Session Laws 1974, chapter 66, § 1. The law was effective May 14, 1974. However, the ballot title and submission clause for Amendmen 1 had already been fixed under the procedures of §1-40-101, C. R. S. 1973, as it existed before the 1974 amendment. References in this brief to § 1-40-101 are to the present 1974 version.

AN ACT TO AMEND ARTICLES XIV AND XX OF THE CONSTITUTION OF THE STATE OF COLORADO CONCERNING THE ANNEXATION OF PROPERTY BY A COUNTY OR CITY AND COUNTY, AND PROHIBITING THE STRIKING OFF OF ANY TERRITORY FROM A COUNTY WITHOUT FIRST SUBMITTING THE QUESTION TO A VOTE OF THE QUALIFIED ELECTORS OF THE COUNTY AND WITHOUT AN AFFIRMATIVE VOTE OF THE MAJORITY OF THOSE ELECTORS."

The text of the Amendment proposed for Article XIV, Section 3 of the Colorado Constitution was as follows:

"ARTICLE XIV
COUNTIES

SECTION 3. Striking off territory - vote. EXCEPT AS OTHERWISE PROVIDED BY STATUTE, no part of the territory of any county shall be stricken off and added to an adjoining county, without first submitting the question to the qualified voters of the county from which the territory is proposed to be stricken off; nor unless a majority of all the qualified voters of said county voting on the question shall vote therefor."

This Court has interpreted constitutional provision similar to "Except as otherwise provided by statute" and held that the language authorizing the legislature to provide alternative methods of proceeding. See Falgout v. People, 170 Colo. 32, 459 P.2d 572 (1969).

The trial court, in its order of February 24, 1973, correctly determined:

"However, the second change is nowhere mentioned in the title. Prior to Amendment 1, Article XIV §3 of the Constitution required counties to secure the majority vote of the electors of a county from which land was to be stricken off and annexed. Amendment 1 drastically changes this provision, and empowers the legislature to change county boundaries. This is done by adding the words: 'Except as otherwise provided by statute.' There can be no other reasonable interpretation than that this is a delegation of power to the legislature where none before had existed, ...

> A title to inform voters of this change might just as easily have read, 'An Act to amend Article XIV concerning annexation of property by a county permitting the striking off of territory from a county without first submitting the question to a vote of the qualified electors of the county.' This would have been substantially the opposite of the actual title of Amendment 1.
>
> . . . it is clear to this court that the title is misleading in that it completely fails to inform the voter of the substantial change to Article XIV, §3, . . ."

II.

THE REQUIREMENT FOR A CORRECT AND FAIR BALLOT TITLE IS A MANDATORY REQUIREMENT WHICH AFFECTED THE RESULTS AND MERITS OF THIS ELECTION AND THE APPROVAL OF AMENDMENT 1 IS THEREFORE VOID.

Having determined that the ballot title for Amendment 1 is misleading and therefore contrary to the requirements of Section 1-40-101, C.R.S. 1973, we proceed to a discussion of the consequence of that obvious defect.

This discussion centers in two areas:

A. Are the requirements of Section 1-40-101 mandatory?

B. Are the requirements of Section 1-40-101 consistent with the principles of initiative and referendum as set out in Section 1 of Article V of the Colorado Constitution?

A.

This Court has recently re-affirmed a prior holding in an action relating to voter registration. Meyer v. Putnam, 186 Colo. 132, 526 P.2d 139 (1974), at 186 Colo. 134-135, quoted and relied on People ex rel. Johnson v. Earl, 42 Colo. 238, 94 Pac. 294 (1908):

> The rule is well established that those requirements of a statute which are mandatory must be strictly construed, while those requirements which are directory should receive a liberal construction to the accomplishment of the intent and purpose of the law. Those requirements are mandatory which affect the results or merits of the election. * * * [Emphasis supplied by the Supreme Court]

This Court in Brownlow v. Wunsch, 103 Colo. 120, 83 P.2d 775 (1938), summarized the legislative power to enact statutes relating to initiative and referendum and the power reserved to the people as follows:

> "The constitutional provisions relating to the intiative and referendum are contained in article V, section 1 of the Constitution. This section was adopted by popular vote at the general election in 1910 and by it the people reserved to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the general assembly. Although by express words it is declared that this section in all respects shall be self-executing, it is clearly contemplated by its terms that legislation may be enacted to further its operation. Pursuant thereto the legislature has adopted certain facilitating statutes which appear in '35 C.S.A. as chapter 86 thereof. It has generally been held by the courts of all jurisdiction that a constitutional provision for the initiative and referendum, and statutes enacted in connection therewith, should be liberally construed. State ex rel. v. Kozer, 108 Ore. 550, 217 Pac. 827; Wood v. Byrne, 60 N.D. 1, 232 N.W. 303; Ford v. Mitchell, 103 Mont. 99, 61 P.(2d) 815; Laam v. McLaren, 28 Cal. App. 632, 153 Pac. 985; State ex rel. v. Superior Court, 97 Wash. 569, 166 Pac. 1126.
>
> We proceed to a determination of the controversy before us upon these considerations to the end that the constitutional right reserved to the people "may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right." [at 103 Colo. 123; emphasis added.]

Section 1-40-101, C.R.S. 1973, is in fact "necessary to fairly guard against mistake in the exercise by the people of their constitutional right" and its requirement for a ballot title and submission clause which shall correctly and fairly express the true intent and meaning of the constitutional amendment is mandatory.

The ballot title and submission clause of Amendment 1 told the voters the "Legislature is prohibited . . ." The Amendment provided "the Legislature may . . ."

At least three other jurisdictions have set aside amendments approved by the voters because of misleading ballot titles.

