11-8-1976

City of Glendale v. Buchanan

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 COUNTY OF JEFFERSON, THIRD-PARTY DEFENDANT-APPELLEE

APPEAL

FROM THE DISTRICT COURT
CITY AND COUNTY OF DENVER

HONORABLE ZITA L. WEINSHIENK, JUDGE

Patrick Mahan, Reg. No. 2372
County Attorney
Richard J. Scheurer, Reg. No. 2371
Assistant County Attorney
Jefferson County Courthouse
Golden, Colorado 80419
279-6511

George J. Robinson, Reg. No. 1962
Special Counsel
6610 West Fourteenth Avenue
Lakewood, Colorado 80214
238-7821

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STATEMENT OF ISSUES

No error was committed by the lower court in declaring that Amendment No. 1 was a valid initiated constitutional amendment. The court properly held that the pre-election statutory provisions for testing the ballot title were never pursued, and that other remedies were available through the injunctive arm of a court to restrain a defective or improper measure from reaching the ballot. The court also properly held that every presumption favors the validity of the amendment when it is attacked after the ratification by the electorate, and that 58,567 voters would have to have been misled to change the results of the election, the amendment being passed by 409,174 affirmative votes as compared to 292,040 negative votes.

Having so decided the validity of the adopted amendment, the pronouncements of the lower court relating to severability of the amendment would ~~be obiter~~. As to such portion of the opinion declaring the amendment not to be severable, the court was in error. If the amendment were to have been declared invalid by virtue of a part thereof being invalid, then the proposition with respect to Article XX was severable from the remainder relating to Article XIV, by merely striking from Article XIV the words provided by the amendment, "Except as otherwise provided by statute". In so doing, Article XX, as amended, would remain complete and capable of being given legal effect.

The lower court was in error by declaring the ballot title to the amendment was misleading. The title clearly reflected that the amendment was to amend an existing prohibition provided by Sec. 3, Article XIV of the Colorado Constitution. The prohibition

prior to amendment was to the striking off of any territory of any county without first submitting the same to a vote of the electorate. The amendment provided the continuation of that prohibition unless otherwise provided by statute. The people, speaking through their legislature, would make the statutory changes if it so desired, otherwise the prohibition remains.

When the trial court made a declaration on February 24, 1975, that the amendment did not effect the annexation by Denver of Glendale, that determination disposed of consideration of any other issues raised by Glendale. The lower court, however, proceeded to a determination of other issues no longer germane, and stated that there appeared to be good arguments that the amendment was severable, a decision upon which should await a hearing attended by all interested parties, by joinder of Jefferson and Adams Counties and all other counties as a class. The court sought a realignment of parties and restatement of claims before such hearing. In effect and by so doing, the lower court framed an issue. It aligned Denver as a plaintiff and the counties as defendants. Those parties urged further and additional issues as to the invalidity or validity of the amendment. All issues, whether raised by the Court, Denver, or the counties, were entirely moot, the seeking of an opinion on all issues becomes advisory only, and so alleged by Jefferson County in its answer to the third-party complaint that there were no justiciable issues before the court.

No appeal has been taken to the first order of the lower court declaring that the City of Glendale, by the adoption of Amendment No. 1, was not consolidated with Denver, which ruling disposed of any need to rule upon remaining issues.

STATEMENT OF THE CASE

The County of Jefferson, herein referred to as "Jefferson County" was made a third-party defendant by a third-party complaint filed by the City and County of Denver, later referred to herein as "Denver". Jefferson County deems it appropriate to enlarge the statement of the case given by Denver.

On November 5, 1974, the people of the State of Colorado adopted two amendments to the Colorado Constitution. One of such amendments, initiated Amendment No. 1, popularly referred to as the "Poundstone Amendment", effected changes in Section 1 of Article XX of the Constitution and in Section 3 of Article XIV, both relating to annexations and consolidations of territories. The other amendment, a referred amendment, Amendment No. 5, added new language to Section 1 of Article XX. We submit a composite reproduction of Section 1 of Article XX to reflect that Section as it read prior to either amendment, and as it stands following both amendments. Those words appearing in caps are words added by amendment to the Section and those words stricken are the words deleted by the amendment. The shaded area is indicated for further clarification of the statement of the case which will be referred to in a later portion of the statement.

The composite reproduction is reflected on the following two pages.

