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THE BOARD OF SUPERVISORS OF ELECTION FOR WICOMICO COUNTY vs. GEORGE W. TODD ET AL.

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF MARYLAND

97 Md. 247; 54 A. 963; 1903 Md. LEXIS 137

April 15, 1903, Decided

PRIOR HISTORY: [*1]** Appeal from the Circuit Court for Wicomico County (HOLLAND, J.)

DISPOSITION: Order reversed with costs to the appellants.

LexisNexis(R) Headnotes

HEADNOTES: *Constitutional Law — Invalidity of Statute Requiring Judge to Order an Election to be Held.*

The Act of 1896, ch. 195, provides that whenever half of the registered, qualified voters of Wicomico County, or of any election district thereof, shall petition the Circuit Court to submit the question of granting or not granting licenses for the sale of liquors at the next general election to be held in the county, the Court shall order the Sheriff of the county to give notice of the election, etc. *Held,* that this statute imposes upon the Judges of the Circuit Court the duty of counting the names upon the petition, of ascertaining whether these names are those of voters at the last election for Governor and of ordering an election to be held; that the duty so imposed is not judicial in its nature, and that consequently the Act is void because in conflict with the Bill of Rights, Art. 8, which declares that the legislative, executive and judicial powers of government ought to be forever separate and distinct from each other and no person exercising the functions of one of the departments shall assume or discharge the duties of any other; and Art. 33 of the Bill of Rights which declares that no Judge shall hold any other office or political trust or employment of any kind whatsoever.

COUNSEL: Alonzo L. Miles and **Joseph N. Ulman** (with whom were Samuel J. Harman, Samuel R. Douglass and Miles & Stanford on the brief), for the appellants.

First. Chapter 195 of the Acts of 1896 is unconstitutional in that thereby the Legislature undertakes to impose upon the Judges of the Circuit Court of Wicomico County a non-judicial act, and to make of the State Judiciary a part of the election machinery.

The principle of the separation of governmental powers was laid down by Montesquieu, and it is found expressed in the Constitution of the United States, and the Constitution of all the States except Kansas, North Dakota, Ohio, Pennsylvania, Washington, and Wisconsin. Notwithstanding this very general acceptance of the principle by the constitutional law-making bodies, judicial interpretation has given a wide divergence to the force of its application in the various States. In some jurisdictions, a philosophical accuracy has impelled the Courts to lay much stress upon the principle, to construe strictly the constitutional expression of it, and to regard it as one of **[***2]** the inalienable and unalterable safeguards of liberty. The Court of Appeals of Maryland has invoked it frequently during the past five years; and, it may be said in passing, this Court has in every recent case construed the provision strictly. In other States; again, the principle has been brushed aside with a judicial wave of the arm, as expressing a fine distinction too theoretical to merit serious consideration. In determining the value of decisions cited upon the specific point in issue from States other than our own, it will be imperative, therefore, to examine closely the judicial tendency in such States in relation to the broad principle, and to give to such decisions more or less weight according as whether the law of the State of their origin is or is not in accord with that of Maryland regarding the general doctrine.

There are two reported cases in which the Courts have been called upon to consider the force of this constitutional provision in reference to laws closely similar to that here in question. These are Dickey v. Hurlburt, 5 Cal. 343; and State, Paul, etc., v. Judge of the Circuit Court, 1 L. R. A. 86, 50 N. J. L. 585-610. The first case declared unconstitutional **[***3]** a statute providing that "whenever the inhabitants of any county of this State (California) desire to remove the seat of justice of the county from the place