In Lane v. Lukens, 283 Pac. 532 (Idaho, 1929), petitioners attacked the validity of the constitutional amendments after the election contending that the question submitted was misleading, ambiguous and directly in conflict as follows:

> From the above, it will be seen that whereas, the proposed amendment expressly fixed the term of office as a period of four years, thereby extending it from the then period of two years to four, the question submitted the individual voter was whether or not the term should be merely limited to that duration, leaving the actual time of incumbency undetermined. [283 Pac. at 533]

The Idaho court then continued as follows:

> Defendant endeavors to meet the situation by urging that, inasmuch as the amendment had been duly published, the voter was given sufficient notice, and whatever ambiguity there might have been suggested by the question propounded by the ballot had been cured thereby. Notwithstanding the opinion expressed by various courts, notably that of Washington in Cudihee v. Phelps, 75 Wash. 314, 136 P. 367, that the publishing of the proposed amendment serves as notice to the people, it will be found that in nearly all these cases it is uniformly held that the question on the ballot must refer to such amendment in general terms. This particular case cites as authority State ex rel. Thompson v. Winnett, 78 Neb. 379, 110 N.W. 1113, 1118, 10 L.R.A. (N.S.) 149, 15 Ann. Cas. 781, wherein the court cogently states the crux of the matter as follows:
>
> > 'Enough was printed upon the ballot to identify the amendment referred to and to show it character and purpose, and that is all that is required.' [283 Pac. at 533; emphasis added by Idaho Supreme Court.]

The Idaho Court, quoting the earlier case of McBee v. Brady, 100 Pac. 97 (Idaho 1909), then voided an amendment adopted by the people:

> 'The questions submitted should be the same questions proposed as the amendment or amendments. The Legislature cannot propose one question and submit to the voters another.' That is just what was done here. The amendment is accordingly void. [283 Pac. at 533]

The case of Ex Parte Tipton, Smith v. Smith, 93 S.E.2d 640 (S.C. 1956), considered a controversy very similar to the present one in that the title stated that the proposed constitutional amendment would amend "section 5 of Article X . . . so as to provide a limitation upon the bonded indebtedness of Greenville Memorial Auditorium District, . . ." and the text of the amendment stated, "Provided, that the limitations imposed by this Section 5, Article X, shall have no application to the bonded indebtedness of Greenville Memorial Auditorium District. . . ." The amendment was adopted by "a majority of those voting upon the question as thus submitted." 93 S.E.2d at 641-642.

The South Carolina Supreme Court commenced its discussion of the law in language very similar to the decision of the Colorado trial court as follows:

> The Courts are slow to strike down either the legislative proceedings or the election incident to the adoption of a constitutional amendment, and will indulge every reasonable presumption in favor of their validity. As was said in State ex rel. Corry v. Cooney, 70 Mont. 355, 225 P. 1007, 1009: 'The question is not whether it is possible to condemn the amendment, but whether it is possible to uphold it, and we shall not condemn it unless in our judgment its nullity is manifest beyond a reasonable doubt'. [93 S.E.2d at 643]

But the Court then distinguished between misleading form and misleading substance of the ballot title as follows:

> And where the ballot is challenged because of the form of the question proposed, rather than its substance, evidence that the voters were in fact misled may be required to overcome the presumption to which we have referred. Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789.

> But where the question, on its face, is manifestly erroneous and misleading, there is no room for presumption, nor is evidence, other than the ballot itself, needed to demonstrate the deception. [93 S.E.2d at 643]

After citing Lane v. Lukens, supra, the Court continued as follows:

> In Bradley v. Hall, 1952, 220 Ark. 925, 251 S.W.2d 470, 471, the purpose of the proposed amendment was to enable the General Assembly to legalize service charges and credit price differentials previously considered usurious, but the ballot described it as one to empower the General Assembly 'to enact laws to authorize, define, and limit charges, in addition to interest, in connection with the lending of money and commercial transactions'. The court, holding the ballot insufficient and misleading, said:
>
> > 'The fair implication of the phrase [authorize, define, and limit] as a whole is that the legislature is to be given new and additional power to curb charges in addition to interest. Yet this implication has a manifest tendency to mislead, since the true purpose of the amendment is pretty nearly the exact opposite.' [93 S.E.2d at 644]

The South Carolina Court then held:

> In the case at bar the erroneous title of the resolution, which was printed on the ballot as the question proposed, was palpably deceptive and misleading for the reasons before stated. The true import of the proposed amendment, which was to remove, not provide, a debt limitation, was, therefore, not fairly and intelligibly presented to the voters; and it follows that the election must be declared invalid. [93 S.E.2d at 644]

The South Carolina Court then rejected the argument that the defect was cured by posting the amendment in full in every voting place:

> Respondents suggest, however, that whatever defect or insufficiency may have existed in the ballot was cured by the fact that the full text of the proposing resolution was posted in each voting place as required by Section 23-321 of the 1952 Code. We do not agree. It is the ballot, not the posted notice, with which the voter comes into direct contact.

> The reasonable assumption is that he reads the question proposed on the ballot, and that his vote is cast upon his consideration of the question as so worded. Keenan v. Price, 1948, 68 Idaho 423, 195 P.2d 662. Moreover, the resolution itself was unfairly and deceptively phrased, as we have before pointed out. Had it been printed in full on the ballot, it would still not have accomplished the fair and intelligible submission of the question to which the electorate is entitled and which the law requires. [93 S.E.2d at 644]

In the next case, Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972), the ballot title was as follows:

REFERENDUM
As required by the
Constitution of the State of Alaska
Art. XIII, Section 3
Shall there be a constitutional
convention?

YES ___

NO ___

The Court summarized the protestors' position:

> The basis of the appellees' complaint was that the prefatory language introduced a bias in the election because the prefatory phrase suggested that what was required by article XIII, section 3, of the constitution was the convention rather than the referendum. [495 P.2d at 78]

The Alaska election code only allowed challenges for "misconduct, fraud or corruption on the part of an election official sufficient to change the result of the election."