AMENDMENT NO. 1

ARTICLE XX

Home Rule Cities and Towns

l Court Declaratory
ment, Feb. 24, 1975;
of Glendale Not
xed to Denver by
dment No. 1

Section 1. Incorporated. The municipal corporation known as the city of Denver and all municipal corporations and that part of the quasi-municipal corporation known as the county of Arapahoe, in the state of Colorado, included within the exterior boundaries of the said city of Denver as the same shall be bounded when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the "City and County of Denver". By that name said corporation shall have perpetual succession, and shall own, possess, and hold all property, real and personal, theretofore owned, possessed, or held by the said city of Denver and by such included municipal corporations, and also all property, real and personal, theretofore owned, possessed, or held by the said county of Arapahoe, and shall assume, manage, and dispose of all trusts in any way connected therewith; shall succeed to all the rights and liabilities, and shall acquire all benefits and shall assume and pay all bonds, obligations, and indebtedness of said city of Denver and of said included municipal corporations and of the county of Arapahoe; by that name may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold, and enjoy or sell and dispose of, real and personal property; may receive bequests, gifts, and donations of all kinds of property, in fee simple, or in trust for public, charitable, or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests, and donations, with power to manage, sell, lease, or otherwise dispose of the same in accordance with the terms of the gift, bequest, or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefore, for the use of said city and county and the inhabitants thereof, and any such systems, plants, or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.

THE PROVISIONS OF SECTION 3 OF ARTICLE XIV OF THIS CONSTITUTION AND the general annexation and consolidation statutes of the state RELATING TO COUNTIES shall apply to the city and county of Denver ~~to the same extent and in the same manner that they would apply to the city of Denver if it were not merged, as in this amendment provided, into the city and county of Denver.~~ Any contiguous town, city, or territory hereafter annexed to or consolidated with the city and county of Denver, under any of the SUCH laws of this state, in whatsoever county the same may be at the time, shall be detached per se from such other county and become a municipal and territorial part of the city and county of Denver, together with all property thereunto belonging.

AMENDMENT NO. 5

Any other provisions of this constitution to the contrary notwithstanding:

No annexation or consolidation proceeding shall be initiated after the effective date of this amendment pursuant to the general annexation and consolidation statutes of the state of Colorado to annex lands to or consolidate lands with the city and county of Denver until such proposed annexation or consolidation is first approved by a majority vote of a six-member boundary control commission composed of one commissioner from each of the boards of county commissioners of Adams, Arapahoe, and Jefferson counties, respectively, and three elected officials of the city and county of Denver to be chosen by the mayor. The commissioners from each of the said counties shall be appointed by resolution of their respective boards.

AMENDMENT NO. 5

No land located in any county other than Adams, Arapahoe, or Jefferson counties shall be annexed to or consolidated with the city and county of Denver unless such annexation or consolidation is approved by the unanimous vote of all the members of the board of county commissioners of the county in which such land is located.

Any territory attached to the city and county of Denver or the city of Lakewood or the city of Aurora during the period extending from April 1, 1974, to the effective date of this amendment, whether or not subject to judicial review, shall be detached therefrom on July 1, 1975, unless any such annexation is ratified by the boundary control commission on or before July 1, 1975.

Nothing in this amendment shall be construed as prohibiting the entry of any final judgment in any annexation judicial review proceeding pending on April 1, 1974, declaring any annexation by the city and county of Denver to be invalid.

The boundary control commission shall have the power at any time by four concurring votes to detach all or any portion of any territory validly annexed to the city and county of Denver during the period extending from March 1, 1973, to the effective date of this amendment.

All actions, including actions regarding procedural rules, shall be adopted by the commission by majority vote. Each commissioner shall have one vote, including the commissioner who acts as the chairman of the commission. All procedural rules adopted by the commission shall be filed with the secretary of state.

This amendment shall be self-executing.

(Adopted November 5, 1974 - Effective upon proclamation of the Governor, December 20, 1974. (See Laws 1974, p. 457.))

The change effected by Amendment No. 1 to Section 3 of Article XIV was by adding six new words thereto, here now reproduced with the additional words appearing in caps.

AMENDMENT NO. 1

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.

On November 11, 1974, the City of Glendale, joined by parties in individual and official capacities and by an individual, filed a complaint for declaratory judgment (ff. 1-21), awkward wording naming as defendants the members of a statutory body to designate and fix a proper fair title for a proposed initiated constitutional amendment, together with the City and County of Denver. The complaint, seeking a declaratory judgment, described the City of Glendale to be within the exterior boundaries of the City and County of Denver; it alleged grounds that the adopted amendment to which the title was assigned was void; that if not void, a part of the amendment should be excised as a conflicting constitutional provision. Additionally, the complaint sought a declaration that if the amendment were valid that "no further consolidation of enclaves or salient territories be effected by passage of said amendment."

Attached to the complaint was a copy of a map of the City of Glendale delineating its boundaries and those of Denver, reflecting that Glendale was a total enclave within Denver.

Following intervention by the County of Arapahoe and Cherry Creek School District No. 5, as defendants, the trial court on February 24, 1975, rendered a declaratory judgment and order (ff. 541-556), a part of the same being:

> "As to the first issue, it is very clear that there was no intention to redraw the Denver boundaries by the Amendment 1 changes in the second paragraph of Article XX. The Court finds that no reasonable interpretation of Amendment 1 can lead to this result. This Court therefore issues a declaratory judgment pursuant to Rule 57, as a matter of law, that Amendment 1 does not have the effect of causing the annexation of Glendale or of any unincorporated enclave within the present physical boundaries of Denver."