where it is fixed by law or otherwise, they may present a petition to the county Judge, praying such removal, and an election shall be held to determine to which place such removal shall be made." It was held by the California Supreme Court that this Act was unconstitutional, because it imposed upon the judiciary plainly ministerial and legislative functions. To this extent, it would seem to be a strong authority for the appellant's contention. But the Court qualifies its opinion by calling attention to the fact that the Act not only required the Judge to call an election when properly petitioned to do so, but imposed upon him the further duty of determining and fixing the time, place, and manner of holding it; and the Court said that "if the Legislature had merely imposed upon the county Judge the duty of making proclamation of the election," then its decision would have been otherwise. That is to say, if the Judge is called upon to do an unconstitutional act, but that act is not essential to the completion of the final act, **[***4]** then the final act will be held none the less valid—just as in the case where a non-essential preliminary act is altogether omitted to be done. To support the distinction, the Court refers to its own decision in The People, etc., v. Brenham, 3 Cal. 447. That was a case not of an unconstitutional act, but of the total omission of the performance of an act. The charter of San Francisco provided for a general election for Mayor, and for other officers, on a certain day in each year. Provision was also made for certain special elections, on certain days; and then it was further provided that all elections should be preceded by a "call" on the part of the Common Council. In 1851, a general election was held, and Mr. Brenham was elected Mayor. But his predecessor refused to yield him the office, claiming that the election was irregular, among other reasons, because the Council had failed to "call" an election. It was held, that notwithstanding this omission, the election was a valid one. And the case is cited, as stated above, as holding that the omission to call an election when the time and place of holding it are fixed is so unimportant in its nature as to constitute no impediment to **[***5]** a valid election. But it does not stand for this proposition, and it is difficult to see how it could have been so cited. If an election is not "called" or otherwise provided for by law, there can be no election; and the mere casting of certain votes would be a nugatory act. And the Court in People v. Brenham, did not say what the opinion in Dickey v. Hurlburt quotes it as saying. That is to say, the opinion of the District Judge in People v. Brenham, afterwards affirmed by the majority of the Supreme Court, declares that "the duty of the Common Council" (to call elections) "only applied to special elections (3 Cal. 481), general elections being otherwise provided for." That is what the Court means when it says that the act was non-essential. The election could be held, and was validly held without the performance of the act at all, because there was no law plainly ordering the act to be done. Therefore, when the later case in 5 Cal. says that it is a non-judicial function for Judges to call an election, and to fix the time and place of it, and that an act requiring this is unconstitutional; but that merely to call an election, if its time and place are fixed, though non-judicial, **[***6]** would be so unimportant that an election held in pursuance of such call would still be valid, the distinction which it makes is not supported by the authority relied upon. That authority would justify the statement that "if an election were otherwise regularly provided for by statute, and if it were further incumbent upon some Judge merely to announce it, then that announcement, though non-judicial, would be so non-essential that the holding of the election would nevertheless be constitutionally provided for." And even this would be merely a dictum upon a question not presented in the case. But if, as in the case of the Maryland Statute, the election were a special election, and would not be held, and none of the machinery of holding it would be set in motion, save by the act of the Judge, then, if that act be non-judicial, the whole election must be unconstitutional—i. e., the case of Dickey v. Hurlburt, in 5 Cal., would be an authority exactly in point. Therefore, one of the two States in which this specific question has been passed upon, has decided it in accordance with the views here contended for.

The other case on this specific point, State, Paul, etc., v. Judge, etc. **[***7]** , 50 N. J. L. 585; 1 L. R. A. 86, was decided by a divided Court, eight judges voting to declare the act constitutional, seven dissenting. The Court gave very little attention to this branch of the case; and it is disposed of in the majority opinion quite summarily. The act there in question empowered the Judges to decide when the circumstances had arisen which required an election on the question of local option, and thereupon to order and fix the time of an election. The main question before the Court was whether or not a local option law was constitutional in itself; and the point here being considered was adverted to only incidentally. It was decided, without the citation of an authority, that, such an act was neither judicial, executive nor legislative, but partook of the nature of all three; that the distinction was impractical and unimportant in any event; and that the act would not be declared unconstitutional for this reason alone.

It is submitted that this decision, though on almost the precise point, can have little weight in Maryland. It is the only decision on the constitutional question handed down by the New Jersey Court of Appeals and Errors; and it is entirely **[***8]** contrary in spirit to two New Jersey Supreme Court cases which it ignores. (In re Application of Cleveland, Mayor, 22 Vr., 311; In re Ridgefield Park, 25 Vr. 288.) If it establishes anything, it establishes that in

New Jersey, this constitutional provision is looked upon as of small weight. But that is directly contrary to the present policy of this State; hence, though almost "on all fours" with the case at bar as to its facts, it cannot be regarded as an authority entitled to great consideration.