Based upon the expert testimony that the prefatory language introduced a significant bias toward an affirmative vote and changed the result of the election, the Alaska Supreme Court affirmed an order setting aside the election and calling a second one on a constitutional convention.

Twice this Court has struck down Charter amendments approved by the electorate because the title used for submission failed to advise the electorate of all of the Amendment's provisions.

In Howard v. Boulder, 132 Colo. 401, 290 P.2d 237 (1955), the requirement for the title was for a clear, concise statement without argument or prejudice descriptive of the substance of the amendment. The title did not advise the electorate that six councilmen would be removed from office before their term had expired. This Court held:

> Words could not be employed to demonstrate more clearly that the charter requirement means that the ballot title must be a clear and concise statement and descriptive of the substance of the proposed amendment. In considering the substance, it surely cannot be disputed that it failed to disclose drastic changes, namely, the reduction of the councilmanic term of office; that councilmen be taxpayers; reduction of the term of residence, and in effect, a recall of six of the elected councilmen. It is inconceivable that the average elector would understand or be familar with sections 3, 4, 5 and 13 of the city charter; and when the voter voted for or against the amendment under the ballot title as submitted, he did so without knowing the effect of his vote one way or the other. The ballot title used contained and combined drastic changes, not related and interdependent; it did not separate each such change into a for-or-against proposal, whereby a voter could exercise independent judgment on each specific change. When it is said in the charter that the ballot title shall contain a clear, concise statement describing the substance of the proposed amendment, it is not to be read as meaning that in order to be concise there must be omission of specific changes simply because more words would have to be used. The true meaning of this requirement is that no more, nor less, words be used than are necesssary to state the proposal clearly and understandably. No convincing argument can be presented to dispute the fact that there were a number of unrelated propositions presented to the voters of Boulder by this amendment, and they were presented as a single proposition without the voter having a chance to separate and accept or reject each such proposal. This was, in the language of the day, a 'package deal.' The voter had no choice but to vote for or against the entire combination, with the result that the ballot title used, being in clear violation of the provisions of Article XX of the state Constitution and of the charter of the city of Boulder, is invalid and the purported amendment to the charter adopted under such circumstance is of no force or effect.

> Such being our conclusion, the judgment of the district court is reversed and the cause remanded with instructions to enter judgment for the plaintiff according to the prayer of his complaint. [132 Colo. at 407-408]

In Hoper v. Denver, 173 Colo. 390, 479 P.2d 967 (1971) the requirement was for the ballot title to show the nature of the charter amendment. The title did not advise the electorate that the amendment created partisan elections:

> In support of their argument that the ballot title under which the amendment in question was submitted to the electorate was sufficient, defendants-appellants raise numerous grounds for reversal of the judgment of the court below. We decline to pass or comment upon the majority of these grounds, however, inasmuch as we have concluded, as did the court below, that the ballot title in question is clearly defective.
>
> One of the powers granted to a home rule city under article XX is to regulate and control the form of ballots (see the relevant portions of §6 quoted above). In this regard, the Charter of the City and County of Denver §C1.19 provides:
>
> 'At any election at which any * * * charter amendment * * * shall be submitted to a vote of the qualified electors, the official ballot shall, by proper words to be provided for by ordinance, show the nature of the * * * charter amendment * * * to be voted upon * * *.'
>
> This provision has been construed to mean that the: '[T]itle be clear and comprehensive. It must show the nature of the measure to be voted upon so that the voter shall have the opportunity to express his preference * * *. And so, therefore, the tests are: Does the title adequately describe the measure; is the amendment so complex as to render it impossible to adequately and comprehensively express its subject matter in the title; is it possible for a voter to be deceived because of its inadequate or misleading description?' (Emphasis added.) Denver v. Mewborn, 143 Colo. 407, 354 P.2d 155.
>
> In a case subsequent to Mewborn, we held that 'the object of the title of an amendment is to notify those concerned with the act as to what is being proposed in the body of the ordinance.' Coopersmith v. Denver, 156 Colo. 469, 399 P.2d 943.

* * * *

> As the court below correctly found, there is no doubt but that the basic structure of municipal elections in Denver was changed by this amendment, especially in the area of setting up partisan elections in the place of what had been previously non-partisan. To quote from the judgment and order of Judge Pinchick: 'It would be difficult for one reading the title of the amendment on the ballot to conceive of the nature of the amendment, as the title merely identifies the charter provisions which are affected by number and does not in any way indicate the general nature or effect of the amendment.' [173 Colo. at 397-398]

The failure of the ballot title of Amendment 1 far exceeds the defects of either Hoper or Howard where the titles failed to advise the voters, as the ballot title of Amendment 1 disguises and conceals the meaning of the Amendment.

Although the requirements concerning titles for legislative bills under Article V, Section 21 of the Colorado Constitution is somewhat different from title requirements for initiatives and referendums, undoubtedly because the entire bill is before the legislature, nevertheless, language from two cases with deceptive bill titles is appropriate.

In People v. Friederich, 67 Colo. 69, 185 P. 657 (1919), this Court, quoting State ex rel. Turner v. Coffin, 74 Pac. 962 (Idaho 1903), struck down a statute, holding:

> 'The trouble with this act is that the title and the act do not fit each other. The title indicates one thing, while the bill attempts to write an entirely different thing into law.' The title under consideration here, instead of clearly showing the purpose and meaning of the Act, rather tends to disguise and conceal it; in short, the title indicates one thing, while the body of the act declares another and different thing. [67 Colo. at 72]

In Gronert v. People, 95 Colo. 508, 37 P.2d 396 (1934) this Court again struck down a statute, holding:

> Under the first count of the information, Gronert was sentenced to imprisonment as a criminal for failing to obtain a license to do that which he could not lawfully do if he had a license. In effect, the title of the statute before us says 'You may;' the statute, 'You shall not.' It is difficult to imagine a statute more clearly within the constitutional inhibition. [95 Colo. at 513]

The Colorado authorities and those of her sister States establish that the requirement for a ballot title and submission clause which correctly and fairly express the true intent and meaning of the constitutional amendment is mandatory.