The shaded area of the reproduced Section 1 of Article XX was the concern of such order, in that Amendment No. 1 embraced the identical language as contained in Article XX when

it was first adopted as an amendment to the Constitution; that language provided that Denver and all municipal corporations included within the exterior boundaries of Denver as the same were bounded when the amendment took effect would be a part of the City and County of Denver.

As to that part of the trial court's order, none of the parties, then or later involved, take exception. Having so disposed of the first issue as designated by the trial court, the court then addressed its order to three other issues, namely:

> "2. Whether certain plaintiffs were denied due process of law because they received no notice of the ballot title of Amendment 1."

The court held there was not factual showing that any plaintiff failed to have actual notice of the ballot title in time to challenge it, and that interested citizens have a burden of inquiry to inform themselves of title designations under § 1-40-102(3).

> "3. Whether Amendment 1 is void because it contains more than one proposition."

The court held that no problem arose by one amendment covering two propositions when both related to annexation; and

> "4. Whether Amendment 1 is void as a matter of law because the title is so misleading."

The court held the title to be misleading, but that parts of the amendment may be severable.

The text of the ballot title to Amendment No. 1 was:

"AN ACT TO AMEND ARTICLES XIV AND XX OF THE CONSTITUTION OF THE STATE OF COLORADO CONCERNING THE ANNEXATION OR 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 trial court then ruled that a decision on the

fourth issue was reserved until "Jefferson and Adams Counties are joined, as well as all other interested Colorado Counties by class action", for a realignment of parties and that restatement of claims should be accomplished before further hearing.

Denver then filed a third-party complaint (ff. 557-582), naming the statutory board, Jefferson County and other counties specifically, and remaining counties as a class, together with the cities of Aurora and Lakewood as third-party defendants, attaching a copy of the previous order of the lower court. Therein Denver set forth the titles to two constitutional amendments relating to annexations, being Amendments 1 and 5, and alleging Denver could not further proceed with annexation as a result of their adoptions. Denver further alleged the amendments to be in conflict, that they contravened federal constitutional prohibitions, and denied Denver citizens equal protection. Denver prayed for an order declaring both amendments void.

Jefferson County answered specific allegations by admissions and denials (ff. 589-598). It also presented other defenses by answer, which were never argued nor ruled upon by the lower court. Those defenses were that the issues raised by the court and parties following its declaration in favor of the city of Glendale were moot, that the court would be improper in rendering an advisory opinion.

Thereafter informal conferences were held in court chambers attended by various counsel. On January 28, 1976, the trial court denied all pending motions, found that the proper parties were before the court and requested briefs on the remaining issue which it then clarified to be as follows:

"Whether said title is so misleading that it affects the validity of Amendment 1, i.e., whether Amendment 1 is valid, partially void, or all void." (ff. 811-812)

After receipt of briefs, the trial court rendered its further order on April 8, 1976, as stated in the brief of Denver at page 7 thereof, and denied the motion of Jefferson County to alter or amend the order in finding the title to be misleading in any part.

SUMMARY OF ARGUMENT

I. The lower court was in error in declaring that the ballot title to Amendment No. 1 was misleading.

II. No error was commited by the lower court in sustaining the validity of the constitutional amendment relating to annexations.

III. Amendment No. 1 is severable, the included amendments to Article XX and Article XIV of the constitution being capable of independent effect and standing.

IV. Amendments No. 1 and 5 are not in conflict. Neither authorizes what the other forbids, nor forbids what the other authorizes.

V. After dispositions rendering declaratory judgment in favor of City of Glendale, all remaining issues were moot and there was no further justiciable issue before the court.

ARGUMENT

I. THE BALLOT TITLE TO AMENDMENT NO. 1 WAS NOT MISLEADING

Prior to the appearance of Jefferson County as a party, the trial court had ruled the title to the amendment was misleading and that there appeared to be good arguments that the two parts of the amendment (i.e., as relating to amending a part of Article XX and amending a part of Article XIV) were severable. Ruling on the second issue was reserved until a later time.

In its trial brief, Jefferson County urged that the ballot title was not misleading. The subsequent opinion of the trial court restated that the court had already found the title to be misleading, but that it did identify and inform the electorate that Article XIV was being amended. Jefferson County then moved to alter or amend the order to reflect that the title was not misleading, the motion being denied.