The Maryland definition of a judicial act. "The mere fact that a Judge is called on by statute to execute a certain function does not make the function a judicial function. Its character is dependent on its qualities, not on the mere accident as to the person who has been designated to do it. The qualities of the act, and not the character of the actor must determine the nature of the act." Robey v. Prince George's County, 92 Md. 150, 162. "It is of the very essence of a judicial function that it shall not be arbitrary, but that it shall be a proceeding between parties." Ibid, p. 162.

It is held unconstitutional for Judges to be called upon to audit accounts, 92 Md. 150, supra, **[***9]** or to appoint a board of visitors to a county jail. Beasley v. Ridout, 94 Md. 641, 659. On the other hand, it has been held a judicial act for a Judge to determine whether an applicant is entitled under the statute to a license to sell liquors, because, under that statute, it was necessary for the Judge to decide whether the signers of the certificate presented by the applicant were freeholders or not; whether they were reputable or otherwise; whether they were residents of the neighborhood, and what was to be considered the neighborhood. These questions are raised by the filing of a petition on the part of the applicant, and the filing of counter petitions or objections, a procedure specifically provided for by the statute. An issue is thus presented which must be decided "by hearing the testimony of witnesses as to whether the facts, which are made by statute a pre–requisite to the issue of the license existed, or not, and then by the construction of the statute, and its application to the facts of the case." McCrea v. Roberts, 89 Md. 238, 252.

Whatever may have been the law in earlier years—as in Crane v. Meginnis, 1 G. & J. 476, or State v. Chase, 5 H. & J. 298—whatever **[***10]** may be the law in other States—and we freely admit that Beasley v. Ridout, 94 Md. 641, represents a minority doctrine—the law of this State today is clear and unequivocal. It regards the principle of the tripartite separation of powers as an "insuperable objection" to the validity of a law which contravenes it; and it defines a judicial function as JUDGE COOLEY defines it, "to adjudicate upon and protect the rights and interest of individual citizens, and to that end to construe and apply the laws." Cooley Constitutional Limitations, p. 109; 89 Md. 253.

Section 1, chapter 195 of the laws of 1896, directs the Judges of the Circuit Court for Wicomico County to order an election. It seeks to make of them a part of the election machinery of the State. Its provisions are a mandate directed to the judiciary and proceeding from the Legislature; no "case" is presented for judicial review; no disputed questions of law or of fact are submitted for judgment under the law; there are no parties, there is no evidence. A petition is presented. If it contains a majority of the names appearing in a certain list, then the judge must act. If it does not contain such a majority, he cannot act. **[***11]** This requires the judge to count, not to judge. It is more clearly ministerial than the auditing of accounts. Nothing can be conceived which involves fewer judicial elements. Suppose for a moment that the law is held constitutional. Then if a petition containing the requisite number of names were presented, and the Judges refused to order an election, what would be the appropriate remedy? An appeal? Certainly not. There could be no disputed question as to the law or fact of the case. What then? Certainly only a mandamus. But "it is the settled law of this Court that one Judge of a Court has no jurisdiction to issue a writ of mandamus against the other Judges of the Circuit." McCrea v. Roberts, 89 Md. 249. The only exception is "that in cases where a tribunal refuses to exercise the judgment and discretion imposed by a statute, or arbitrarily exceeds its jurisdiction, a mandamus will lie." Miles et al. v. Stevenson, 80 Md. 358. But this statute imposes no exercise of judgment or discretion. It simply says, "if a petition is presented, order an election." That leaves nothing to judicial discretion—hence it imposes a non–judicial act upon the judiciary.

It is non–judicial because **[***12]** it contains none of those elements, which render an act judicial according to the definitions laid down by this Court. It is an act definitely commanded to be done. It differs radically from the act of judgment required by the statute passed upon in McCrea v. Roberts, 89 Md. 238, because that statuate provided for petition and counter petition, for parties, and for a "case;" it leaves open numerous questions upon which a judge can pass judgment, and upon which his decision is not arbitrarily prescribed for him by the statute. But this law of 1896 raises absolutely no such questions. It presents no case, but merely directs that the Judge shall count a certain number of signatures, and then pass a certain order. That is clerical drudgery, is a ministerial function of the executive department of the government and the Constitution will not permit the Legislature to impose it upon the judiciary.