B.

Section 1-40-101, C.R.S. 1973, is consistent with Article V, Section 1 of the Colorado Constitution, and was enacted to insure that the true will of the people would be manifested. It seems appropriate to quote language from In re Interrogatories Propounded by the Senate Concerning House Bill 1078, ____ Colo. _____, 536 P.2d 308 (1975), at 314, and substitute provisions of Section 1-40-101, C.R.S. 1973, for Section 1-40-113, C.R.S. 1973, as they appear therein:

> "Colo. Const. Art. V, §1 provides in part:
> 'The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly. . . .'
> In enacting [Section 1-40-101, C.R.S. 1973, WHICH PROVIDES THAT "THE BALLOT TITLE AND SUBMISSION CLAUSE SHALL CORRECTLY AND FAIRLY EXPRESS THE TRUE INTENT AND MEANING OF THE CONSTITUTIONAL AMENDMENT"] the Colorado legislature, anticipating the precise situation present here, acted to insure that the will of the people would be manifested. We recall the wisdom of Chief Justice John Marshall that 'we must never forget that it is a constitution we are expounding.' McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406, 4 L.Ed. 547. There he pointed out that the legislative

branch can and should give flesh and body to a constitutional provision. And while the Colorado Constitution certainly guarantees the right of initiative and referendum to the people, the legislature may, so long as it does not diminish these rights, enact provisions regarding their exercise. It is a fundamental principal of constitutional law that 'Every presumption in favor of the validity of questioned legislation is indulged in by courts in testing its constitutionality.' Allardice v. Adams County, 173 Colo. 133, 476 P.2d 982, 990.

We have the view that the statute enhances rather than limits the right of the people to amend our constitution. In Colorado Project Common Cause v. Anderson, 178 Colo. 1, 495 P.2d 220, this court struck down a statute restricting the right to circulate and sign petitions for initiative. We there stated:

> 'The initiative provisions are expressly declared to be self-executing, and, as such, only legislation which will further the purpose of the constitutional provision or facilitate its operation, is permitted.' 178 Colo. at 5, 495 P.2d at 221-22 (emphasis added.)
>
> See also Yenter v. Baker, 126 Colo. 232, 248 P.2d 311.
>
> If this statute is not permitted to operate in this case, the people will be left [WITH AN AMENDMENT TO THEIR CONSTITUTION WHICH DOES NOT GIVE EFFECT TO THE TRUE INTENT AND MEANING OF] the expression of the predominant will of the people. Viewed in this perspective, there is no question that this statute enhances rather than restricts the right of the people to amend the constitution.

One year after the adoption of the Amendment to Article V, Section 1, approving the present initiative and referendum provision of the Colorado Constitution this Court in In Re House Resolution No. 10, 50 Colo. 71, 114 Pac. 293 (1911), determined that the said Section 1 authorizes legislation establishing the procedure for submitting constitutional amendments. The applicable provision of Section 1 of Article V of the Colorado Constitution provides:

> The text of all measures to be submitted shall be published as constitutional amendments are published, and in submitting the same and in all matters pertaining to the form of all petitions the secretary of state and all other officers shall be guided by the general laws, and the act submitting this amendment, until legislation shall be especially provided therefor. (Emphasis supplied)

The issue in In Re House Resolution No. 10, supra, concerned whether the "therefor" at the conclusion of the sentence authorized the legislature to enact legislation for publication and submitting specified matter to a vote, or whether the "therefor" only authorized the legislature to enact legislation concerning submitting the specified matter to a vote.

The Court held, at 50 Colo. 75:

> But the constitution leaves to the general assembly to prescribe regulations for submitting amendments to a vote of the people. Accordingly, we find that the general assembly has enacted section 2145, Rev. Stats. of 1908, which furnishes the procedure to be observed by public officers in submitting constitutional amendments and other questions to the vote of the people. Section 1 of article V, having specifically provided that the new measures must be published as constitutional amendments are, then makes it the duty of public officers, in submitting them, to be guided by the 'general laws,' that is, the 'general statutes,' under which questions generally are submitted, until the general assembly itself may provide especial legislation for forms of petitions, and for submitting ititiative and referendum measures only. Some method for submitting new measures had to be provided. The procedure already prescribed by the 'general laws' was chosen. It is only to these statutory provisions that the qualifying, closing words refer. The plain, ordinary meaning of the section leads to this conclusion, and there is no language therein opposing this view.

Section 1-40-101, C.R.S. 1973, is within the authority of the legislature and consistent with the principles of initiative and referendum.

III.

THE TRIAL COURT ERRED IN DETERMINING THAT AMENDMENT 1 WAS VALID EVEN THOUGH THE BALLOT TITLE WAS DEFECTIVE.

The trial court determined that Amendment 1 was misleading, but not invalid, as follows:

> Available pre-election remedies, both statutory and equitable, were not pursued by those parties now challenging the sufficiency of the ballot title.
>
> Colorado law requires that the ballot title of an initiated constitutional amendment 'correctly and fairly express the true intent and meaning of the constitutional amendment.' C.R.S. 1973 1-40-101(1). This statutory requirement must be read together with C.R.S. 1973 1-40-101(2) and 1-40-102(3) which provide expedient and efficient procedures for challenging and obtaining judicial review of ballot title.
>
> * * * *
>
> Therefore, this Court is of the opinion that C.R.S. 1973 §§ 1-40-101 and 1-40-102(3) provided the proper method whereby the ballot title affixed to Amendment 1 should have been challenged.
>
> In addition, this state has long recognized the availability of injunctive relief to restrain the placement of defective or improper measures on the ballot, Elkins v. Milliken, 80 Colo. 135, 249 P.2d 655 (1926).
>
> Considering the foregoing and under the circumstances of this case, the Court can find no justification or authority for overturning the vote of the people when available pre-election remedies were not pursued. Where ample means exist for correction of ballots prior to the election, the contestor must speak out before the election rather than wait until after the will of the people has been expressed. Allen v. Glynn, 17 Colo. 338, 29 Pac. 670 (1892).