Prior to the amendment, Section 3 of Article XIV of the Colorado Constitution prescribed that "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;". The amendment added six new words to that section as follows: "EXCEPT AS OTHERWISE PROVIDED BY STATUTE, no part of the territory, etc." The pertinent part of the ballot title and submission clause for the initiated amendment was: "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 . . . .". So far as the title was related to Article XIV, it was in fact to "Amend Article XIV prohibiting the striking off of any territory without first submitting the question to a vote". Thus the title was clear and precise, being to amend an existing prohibition.

Had the amendment been directed solely to Section 3 of Article XIV, would one question the title had it read: "An Act to Amend Article XIV Prohibiting the Striking off of a Territory from a County Without First Submitting the Question to a Vote"? If not, then why should it become misleading when it also provided for amendment of a further article relating to annexation by a

county or a city and county? The prohibition was prescribed by the constitution and the amendment was to amend a prohibition. The amendment did not create a prohibition, for that prohibition existed. Rather, the amendment was for a modification, an amendment, to that prohibition, and the ballot title clearly so stated.

By statute (1-40-101 C.R.S. 1973), the original draft of all initiated petitions for constitutional amendments, before being signed, must be submitted to the secretary of state without title; the law imposes a duty upon the secretary, the attorney general and the reporter of the supreme court to fix a proper title to correctly and fairly express the true intent and meaning of the amendment, and with the requirement that it be brief.

> "It is the duty of those to whom the duty is assigned to prepare a title to an initiated measure, to use such language as shall 'correctly and fairly express the true intent and meaning' of the proposal to be submitted to the voters. "The action of the statutory board empowered to fix the ballot title and submission clause is presumptively valid, and those who contend to the contrary must show wherein the assigned title does not meet the statutory requirement. No such showing is made in the instant case.
>
> "In a carefully considered opinion written for a unanimous court, the Supreme Court of California had occasion to consider a title fixed by the attorney general pursuant to a statute, and expressed this principal in clear language as follows:
>
> "'In approaching the question as to whether the title so prepared is a proper one all legitimate presumptions should be indulged in favor of the propriety of the attorney-general's actions. Only in a clear case should a title so prepared be held insufficient. Stated another way, if reasonable minds may differ as to the sufficiency of the title, the title should be held to be sufficient. These rules of construction are in accord with the fundamental concept that provisions relating to the initiative should be liberally construed to permit, if possible, the exercise by the electors of this most important privilege.'
>
> "*Epperson v. Jordan*, 12 Cal. (2d) 61, 82 P. (2d)

> 445. From this principle it further follows, as the Oregon court remarked in *Wieder v. Hoss*, 143 Or. 122, 21 P. (2d) 780, that:
>
> "'The mere fact that after an appeal has been taken and we have had the benefit of the additional labor bestowed upon the ballot title by counsel we may be able to write a better ballot title than the one prepared by the Attorney General constitutes no reason for discarding his title. The purpose of the appeal is not to secure for the bill the best possible ballot title, but to eliminate one that is 'insufficient or unfair,' if it should develop that the one submitted by the Attorney General is of that kind.'" Say v. Baker, 137 Colo. 155, 159, 322 P.2d 317, (1958). (Emphasis supplied)

If then, the ballot title is presumptively valid, such presumption, we submit, must be overcome by those challenging on the grounds of a misleading title.

> "(2) all legitimate presumptions must be indulged in favor of the propriety of the board's action; and (3) only in a clear case should a title prepared by the board be held invalid. Our case law on this subject is epitomized in *Say v. Baker*, 137 Colo. 155, 322 P.2d 317." Bauch v. Anderson, 178 Colo. 308, 497 P2d 698 (1972).

The record is devoid of any evidentiary fact that any person was deceived by the ballot title, and those challenging the validity of the ballot title have failed to meet the burden of overcoming its presumed validity.

II. PRESUMPTIONS OF VALIDITY OF TITLE AND ENACTMENT CAN ONLY BE OVERCOME BY SHOWING THAT A SUFFICIENT NUMBER OF PERSONS VOTING THE AFFIRMATIVE WERE SO MISLED AS TO CHANGE THE OUTCOME OF THE ELECTION

The County of Jefferson has urged that the title to the amendment was not misleading; were the title in fact misleading, the amendment remains a valid enactment by the people of the state.

No position has been taken that the title was misleading upon the changes to Article XX. The issue is confined upon that part of the title and amendment effecting changes in Article XIV.