Finally, does all this vitiate an election held under this law. We submit that it does. It is said in Mayor of Baltimore v. Board of Police, 15 Md. 376, 463, "when the Court

is satisfied that the Legislature has exceeded its authority, we should no more falter in denouncing the act as void, **[***13]** than we should hesitate in deciding the most unimportant matter within our jurisdiction." Under the decisions of this State the act sought to be imposed upon the Judges is a non-judicial act; and unless that act be done, no election can be held. Then an election held because of the doing of that unconstitutional act, which would not have been held unless the unconstitutional act had been done must be a nullity. If the Judge had not ordered the election, the statute law of the State provided no other means for causing it to be held. Therefore, the non-judicial and unconstitutional act of the Judge is made an absolutely essential part of the election machinery of the State. The mandamus requiring the Supervisors of Election "to submit the question of granting, or not granting licenses to election, and to prepare official ballots in accordance therewith," should never have been granted, because it recognized as valid an unconstitutional and nugatory act done by the Judge of the Circuit Court. The lower Court must be reversed in its ruling which granted this mandamus. That is the question before this Court. But without the mandamus, there would have been no election. Hence, there is no **[***14]** legal election, and it must be so ordered.

Moreover, the Constitution says "no person exercising the functions of one of said departments shall assume or discharge the duties of any other" (supra). This phraseology disposes of a contention which will probably be raised by the appellees. They may say—"True it is, a Judge cannot be compelled to perform a non-judicial function; but if he has done the act, then it need not be disturbed." But the section of the Constitution is mandatory. "No person shall assume or discharge the duties of any other department." If a Judge has done such an act, he has transcended the Constitutional limitations of his office; and the act so done is entirely nugatory.

Second: The allegations of the petition are not of such a character as to authorize the Court to issue the writ. The petition nowhere alleges that the Supervisors of Election for Wicomico County could have advertised the question, which was to be submitted to the people of the ninth election district of Wicomico County according to law, after notice received. This is a question of fact, and in an application for mandamus all the facts necessary to the granting of the writ should be **[***15]** stated. Sudler et al. v. Lankford, 82 Md. 149.

Third. That if an election upon the question of license for the sale of intoxicating liquors in Wicomico County, as provided in chap. 195 of the Acts of 1896, can be ordered at all by the Court, it must be subject to the provisions and after the notices required by secs. 44 and 47 of chap. 202 of the Acts of 1896.

Fourth. That the provisions of secs. 44 and 47 of said Acts of 1896, with reference to the notice to be given and the publication to be required before a local question of the kind and character referred to in the petition for mandamus in this case can be submitted to the people are mandatory.

Fifth. That even if the provisions of said secs. 44 and 47 of chap. 202 of the Acts of 1896, are not mandatory, then the petition is defective in that it does not allege that there was a sufficient or reasonable time to enable the appellants to comply with the provisions of said sections, and of the other Acts of Assembly governing such cases. By no construction of the Act can it be maintained that the Election Supervisors are not entitled to a reasonable time in which to comply with its provisions; and as to what is a reasonable **[***16]** time, they have some discretion which cannot be controlled by mandamus. Wells v. Munroe, 86 Md. 443.

Sixth. That the certification to the Board of Supervisors of Election by the County Commissioners of Wicomico County is defective, and not such as is authorized and required by law. Acts of 1896, ch. 195, sec. 1; 1896, ch. 202, secs. 44, 47.

John H. Handy and Elmer H. Walton, for the appellees.