Reviewing the concepts of this ruling one point at a time establishes its error.

A. The citizens of Colorado acting in their legislative capacity while amending their constitution cannot, fourteen months in advance of election, waive their right to have a ballot title which shall correctly and fairly express the true meaning of the question upon which they are voting.

B. When this Court struck down Section 1-40-102(1) and 102(2) of the Statute which afforded Colorado citizens notice of the nature of the ballot title, the exclusive nature of the remedies based upon that notice cannot stand alone.

A. The Citizens of Colorado Acting in Their Legislative Capacity While Amending Their Constitution Cannot, Fourteen Months In Advance of Election, Waive Their Right to Have a Ballot Title Which Shall Correctly and Fairly Express the True Meaning of the Question Upon Which They are Voting.

The general rule is set out in 28 Am. Jur.2d Estoppel and Waiver, § 122, as follows:

> Unquestionably, an estoppel may operate in favor of the public. In fact, it is said that an estoppel in favor of a public interest will be raised upon circumstances slighter than are requisite to raise an estoppel in favor of an individual.
>
> On the other hand, it has been declared the doctrine of estoppel is not given the same freedom of application against the public as against private persons.

A similar statement of this principal is found in Annot., 1 A.L.R.2d 338, Estoppel - Governmental Bodies, § 3, at pages 340-341:

> §3. The public, the United States, the state governments -- general doctrine.
>
> As a general rule the doctrine of estoppel will not be applied against the public, the United States government, or the state governments, where the application of that doctrine would encroach upon the sovereignty of the government and interfere with the proper discharge of governmental duties, and with the functioning of the government, or curtail the exercise of its police power; or where the application of the doctrine would frustrate the purpose of the laws of the United States or thwart its public policy; or where the officials on whose conduct or acts estoppel is sought to be predicated, acted wholly beyond their power and authority, were guilty of illegal or fraudulent acts, or of unauthorized admissions, conduct or statements; or where the public revenues are involved.

> The principles of equitable estoppel cannot be applied to deprive the public of the protection of a statute because of the mistaken action or lack of action on the part of public officials.
>
> The doctrine of estoppel will be applied however, where the controversy is between two or more public agencies.

For Colorado cases holding estoppel cannot be envoked against a governmental agency acting in its public capacity see Beery v. American Liberty Ins. Co., 150 Colo. 499, 375 P.2d 93 (1962); Orchard City Irrigation Dist. v. Whitten, 146 Colo. 127, 361 P.2d 130 (1961); Bennetts, Inc. v. Carpenter, 111 Colo. 63, 137 P.2d 780 (1943); Armstrong v. Driscoll Const. Co., 107 Colo. 218, 110 P.2d 651 (1941); Edwards v. Gunther, 106 Colo. 209, 103 P.2d 6 (1940); and Van Gilder v. Denver, 104 Colo. 76, 89 P.2d 529 (1939).

The right to know the true intent and meaning of the proposed constitutional amendment is a right of the electorate which cannot be waived. Section 1-40-108(1) C.R.S. 1973, provides "Measures shall appear upon the official ballot by ballot title only . . ." (emphasis supplied). Section 1-40-101 requires this title ". . . to correctly and fairly express the true intent and meaning of the law or constitutional amendment . . ." The entire purpose of initiative and referendum embodied in the constitution is to facilitate the free exercise of legislative power by the people. The trial court erred in failing to hold that the legislature intended to enact a statutory procedure, in furtherance of the free exercise of this power, whereby voters at the time they vote could not, for any reason, have before them a totally misleading description of the issue upon which they are voting.

The trial court held that the contestors should have acted at about the time the petitions were first circulated and some

fourteen months prior to the election. Are the contestors the trial court held should have protested among the 409,174 voters who wanted to prohibit the legislature from changing county boundaries pursuant to the unpublished ballot title and were wrong, or among the 292,040 voters who wanted to prohibit the legislature from changing county boundaries pursuant to the unpublished text and lost? The ballot title and submission clause were fixed and determined on July 10, 1973. Subsection 1-40-102 (3) grants until August 19, 1973, for objectors to protest thereto.

B. When this Court Struck Down Section 1-40-102(1) and 102(2) of the Statute Which Afforded Colorado Citizens Notice of the Nature of the Ballot Title, the Exclusive Nature of the Remedies Based Upon That Notice Cannot Stand Alone.

Sections (1) and (2) of 1-40-102, C.R.S. 1973, which related to publication of initiated constitiutional amendments and payment of the costs, were declared unconstitutional in 1972. Colorado Project-Common Cause v. Anderson, 177 Colo. 402, 495 P.2d 218 (1972). The question then arises concerning the validity and meaning of Subsection (3) of C.R.S. 1-40-102.

The importance of this question cannot be minimized. The trial court's determination that contestors had pre-election remedies was based upon Sections 1-40-101(2), 1-40-102(3), C.R.S. 1973, and upon Elkins v. Milliken, 80 Colo. 135, 249 Pac. 655 (1926). Section 1-40-101(2) refers to a protest of ballot title by proponents of the amendment after they have received actual notice of the title. Elkins v. Milliken involved an action for fraud in circulation of petitions prior to the time when the statute authorized the secretary of state to summon witnesses to a hearing on the sufficiency of the petitions. After determining

that there was no adequate remedy at law the court entered an injunction. Section 1-40-109(2), C.R.S. 1973, as amended in 1941, now authorizes the issuance of subpoenas by the Secretary of State.