Article XX of the Constitution, when adopted, effected

major and numerous changes to several articles of the constitution. There, as here, the amendment was of one purpose and view. When Article XX was attacked in the courts, by an extended and considered opinion, in People v. Sours, 31 Colo. 369, 74 Pac. 167 (1903), this Court held:

> (Page 375 et seq.) "At the time of the filing of the pleadings in the case, upon the matter being presented, we determined that the burden was upon the respondent to establish the fact that the constitution had been violated in proposing and submitting the amendment. At the outset it should be stated that every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to the constitution when it is attacked after its ratification by the people. In the determination of these questions we ought constantly to keep in mind the declaration of the people in the bill of rights, 'That the people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness;' and we should examine the objections which have been raised against the validity of this amendment from the viewpoint of a fair and liberal construction, rather than from that of one which unnecessarily embarrasses the exercise of the right of amendment. As was said by Judge Handy in 1856, in delivering the opinion of the court in *Green v. Weller,* 32 Miss. 684: 'There is nothing in the nature of the submission which should cause the free exercise of it to be obstructed, or that could render it dangerous to the stability of the government; because the measure derives all its vital force from the action of the people at the ballot-box, and there can never be danger in submitting, in an established form, to a free people, the proposition, whether they will change their fundamental law. The means provided for the exercise of their sovereign right of changing their constitution should receive such a construction as not to trammel the exercise of the right. Difficulties and embarrassments in its exercise are in derogation of the right of free government, which is inherent in the people; and the best security against tummult and revolution is in the free and unobstructed privilege to the people of the state, to change their constitution in the mode prescribed by the instrument.'" (Emphasis supplied).

Further, taking from the opinion commencing at page 381, this Court quoted from a Kansas decision as follows:

> "Many amendments have gone before the people, been adopted and acted upon as parts of the constitution, when only the title, scope, and object can be found in the journals. Another thought, and we pass from this question. We may not ignore public history. Nearly two years elapsed between the time the proposition passed the legislature and the day of the popular vote. During this time this question was not forgotten. It was discussed in every household and at every meeting. The state was thoroughly canvassed; its merits and demerits were presented and supported by all possible arguments. Pulpit, press and platform were full of it. It was assumed on all sides that the question was before the people for decision. There was not even a suggestion of any such defect in the form of submission as would defeat the popular decision. If this objection had been raised prior to the election, the legislature could have been easily convened, and the defect remedied. But there was not a suggestion from friend or foe. The contest was warm and active. After the contest was ended and the election over, the claim is for the first time made that after all there was nothing in fact before the people; that this whole canvass, excitement and struggle was simply a stupendous farce, meaning nothing, accomplishing nothing. This is a government of the people, by the people, and for the people. This court has again and again recognized the doctrine lying at the foundation of popular governments, that in elections the will of the majority controls, and that mere irregularities or informalities in the conduct of an election are impotent to thwart the expressed will of such majority! - Prohibitory Amendment Cases, 24 Kan. 700." (Emphasis supplied).

In the Sours case, it was urged that the proposed amendment, Article XX was submitted to the voters upon a misleading and deceptive title. To this issue the court succinctly responded at page 388.

> "It is stated that the proposal was submitted under a misleading and deceptive title. There is no proof that any elector was deceived by the title under which the amendment was submitted, and the proposed amendments were published in full in a newspaper in each county in the state for four weeks preceding the election. In this connection it is urged that the people who voted for this amendment constituted only a minority of the electors of the state and that only about one-third of the electors expressed

> themselves upon the subject of the amendment. This is not very important, for we should be compelled to sustain this amendment though but a bare majority of the electors had favored it, if, in our opinion, it was legally submitted and ratified, and we should declare it invalid if its invalidity were established beyond a reasonable doubt, although it had received the unanimous support of the electors." (Emphasis supplied).

It would appear that this Court, by long standing decision, has decided the concerned issue, even, arguendo, though the title could, in after thought, have been more clearly stated.

People v. Sours, supra, stands as a landmark case. Every reasonable presumption, both of law and fact, is indulged in favor of validity of a constitutional amendment. Sec. 41, Constitutional Law, Vol. 16 Am.Jur.2d 214.

Herein, the subject amendment was initiated by petitions of the electorate, bearing ballot title and submission clause prepared by the Secretary of State, the Attorney General and reporter of the Supreme Court. 1-40-101, C.R.S. 1973. Each signer to the petition was required to read the measure in its entirety and to understand its meaning. 1-40-106, C.R.S. 1973. There is no evidence, no fact that any voter was misled by the title.

The enactment of the amendment is attended with a presumption of its validity. There must be evidentiary support that those voting for the amendment were misled by its title, and in sufficient numbers that would affect the affirmative ballots, and change the results of the election.

> "An election will not be set aside for irregularities unless they affect the results of the election." City of Loveland v. Western Light & Power Co., 65 Colo. 55, 59, 173 Pac. 717 (1918). Suttle v. Sullivan, 131 Colo. 519, 525, 283 P2d 636 (1955).

The presumption of the validity of the constitutional

amendment imposes the duty upon a court to employ every resource to give effect to the expression of the people. As this Court stated in its recent opinion In Re Interrogatories Propounded By The Senate Concerning House Bill 1078, ___Colo.___ 536 P2d 308 (1975):

> "We address ourselves to the question as to whether the two amendments conflict. In doing so we are fully mindful that it is our duty, whenever possible, to give effect to the expression of the will of people contained in constitutional amendments adopted by them"

With this principle in mind, Jefferson County submits that the whole of Amendment No. 1 is valid, as the lower court so ruled. It is not enough that a possible argument can be made suggesting a misleading title to vitiate the acts of a large number of voters casting an affirmative ballot.