The petition is to be addressed to the "Circuit Court," which is required to ascertain the following facts before it can issue the order prayed: The aggregate number of votes cast in the 9th election district at the last election for all the candidates for Governor—to do this they must find from the evidence—for there is no other way to ascertain the facts—when the last election for Governor was held—who and how many candidates were voted for—how many votes in all were cast for Governor—in the said district. Having found all the above facts, and ascertained the aggregate number of such votes, and the one-half thereof required by the Act, it must then look to the petition to find if a number equal to one-half of that aggregate appear to have signed the petition to the Court. **[***17]** The number being found sufficient, it must next be found whether the persons whose names are so signed, did in fact sign the petition. If they did—the Court must then find, if the requisite number of them were registered qualified voters. They must be found to be both registered and qualified. They might be registered but not qualified. They might be qualified but not registered.

Again, the Court must find when the next Congressional

election will be held, to enable it to order the question to be put on the ballots, because the order must be passed within ten days after the receipt of the petition—and the law contemplates the election immediately about to be held. It has to find, therefore, as a matter of fact, whether there is to be a Congressional election about to take place. Now all these facts require evidence and a determination—the exercise of judgment after hearing the evidence. Nor is this all—the question as to who were registered qualified voters, involves questions of law.

In McCrea v. Roberts, 89 Md. 238, this Court says: "The statute requires that the applicant for a license shall file a certificate signed by at least nine reputable freeholders, bona fide **[***18]** residents of the neighborhood in which the applicant proposes to conduct the business. One of the objections filed to the appellant's application denied that the certificate thereto annexed was signed by persons possessing the qualifications. It was necessary to determine whether the signers of the certificate were freeholders or not; whether they were reputable or otherwise; whether they were residents of the neighborhood and what was to be considered the neighborhood. It is manifest that these are questions of fact and law upon which the Judge was required to exercise his judgment, after hearing the evidence."

But what jurisdiction does the Constitution confer upon the Judges of the Circuit Court? It says "The said Circuit Courts shall have and exercise, in the respective counties, all the power, authority and jurisdiction, original and appellate, which the present Circuit Courts of this State now have and exercise, or which may hereafter be prescribed by law." Art. 4, sec. 20, Constitution of Md. Does not this section confer upon them the right to exercise all the power, authority and jurisdiction which the Legislature may thereafter prescribe? Did not the Judges accept their **[***19]** offices with full knowledge that the Legislature might under that section prescribe other power and authority and extend the jurisdiction of the Court? Where is the limit to the power of the Legislature in that direction? It may be said that it lies in keeping in view the provisions requiring the legislative, executive and judicial branches of the government to be kept separate. True, but the duty imposed by the Act of 1896, ch. 195, certainly is not legislative—and is no more executive, than the duty of the Court to pass orders and judgments in execution of any law requiring their judgment in its execution. It does not invade the functions of either of the other departments of government.

But suppose the Court could not be legally compelled to perform duties imposed on it by the Legislature, but does perform them, is not their action valid and binding under sec. 20 of Art. 4, Constitution? In the case of The State v. Chase, 5 H. & J. 304, JUDGE BUCHANAN speaks of such a class of cases as those "a Judge is under no legal obligation to perform." And in the late case of Goldsborough v. Lloyd, 86 Md. 378, this Court says, "Do these statutes impose a duty on the Judges which is not **[***20]** judicial in its character, and, therefore, a duty which they cannot be required to discharge?" In neither of these decisions does the Court hold that, if the Circuit Court does perform the duty and "exercise power, authority and jurisdiction prescribed by law" such action is a nullity. Years ago, the Legislature imposed on the Judges the duty of appointing School Commissioners, and many of them performed that duty; but was it ever held their action was a nullity and the School Commissioners so appointed illegally appointed and their proceedings void? notwithstanding some able members of this Court individually refused to perform the duty, on the ground it was not judicial. The law requiring the Court to ratify tax collectors sales involves no more judicial duty than that required under the Act of 1896, chap. 195. Yet we do not remember to have heard its constitutionality impeached on the grounds that it was not a judicial function.

JUDGES: The cause was argued before MCSHERRY, C. J., FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER and JONES, JJ.

OPINIONBY: JONES

OPINION:

[963]** **[*259]** JONES, J., delivered the opinion of the Court.