A review of the legislative history of Title 1, Article 40, Part 1, C.R.S. 1973, would indicate that after notice by publication the legislature intended Section 1-40-102 to be an exclusive and adequate remedy at law thus precluding an Elkins type of review. Elkins v. Milliken, supra, at 80 Colo. 140:

> But is is said that there is an adequate remedy at law, to wit, the protest before the secretary of state and the review thereof by the district court under C. L. sec. 31. Counsel for the plaintiff in error answers this by saying that the proceedings before the secretary of state are inadequate since there is no power to summon witnesses and therefore no power to prove fraud or any other facts that do not appear on the face of the petition, as, for example, forgeries and false affidavits. We are unable to refute that argument. The secretary of state is without the power to even summon witnesses, let alone compel them to testify, and so is powerless against the wrongs mentioned in the complaint unless they appear on the face of the petition or are voluntarily made otherwise to appear. We do not see how the conclusion can be avoided that in those respects there is no adequate remedy at law. Ought it to be said that the courts are without power in such matters and that such wrongs must go unredressed? It is true that some states have said that the proceedings before the secretary of state and the review thereof by the courts is an exclusive and adequate remedy, but we cannot so regard it until the legislature expressly says so.

A review of that legislative history indicates the adoption of the present law in its basic form in 1913. Since that time it has been amended three times, in 1919, 1941 (the one in issue herein) and in 1945. In 1919 three sections were added: 1) what is now Section 1-40-101, which was amended in 1941; 2) Section 1-40-103(1), which was amended in 1941; and 3) Section 1-40-103(2),

which was amended in 1941. In 1941 the entire Act was rewritten by expanding many Sections and rearranging the provisions. For a review of the important changes effected by that Amendment a review of Chapter 86 C.S.A. 1935 and Article 40, Title 1, Part 1, C.R.S. 1973, is set out as follows:

Sections of 1973 law setting forth the 1941 Amendments:

1-40-102 - entire new Section added.

1-40-108 - removed the following language:

> Such ballot-title may be enjoined from appearing upon the ballot, if misleading or unreasonably long, in which event or if a majority of the persons representing the signers of such petition shall determine said ballot-title to be misleading or unreasonably long, a majority of such persons representing signers shall select another ballot-title that shall fairly describe the measure submitted to vote. [See Ch. 86, §8, C.S.A. 1935]

1-40-114 removed provision requiring the publication of arguments for and against amendments and the following language:

> "provided, that the secretary of state shall issue no voucher to any publisher in any county in which said publications are made, until he shall be furnished with sufficient proof that a copy of said constitutional amendments, initiated and referred measures and parts of measures, and arguments was placed in the hands of every known registered elector, by such publishers making the publication in said county; provided, [earlier language of Ch. 86, §11, C.S.A. 1935 included ballot title within this publication]

In summary, the 1941 Act indicated the legislature adopted Section 1-40-102(1) and thereby reduced the notice the voters received from actual notice to notice by publication and from notice of the ballot title, text and arguments for and against to notice of the ballot title and text. In adopting Section 1-40-102(2) the legislature shifted the cost from the state paying for the ballot title and text to the proponent paying that cost.

By adopting Section 1-40-102(3) the legislature changed the remedy available to the voters from enjoining the appearance of the misleading ballot title to a procedure of filing a motion with the secretary of state for a rehearing on the title. The time for filing this motion is set at forty days from the time the title is fixed. Section 1-40-102(3) commenced "Any qualified elector, who is not satisfied with the title and submission clause thus provided . . ." (emphasis supplied), clearly expressing legislative intent that all preceding steps were to be accomplished.

In deciding that Section 1-40-102(3), C.R.S. 1973, standing alone offered an adequate and exclusive remedy to contest a ballot title the trial court must have concluded that Section 102(3) was severable from Sections 102(1) and 102(2) and constitutes an adequate remedy even without notice in any form to the public. Denver disagrees with both conclusions. Section 1-40-102(3), C.R.S. 1973, is not severable from the first two subsections adopted at the same time as a complete procedure for notice and review.

The general rule is found in Four-County District v. Commissioners, 149 Colo. 284, 369 P.2d 67 (1962), at 149 Colo. 297, citing Denver v. Lynch:

> The test of severability is stated by this court in Denver v. Lynch, 92 Colo. 102, 18 P.(2d) 907, as follows:
>
> 'An act or a statute may be constitutional in one part and unconstitutional in another, and, if severable, the invalid may be stricken and the valid left stand. 6 R.C.L., p. 121, §121. The power of the court to make such a decision rests primarily upon legislative intent. * * * If the invalid portion of an act was apparently an inducement to the passage of the valid, the statute is not severable. Id. p. 125, §123. Nor can an essential part of an act, which colors the whole, be stricken as invalid and the remainder sustained. Id. p. 127 §125.'

No specific test exists for the determination of what is an essential part of an Act which colors the whole. 2 Sutherland Statutory Construction, § 44.02 (4th ed. 1973), summarizes the problem of separability as follows:

> Although separability problems usually arise with reference to different provisions or applications of a single, separate, independent 'act' of the legislature, they are not intrinsically confined to that frame of reference. In fact, the conception of legislation being validated and promulgated in separate, self-contained statutory units called acts, corresponding to independent bills during the enactment process, did not always figure as prominently through the historical past as it does nowadays. Except as constitutional provisions prohibit bills from dealing with more than one subject per bill, there is nothing about the nature of the legislative process which compels either that each separate rule of enacted law be issued in a separate act or that every separate act embrace all of the interdependent and inseparable legislative treatment of a single subject. In actual legislative practice, it is not uncommon for a legislative program, involving related and interacting provisions, to be embodied in a group of associated bills. This may be done for a variety of reasons, such as to facilitate referral of different portions of the program to different legislative committees during the enacting process or to simplify the incorporation of different portions of the legislation into different sectors of a compilation after their enactment, none of which reasons has anything directly to do with the considerations which govern decision on questions of separability. It is possible, therefore, for separate acts to be legally inseparable. Thus, where two separate acts were so interrelated in the treatment of a subject that the court did not believe the legislature would have intended one to be effective without the other, the unconstitutionality of one rendered the other also invalid.