III. AMENDMENT NO. 1 IS SEVERABLE, THE INCLUDED AMENDMENTS TO ARTICLE XX AND ARTICLE XIV OF THE CONSTITUTION BEING CAPABLE OF INDEPENDENT EFFECT AND STANDING.

Is in this position?

Only if this Honorable Court should determine that there were deficiencies in the ballot title of Amendment No. 1 and that the proposed amendment to Article XIV of the Colorado Constitution was not properly represented, would the question of the severability of Amendment No. 1 be at issue.

In the case of People v. Max, 70 Colo. 100, 104, 198 Pac. 150 (1921), this Court held the rule as to divisibility of a constitutional provision was the same as that applied to a statute under similar circumstances. The rule pertaining to severability of statutes is set out in Section 2-4-204, C.R.S. 1973, which reads as follows:

> "2-4-204. Severability of statutory provisions. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid, unless it appears to the court that the valid provisions of the statute are so essentially and

> inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent."

It has not been argued that the amendment to Article XX of the Colorado Constitution was improperly reflected in the ballot title. The ballot title dispute has been limited to whether or not amendment to Article XIV was adequately represented on the ballot title. Assuming, for argument only, that it was determined that amendment to Article XIV was not properly set forth on the ballot title, the question narrows itself to whether or not Amendment No. 1 can be severed, excising that portion which amended Article XIV. If the portion of the amendment which amended Article XIV of the constitution were to be excised, the remaining portion which amends Article XX is complete by itself and is not dependent upon the voided portion. The amendment to Article XX provides that Section 3 of Article XIV and the general annexation laws of the state relating to counties shall apply to the City and County of Denver. In the related but independent amendment to Article XIV of the constitution, the legislature was empowered to provide statutory alternatives to the prohibition of striking off territory of a county without the majority vote of the qualified voters of the county from which such territory is proposed to be stricken. The amendments of the two articles, though related, are of independent effect and standing.

It is noted that this Honorable Court recently applied the principle of severance to provisions of Amendment No. 6 which appeared on the same ballot with Amendment No. 1.

> "We wish to make clear that Amendment No. 6 related to many subjects other than Colo. Const. Art. V, §§ 46 and 48. Each of the subjects appear to be severable. In any event, the propositions with respect to §§ 46 and 48 are severable from the remainder of Amendment No. 6. Expressly, we do not pass

> upon any other portions of Amendment No. 6." In Re Interrogatories Propounded By The Senate Concerning House Bill 1078, ___Colo.___, 536 P2d 308.

The trial court held that amendment to Article XX incorporated by reference the amended Article XIV, and, therefor, the two articles were so interdependent and so interrelated that severance was impossible. We submit that amendment to Article XX does not incorporate amendment to Article XIV, but only set forth that "the provisions of Section 3 of Article XIV and annexation and consolidation statutes of the state relating to Counties shall apply to the City and County of Denver. . . .". While the amendment to Article XX makes reference to Article XIV, it does not incorporate Article XIV. Article XX standing alone is complete and capable of being given legal effect.

It should be observed that the trial court, determining severance impossible, relied upon Denver v. Lynch, 92 Colo. 102, 18 P2d 907 (1932), People v. Max, supra. In the case of Higgins v. Sinnock, 129 Colo. 66, 266 P2d 1112 (1954) this Court held:

> "Therein [referring to Denver v. Lynch supra] we said that if the invalid portion of the Act was apparently an inducement to the passage of the valid, then the statute would not be severable. Here there is nothing contained in the record which authorizes or empowers us to assume that the portions of the 1953 Act, supra, providing for the payment of the benefits under the old age pension Act to the chief financial officer of the institution for the inmates therein was an inducement to the enactment of the portion of said Act giving those inmates the benefits of the old age pension Act. We may not rest our decision upon assumption or presumptions without some evidence in support thereof." (Empahsis supplied)

In School District No. 1 v. School Plan, 164 Colo. 541, 554, 437 P.2d 787 (1968), this Court observed:

> "A valid analogy can be drawn between the instant case and one where a portion of a legislative enactment is declared constitutionally invalid. The question then arises as to whether the remaining provisions of the enactment must also fall. In such a situation, the remaining portions

> of the statute will be held valid if they are complete in themselves and can be given legal effect, *Home Owners' Loan Corporation v. Public Water Works District No. 2*, 104 Colo. 466, 92 P.2d 745 (1939); and, if the invalid portion was not an essential, pervasive part of the Act. *Four-County Metropolitan Improvement District v. Board of County Commissioners*, 149 Colo. 284, 369 P.2d 67 (1962); *Colorado Nat. Life Assurance Co. v. Clayton*, 54 Colo. 256, 130 P. 330 (1913)." (Emphasis supplied)

In the present case, as in the Higgins case, supra, assumption on inducement to the passage of an amendment cannot be made without supporting evidence. There exists no evidence that amendment to Article XIV was any inducement to passage of amendment to Article XX, or vice-versa. Lacking such evidence, no inducement can be assumed. Without inducement as a consideration, the authority of Denver v. Lynch, supra, is not available to support a position that Amendment No. 1 is not severable.