The Act of Assembly of 1896, ch. 195, a public local law of Wicomico **[***21]** County, enacted in its first section "that whenever such of the registered qualified voters of Wicomico County, or of any election district, city or town thereof, as constitute one-half of all the votes cast for all of the candidates for Governor at the last election in said county, or in an election district, city or town thereof, shall petition the Circuit Court for said county for the submission, at the next regular congressional election held in said county of the question of granting or not granting any license for the sale of intoxicating liquors for beverages therein, the said Circuit Court shall, within ten days after the receipt of said petition, issue an order for an election on this question to the sheriff of the county, whose duty it shall be to give the same notice and perform all other acts required of him for the holding of elections under the election law of this State, and subject to like penalties in case of his default in his performance of said duties."

The second section enacts "that such election shall be

held and conducted under the provisions of the election law applicable to the said county." The 3rd section provides that after an election so held there shall **[***22]** be no other such election within four years. The 4th section provides how the question thus to be submitted to vote shall be indicated on the ballots; how the preference of the voters upon the question is to be made to appear and be ascertained; how the ballots are to be counted and canvassed in respect to this question; how the result of the voting is to be certified; and how notice is to be given of the result in case it shall "appear that the majority of the votes cast is against the sale of intoxicating liquors for beverages." The succeeding sections of the law in question are provisions for carrying into effect the prohibition of the sale of intoxicating liquors for beverages in the county, election district, city or town as the case may be, according to the submission made in respect to locality, when it appears that a majority of the votes cast upon "the question of granting or not granting any license for the sale of intoxicating liquors," &c., is against the granting of such license.

[*260] This case arises under this law and originated in a petition for the writ of *mandamus* filed in the Court below on the 24th day of October, 1902, by the appellees, George W. Todd **[***23]** and William A. Crew, against the appellants, in which it is alleged that the petitioners "together with four hundred and forty (440) other voters and residents" of the ninth election district of Wicomico County, on the 18th day of October, 1902, presented to the **[**964]** Circuit Court for that county a petition verified by affidavit praying the Court "to submit to the voters of said district the question of granting or not granting any license for the sale of intoxicating liquors for beverages therein * * in pursuance of the provisions contained in sec. 1 of ch. 195 of the Acts of Assembly of Maryland of 1896;" that upon "the hearing of said petition and the motion of the objectors thereto" the said Court passed the following order. "No sufficient cause to the contrary having been shown it is this 23rd day of October, 1902, ordered by the Circuit Court for Wicomico County, Maryland, that in pursuance of sec. 1, ch. 195 of the Acts of 1896, the Sheriff of Wicomico County, Maryland, shall submit to the voters of the ninth election district of Wicomico County the question of granting or not granting licenses for the sale of intoxicating liquors for beverages in said district and the **[***24]** clerk is hereby directed to serve a copy of this order on the said Sheriff of Wicomico County immediately; that in pursuance of said order the Sheriff on the 24th day of October, 1902, notified the County Commissioners of said county and on said day the County Commissioners notified the Supervisors of Election of said county; but said Supervisors refused "to advertise the question" and were "preparing the official ballots to be used in said district without any provision for the submission of the aforesaid question to the voters." It is then prayed that the writ be issued "directed to the said Supervisors of Election of Wicomico County," who are the appellants here, "commanding them to advertise said question, and to prepare the official ballots to be used in the ninth district of Wicomico County —— at the election to be held on November 4th, 1902, in accordance with the provins of section 4 of said chapter 195 of the Acts of 1896."

[*261] Upon this petition the Court below passed an order that cause be shown immediately by the appellants why the writ of *mandamus* should not issue. On the same day that this order was passed the appellants filed their answer in which they **[***25]** admitted the allegations of fact in the petition and rested their refusal to advertise the question of granting or not granting licenses for the sale of liquor and to place such question upon the ballots at the approaching election as set out and stated in the petition upon the ground that the Act of 1896, chapter 195, is unconstitutional and void; that if not unconstitutional it is in conflict with the provisions of chapter 202 of the Act of 1896 from which the appellants, as Supervisors of Elections derived all of their powers and authority over elections in said county; and that by section 47 of the said chapter 202 of the Act 1896, "all questions of local concern which are to be submitted for approval to the vote of the people" of a county must be certified to the Board of Supervisors of Elections by the County Commissioners of the county not less than thirty days before the election at which such question is to be submitted; and that the question of granting or not granting any license for the sale of intoxicating liquors in the 9th election district of Wicomico County had not been so certified thirty days before the election as a question to be submitted for approval. The appellees **[***26]** demurred to the answer; and upon hearing the Court on the same day the answer was filed, October 24th, 1902, ordered the writ of *mandamus* to issue as prayed. From such order this appeal was taken.