The preceding discussion of legislative history clearly establishes that the 1941 legislature viewed Section 1-40-102 as one entire procedure. The legislature repealed provisions of two other sections and brought together in one section a complete procedure for notice and protest. The subsections are more than

colored by each other, they are inseparable. There is no basis for a determination that the legislature intended to establish a procedure for protest, without notice, as an exclusive remedy of the public.

To constitute an exclusive remedy, rather than one available remedy, notice is the essence of due process. In an action to enjoin the placement of an initiative proposal on the Alaska preliminary ballot the Alaska Supreme Court held that the action was not barred by the 30-day period specified as time to bring an action to review the determination of the lieutenant governor where notice was given only to the sponsors of the proposal. In Boucher v. Engstrom, 528 P.2d 456 (Alaska 1974), the Court stated:

> Boucher first argues that Engstrom's action is barred by AS 15.45.240, the statutory provision for judicial review of the lieutenant governor's determination. AS 15.45.240 reads as follows:
>
> > Any person aggrieved by a determination made by the lieutenant governor may bring an action to have the determination reviewed within 30 days of the date on which notice of the determination was given by any appropriate remedy in the superior court. (emphasis added by the Court)
>
> Boucher's position is that since no action was brought within thirty days of March 12, 1973, when he first certified the initiative application, suit questioning the proposed bill's constitutionality can be commenced only after the bill has been approved by the electorate. Engstrom argued, and the superior court agreed, that the thirty-day provision of AS 15.45.240 applies solely to the initiative committee, not the general public, and therefore Engstrom's action was not barred. The thirty-day period specified in AS 15.45.240 begins to run when the lieutenant governor gives notice of his determination. In the case at bar, only the members of the initiative committee were given notice of the lieutenant governor's determination. In this regard, the superior court, in its decision, stated in part:

> It is fundamental that due process requires notice and the statutory scheme of AS 15.45.010-240 [15.45.240] does not provide for the giving of notice to the general public. The limitation of AS 15.45.240 only applies to those who receive notice of the lieutenant governor's action, the initiative committee.

A non-sponsor's right to obtain judicial review of the lieutenant governor's certification of an initiative application cannot constitutionally be precluded prior to giving notice to the public that certification has been made. Any other interpretation of AS 15.45.240 would render the statute unconstitutional. Thus, we hold that the superior court did not err in refusing to dismiss Engstrom's suit on the ground of its untimeliness. [528 P.2d at 459]

IV.

THE TRIAL COURT ERRED IN RULING THERE HAD BEEN NO FACTUAL SHOWING THAT SUFFICIENT VOTERS WERE MISLED.

Addressing now the second portion of the decision of the trial court concerning the validity of Amendment 1, the trial court held:

> There has been no factual showing that a sufficient number of voters were misled by this title so as to affect the outcome of the election. Such a showing in this case would be most difficult, if not impossible. The affidavit of the Secretary of State attached to the Attorney General's brief indicates that Amendment 1 passed with 409,174 'yes' votes and 292,040 'no' votes. Therefore 58,567 voters would have had to have been misled by the title to change the outcome.
>
> The burden of proof is upon the challengers to show beyond a reasonable doubt, both as to law and fact, that the constitution has been violated in the submission of a constitutional amendment before that amendment will be overthrown. People v. Sours, supra; People v. Prevost, 55 Colo. 199, 134 Pac. 129 (1913). At least that same burden must necessarily apply when the alleged defect is statutory rather than constituional. That burden has not been met.

Denver asserts that the trial court erred in so holding for two reasons:

A. The trial court in a series of rulings held there was no issue of fact to be tried.

B. 6,000 changed votes would defeat Amendment 1 because of the conflict between Amendment 1 and Amendment 5, assuming both Amendments are valid and meaningful.

A. The Trial Court in a Series of Rulings Held There Was No Issue of Fact to be Tried.

On February 24, 1975, the trial court ruled:

> Since it is clear to this court that the title is misleading in that it completely fails to inform the voter of the substantial change to Article XIV §3, the question then is raised whether both parts of Amendment 1 must fail, whether the Amendment to Article XIV is severable, or whether there is some other solution. It appears to this Court that there are good arguments that the two parts of Amendment 1 are severable and that only that part pertaining to Article XIV should fail. There may be other solutions.
>
> However, this Court agrees with arguments that a decision on this issue should await another hearing wherein all interested parties and remaining issues are before the Court.

All of the counties of the State were joined as a class, with the counties surrounding the City and County of Denver and other nearby counties individually joined.

After several attempted pre-trial sessions, the court on November 25, 1975, requested each party to submit to the court a statement of position concerning the issues to be tried. On the 28th day of January, 1975, the trial court entered the following order:

> IT IS ORDERED that all pending motions for pre-trial summary judgment and for continuance are denied.
>
> This Court, having considered the memoranda of the parties, rules as follows:
>
> 1) All proper parties are now before the Court.
> 2) This Court has previously ruled that the title to Amendment 1 is misleading.

3) The remaining issue is whether said title is so misleading that it affects the validity of amendment 1, i.e., whether amendment 1 is valid, partially valid and partially void, or all void.
4) Said issue is basically an issue of law and can best be decided on written briefs.

IT IS THEREFORE ORDERED that any party desiring to file a brief on the law may do so on or before March 1, 1976. Thereafter, within 15 days, this Court will schedule oral argument if deemed necessary, or issue an opinion.