Since Denver v. Lynch, supra, this Court has applied the test of severability in numerous decisions.

> "We follow the view of *School District No. 1 v. School Planning Comm.* 164 Colo. 541, 437 P.2d 787, that where a portion of a statute is unconstitutional, the remaining portions will be held valid if they are complete in themselves and can be given legal effect." Pike v. School District, 172 Colo. 413, 419, 474 P2d 162 (1970).

The general rule of severability as stated in Denver v. Lynch, supra, is the rule generally applied in all jurisdictions, but, as with any general rule, its application produces different results in accord with a particular set of circumstances. So applied, the rule narrows to the inducement of the act, the completeness of the remainder, the existence or non-existence of facts.

In summary, the County submits that the amendment to Article XX was not adopted with the amendment to Article XIV as inducement, that Article XX is legally self-contained and complete, and Amendment No. 1 is capable of severance so as to give maximum

legal effect to the expression of the people of Colorado, by excising the words "Except as otherwise provided by statute".

IV. AMENDMENTS NO. 1 AND NO. 5 ARE NOT IN CONFLICT, NEITHER ONE AUTHORIZING WHAT THE OTHER FORBIDS OR FORBIDING WHAT THE OTHER AUTHORIZES.

In response to the initial Complaint for Declaratory Judgment filed by the City of Glendale, Denver filed an Answer and Request for Affirmative Relief. That responsive pleading included the issue that Amendment No. 1 and Amendment No. 5 were in material conflict. In the brief of Denver at page 1, "Issues Presented For Review", Denver stated "the issue of Amendment No. 5 was later withdrawn". On January 28, 1976, the lower court entered an order framing the sole issue as briefed and argued. Paragraph three of said order reads:

> "(3). The remaining issue is whether said title is so misleading that affects the validity of Amendment 1, i.e., whether Amendment 1 is valid, partially valid and partially void or all void."

Notwithstanding the facts that the issue of Amendment No. 5 was withdrawn and the court by its order excluded the issue of conflict between Amendments No. 1 and No. 5, the lower court, in its order of April 8, 1976, proceeded, obiter dictum, to a determination that no conflict exists between Amendments No. 1 and No. 5. Jefferson County concurs with the reasoning of the lower court in applying the test set forth by this Court In Re Interrogatories Propounded By The Senate Concerning House Bill 1078, ___Colo.___, 536 P2d 308 (1975). A restatement of that test is:

> "Does one authorize what the other forbids or forbid what the other authorizes?"

Amendment No. 1 modified Articles XX and XIV of the Colorado Constitution providing that annexation laws of the state relating to counties shall apply to the City and County of Denver and that, unless otherwise provided by statute, an approval by

the majority of qualified voters of the county from which the territory will be removed is required prior to accomplishing such an annexation. In other words, unless the legislature provides otherwise, the proposal for annexation must be submitted to the voters of the affected county for their approval. In terms of prohibition, Amendment No. 1 merely prohibits annexation to the City and County of Denver without required voter approval. Nothing within Amendment No. 1 prohibits the provisions of Amendment No. 5 prescribing for a commission from whom approval must be obtained prior to initiating any annexation procedure.

Amendment No. 5 modified Article XX of the Colorado Constitution by establishment of a Boundary Control Commission and requiring the approval of this commission prior to initiation of proceedings to annex to the City and County of Denver. In terms of prohibition, Amendment No. 5 merely prohibits initiation of annexation proceedings prior to boundary commission approval.

In application of the holding In Re Interrogatories Propounded By The Senate, supra, the trial court properly applied the same as follows:

> "In the opinion of this Court, no such conflict exists here. Amendment 5 provides for procedures that must be followed before certain annexation or consolidation proceedings may be initiated. It thus provides for a condition precedent to operation of the general annexation and consolidation laws of the state. Amendment 1, on the other hand, applies the general annexation laws pertaining to counties to the City and County of Denver. Amendment 1 does not forbid the existance (sic.) of a precedent procedural step and Amendment 5 does not authorize annexation without subsequent compliance with the general annexation laws. They do not conflict and both may stand as adopted."