In the view we take of this case the ground of defense first set up in the answer of the appellants against the application for *mandamus* is sufficient to dispose of the case upon this appeal and it will be unnecessary to consider any other. We think it advisable to dispose of it upon this ground because future litigation under the law in question will thus be avoided. The Legislature has seen fit to prescribe as a condition for the law (chap. 195 of the Act of 1896), being called into existence and put into operative effect, that an application shall be made to the Circuit Court for Wicomico County for a submission **[*262]** of the question of the adoption of the law, to the voters of the county or of a town or election district of the

county as the case may be; that the said Court shall order the submission of such question to a vote upon conditions prescribed; and that upon the vote being had a majority of the votes of the locality to be effected, according to the submission, **[***27]** shall appear to be in favor of putting the law into operation. The existence of the law with operative effect is made to depend upon the observance of these prescribed proceedings, the initial step in which is the application to, and the order from, the Circuit Court for the submission of the question, whether the law shall be put into effect, to the voters within the territorial limits to be affected.

The question raised is as to the validity of this legislation. The inquiry as to this is whether it is within the constitutional power of the Legislature to impose upon the judiciary, or invest them with, a function of this character, and whether the judiciary in the attempt to discharge such a function are not acting without constitutional warrant. In making this inquiry we are not dealing with any question of expediency or policy; nor can we have regard to the question whether, in the particular instance, the Legislature has prescribed a course of proceeding best adapted to the accomplishment of a laudable object. The public policy involved in the inquiry is determined and fixed in our Bill of Rights and the Constitution—the fundamental law; and we are limited to the question of **[***28]** constitutional power. As was said in the case of *Thomas v. Owens, 4 Md. at page 225,* "under our system of government its powers are wisely distributed to different departments; each and all are **[**965]** subordinate to the Constitution, which creates and defines their limits; whatever it commands is the supreme and uncontrollable law of the land." This distribution of the powers of our State government was declared in our original Bill of Rights accompanying the Constitution of 1776 in this language, "That the Legislative, Executive and Judicial powers of government ought to be forever separate and distinct from each other." Art. 6, Bill of Rights, 1776.

[*263] There are a number of decisions of this Court having reference to this Article of the Bill of Rights sanctioning its wisdom and enforcing practically the principle involved in the declaration. Only those which may have more immediate reference to the case at bar need be referred to. Among those which arose under the Constitution of 1776 is that of *The State* v. *Chase,* 5 Har. & John. 297, in which JUDGE BUCHANAN, in the course of his opinion, says: "New judicial duties may often be unnecessarily **[***29]** imposed, and services, not of a judicial nature, may sometimes be required. In the latter case, a Judge is under no legal obligation to perform them" which was to say that the opinion of the Court was that duties, "not of a judicial nature," could not legally and constitutionally be imposed upon the Courts or the Judges.

In the subsequent Constitutions adopted in this State in 1851, 1864 and 1867 the declaration, which has been quoted from the Bill of Rights of 1776, has been incorporated, and emphasized by adding thereto this language of exclusion "and no person exercising the functions of one of the departments shall assume or discharge the duties of any other." Art. 6, Bill of Rights, Const. 1851, Art. 8 in each of the Constitutions of 1864 and 1867. And in each of these subsequent constitutions there is this further declaration "no Judge shall hold any other office, civil or military, or political trust or employment of any kind whatsoever under the Constitution and laws of this State or of the United States or any of them." Art. 30, Bill of Rights, 1851, Art. 33 in each of the Constitutions of 1864 and 1867.