It seems somewhat unfair to first rule the title completely fails to inform and that the remaining issues are issues of law and then rule that there had been no factual showing that a sufficient number of voters were misled.

B. 6,000 Changed Votes Would Defeat Amendment 1 Because of the Conflict Between Amendment 1 and Amendment 5, Assuming Both Amendments are Valid and Meaningful.

Either Amendments 1 and 5 establish alternative methods whereby the City and County of Denver can annex surrounding property or, under the recent test set out in In Re Interrogatories . . . House Bill 1078, supra, the two Amendments are in conflict as each prohibits what the other authorizes.

Obviously the preceding sentence suggesting an ambiguity of meaning would be legally improper if the language of Section 1, Article XX of the Colorado Constitution, as amended by Amendments 1 and 5, is plain and admits of no more than one meaning. Unfortunately, this is not true. Neither Amendment 1 or Amendment 5, or the combination of the two, is plain and admits of no more than one meaning.

Amendment 5 commences with "Any other provision of this Constitution to the contrary notwithstanding. No annexation. . . shall be initiated . . . pursuant to the general annexation . . . statutes. . ." .Amendment 5 was intended to supplement and supersede the earlier two paragraphs of Article XX, Section 1, and specifically supersede the exact language amended by Amendment 1. The meaning of the above quoted commencing langauge of Amendment 5 is, therefore, changed from the meaning of the text prior to its adoption.

Amendment 1 added language to the second paragraph of Section 1, Article XX, as follows "the provisions of Section 3 of Article XIV of this Constitution and . . ." and then continues "the general annexation . . . statutes of the state relating to Counties shall apply to . . . Denver . . ." Amendment 1 then struck the language which defined how these laws should apply. But because Amendment 1 amends Section 3 of Article XIV so that it commences with "Except as otherwise provided by Statute" the meaning of the first sentence in the second paragraph of Section 1, Article XX, becomes "the Statutes relating to County boundaries under Section 3 of Article XIV and the annexation statutes relating to Counties shall apply to Denver".

A simplified statement of the confusion is that Amendment 1 attempts to accomplish a negative with positive language and Amendment 5 attempts to accomplish a positive with negative language. Amendment 1, intending to limit annexation, states which statute applies, and Amendment 5, intending to allow annexation after prior approval, states when annexation cannot occur. Denver has maintained from the beginning that the two Amendments are either in conflict or one of the Amendments is meaningless.

The initial determination of the existence of a conflict between the texts of Amendments 1 and 5 centers upon the meaning of the word "statutes" as used in Section 3, Article XIV and

Section 1, Article XX of the Colorado Constitution, as amended.

If the "statutes" referred to in Amendment 5

> ". . . pursuant to the general annexation and consolidation statutes of the State of Colorado . . ."

include those statutes adopted within

> "Except as otherwise provided by statute . . ."

in Section 3 Article XIV and, therefore, Denver can annex pursuant to the general annexation and consolidation statutes after receiving approval of the boundary control commission, then under this interpretation Amendments 1 and 5 are not in conflict but Amendment 1 accomplished nothing. Amendment 1 is meaningless because Denver could annex by a vote of the surrounding Counties both before and after Amendment 1, and Denver could also annex under the general annexation laws before and after Amendment 1.

If, on the other hand, the general annexation and consolidation statutes referred to in Amendment 5 do not come within the exception in Section 3, Article XIV of the Colorado Constitution and Denver must comply with Amendment 1 to annex then Amendment 5 becomes meaningless. Amendment 5 is meaningless because complying with Amendment 1 per se detaches territory and adds it to Denver. Paragraph 2, Section 1, Article XX of the Colorado Constitution, as amended, so states.

One other alternative exists. The terms "general annexation and consolidation statutes of the state relating to counties" as used in Amendment 1 and "the general annexation and consolidation statutes of the state" as used in Amendment 5 both come within "except as otherwise provided by statute" as used in Section 1, Article XIV and the legislature could determine by statutory designation whether either Amendment or both Amendments applied, a result which is clearly contrary to the intent of both ballot titles.

CONCLUSION

The certification of the Governor of Colorado, contained in his executive order of the twentieth day of December, 1974, is:

> NOW, THEREFORE, I, John D. Vanderhoof, Governor of the State of Colorado, pursuant to Article V, Section 1, of the Constitution of Colorado, do hereby proclaim and officially declare that the vote on said measures was as follows:
>
> Amendment No. 1 - An Act to Amend Articles XIV and XX of the Constitution of the State of Colorado concerning the annexation of property by a county or city and county, and prohibiting the striking off of any territory from a county without first submitting the question to a vote of the qualified electors of the county and without an affirmative vote of the majority of those electors.
>
> For. 409,174
>
> Against. 292,040
>
> Amendment No. 5 - An Amendment to Article XX of the Constitution of the State of Colorado, concerning the modernization of annexation and consolidation proceedings in the Denver Metropolitan area, and creating a boundary control commission with powers related thereto.
>
> For. 397,442
>
> Against. 252,256

If this Proclamation is accurate, 409,174 persons voted to amend annexation procedures to Denver and to prohibit striking off any territory from any County without a vote of the electors of that County, and 397,442 persons voted to delegate certain annexation powers to a boundary control commission. The margin of passage on Amendment 5 was larger than the margin on Amendment 1. Under the circumstances of this election the only method of approving the true expression and will of the voters is to void Amendment 1. Such a result would:

> . . . Amend Articles XIV and XX of the Constitution of the State of Colorado concerning the annexation of property by a county or city and county, and prohibiting the striking off of any territory from a county without first submitting the question to a vote of the qualified electors of the county and without an affirmative vote of the majority of those electors.

Denver requests this Honorable Court to reverse the judgment of the District Court, and to enter judgment declaring Amendment 1 void.

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