V. AFTER DISPOSITION RENDERING DECLARATORY JUDGMENT IN FAVOR OF CITY OF GLENDALE, ALL REMAINING ISSUES WERE MOOT AND THERE WAS NO FURTHER JUSTICIABLE ISSUE BEFORE THE COURT.

As this Court held of recent date, the constitution restricts cases in which advisory opinions may be rendered. Billings, et al. v. Buchanan, Case No. 27407. Herein no justiciable issue remained before the trial court. Rather the trial court, after disposing of the issue raised by the City of Glendale as a plaintiff and in its favor, proceeded to frame an issue, ordered specific counties and other counties as a class to be made parties to test the issue so framed. Denver then appeared as a third-party plaintiff, raising additional issues; the third-party defendants, in response to those issues, interjected further issues, or made no appearance. None of the issues were germane as to whether the City of Glendale has been consolidated with Denver. As a consequence, utter confusion arose to where one party stood adversely to another, and as to what issues were before the lower court to be resolved. There was a total lack of aggrieved parties; parties are present herein because the trial court commanded their appearances to test an issue by it raised, and upon which it sought to render an opinion as an advisor. However considered, whether raised by the original parties, the intervenors, the court, or third-party defendants, any other issue or issues were totally moot and immaterial. Until factual issues are raised by adverse parties, there is nothing for a court to consider; if factual issues are raised, then arises the question of indispensable parties or permissive parties. It is beyond the function of any court to frame an issue and command the appearance of a party to test that issue; it may dismiss the action for lack of issue or lack of an indispensable party, but no more. Herein, with a suit by a city against another city, and having disposed of the necessary determination, it was totally improper for the lower court to raise an issue and command the appearances of other parties to test the issue so raised.

CONCLUSION

The ballot title to Amendment No. 1 fairly expressed the true intent and meaning of the amendment. The trial court correctly invoked the doctrine of presumption of validity of a constitutional amendment and properly applied the test of the Sours case in holding that the presumptive validity was not overcome.

If it would be determined that the ballot title was misleading by its reference to Article XIV, then that part relating to the amendment of Article XIV could be readily severed to give effect to the will of the people. The included amendments to Articles XX and XIV were not inducements of one for the other; each are capable of independent legal effect and standing, allowing, if necessary, to severe that part of the amendment not clearly related to the title.

Constitutional Amendments No. 1 (Poundstone) and No. 5 (Boundary Control Commission) are not in conflict inasmuch as neither authorizes what the other prohibits or prohibits what the other authorizes.

On the strength of these arguments, the County of Jefferson submits the expression of the People of Colorado must be given full effect, and Amendment No. 1 be accorded full validity and be recognized as free of any conflict with Amendment No. 5.

Respectfully submitted,

Patrick Mahan, Reg. No. 2372
County Attorney for Jefferson County

George J. Robinson,
Reg. No. 1962
Special Counsel for
Jefferson County
6610 West Fourteenth Avenue
Lakewood, Colorado 80214
238-7821

By: Richard J. Scheurer
Richard J. Scheurer, Reg. No. 2371
Assistant County Attorney for
Jefferson County
Jefferson County Courthouse
1700 Arapahoe
Golden, Colorado 80419
279-6511

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Brief of County of Jefferson, Third-Party Defendant-Appellee, sufficient postage prepaid, this 5th day of November, 1976, to:

Douglas G. McKinnon
City Attorney
609 West Littleton Blvd
Littleton, Colorado 80120

Ronald S. Loser
County Attorney
709 West Littleton Blvd.
Littleton, Colorado 80120

J.D. MacFarlane
Attorney General
Jean E. Dubofsky
Deputy Attorney General
State Capitol
Denver, Colorado 80203

David J. Hahn
Attorney at Law
515 Western Federal Savings Bldg
Denver, Colorado 80202

Tom L. Eitel
Attoney at Law
333 West Hampden Avenue
Englewood, Colorado 80110

S. Morris Lubow
County Attorney
Adams County Courthouse
Brighton, Colorado 80601

Earl L. Dazey
County Attorney
P.O. Box 637
Castle Rock, Colorado 80104

Sam Telep
County Attorney
Weld County Courthouse
Greeley, Colorado 80631

Joseph C. French
County Attorney
720 Pearl Street
Boulder, Colorado 80302

John M. Yeager
County Attorney
Gilpin County Courthouse
Central City, Colorado 80427

William W. McNeill
County Attorney
Clear Creek County Courthouse
Georgetown, Colorado 80444

Norman A. Palermo
Attorney at Law
Fifth Floor
Pikes Peak Building
Colorado Springs, Colorado 80903

Leland Coulter
City Attorney
1470 Emporia Street
Aurora, Colorado 80010

Raymond C. Johnson
City Attorney
1455 Ammons Street
Lakewood, Colorado 80215

Herman J. Atencio
Assistant City Attorney
353 City and Bounty Bldg
Denver, Colorado 80202

Sue Berry