The force of the opinion of the Court speaking through JUDGE BUCHANAN **[***30]** in case of *State* v. *Chase, supra,* is enhanced therefore not only by the subsequent more emphatic declarations of the fundamental law in reference to the separation of the powers of government but by the express inhibition against the exercise by a Judge of any other "political trust or employment whatsoever." It would seem thus to be made evident in our fundamental law that the policy and intent of that law is that the Courts and Judges provided for in our system **[*264]** shall, not only, not be required but shall not be permitted to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of the judicial function; and that the exercise of any power or trust or the assumption of any public duty other than such as pertain to the exercise of the judicial function is not only without constitutional warrant but against the constitutional mandate in respect to the powers they are to exercise and the character of duties they are to discharge. In accord with this are recent decisions of this Court. In the case of *Robey v. Price George's County, 92 Md. 150,* a statute which required the Judges of the **[***31]** Circuit Court to approve the accounts of certain county officers before payment of the same by the County Commissioners was held unconstitutional as to this requirement because it imposed on the Judges a non–judicial duty. For the same reason in the case of *Beasly v. Ridout, 94 Md. 641,* a staute that imposed upon the Judges of the Circuit Court the duty of appointing members of a Board of Visitors for the county jail of Anne Arundel County was pronounced unconstitutional.

Therefore to test the constitutionality of the law here in question in respect to the duty assigned by it to the Circuit Court we have only to inquire whether the duty so assigned to the Court is a judicial duty. It is quite unnecessary to undertake to define here the essential qualities

of a judicial act or to prescribe the precise limits to be observed by the legislative branch of the government in assigning duties to the Judiciary. Such attempt could, in its results, only be misleading and confusing. It would not be practicable to lay down a rule for all cases; and it would be inappropriate that the Courts should undertake to do this. It is only necessary in this case to say that counting **[***32]** the names upon a petition, ascertaining whether the names appended thereto are those of voters at the last election for Governor, and ordering an election, is not a judicial function, is a proposition that would seem to be too plain to need argument to enforce it. The order, which by the statute here under consideration, the **[*265]** Court is required to pass, is not to be the result of any judicial inquiry. It is not to be passed in the course, of, or in connection with, any judicial proceeding. It is not to be made as preparatory or preliminary to the bringing of any matter within the judicial cognizance; nor as a means necessary or appropriate to aid, in any way, the efficient and appropriate exercise of the judicial function. In short, there is no view in which the duty to pass the order, required by the statute, presents itself as a judicial act. In assuming the duty to pass the order in question therefore the Court assumes a political trust or duty distinct from its constitutional duty as a Court. Again, if the Court can be required to take one step in proceeding to hold an election for the object indicated in the statute in question; or for such other purpose as the Legislature, **[***33]** within its powers, may see fit to order an election, why may not all the duties in connection with the holding of such election be devolved upon the Courts? Why may they not be required to name time and place of holding such election, appoint the judges and **[**966]** clerks of election, canvass the votes and declare and certify results? The initial step in holding such elections would be no more judicial in its character than all the other necessary proceedings therein. It is not reasonable to impute to the fundamental law, in view of the declarations therein heretofore noticed, an intention to make the Courts subject to have devolved upon them duties so distinct from those pertaining to the exercise of the judicial function; and which could be imposed to such an extent as to seriously interfere with the efficient discharge of the duties of the judicial office. This being so, the provision of the Act of 1896, ch. 195, which requires of the Circuit Court for Wicomico County the duty of ordering elections as therein prescribed is repugnant to the Constitution and Bill of Rights and therefore void. As these elections, by the terms of the Act, must depend upon the orders from the Circuit **[***34]** Court the Act must fail.

No reference has been made to authorities or precedents in other States among which there is more or less conflict as to **[*266]** the questions herein considered. It is sufficient that the views expressed and the conclusions reached seem to be the logical and inevitable consequence of the principles embodied in our organic law; and of our decisions expounding them. As authorities however maintaining similar views in analogous cases we may refer to *Dickey v. Hurlburt, 5 Cal. 343,* and the case of *Supervisors of Election, 114 Mass. 247.*

As a result of our views we must reverse the order of the Circuit Court for Wicomico County from which the appeal in this case was taken.

Order reversed with costs to the appellants.