State of Arizona Budget-Related Court Cases

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Fairfield v. Foster	April 1923	Supreme Court
Black and White Taxicab Co. v. Standard Oil Co.	August 1923	Supreme Court
Hunt v. Callaghan	June 1927	Supreme Court
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Crane v. Frohmiller	June 1935	Supreme Court
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Arizona Assoc. of Providers for Persons with Disabilities v. State of Arizona	April 2009	Court of Appeals
Arizona Early Childhood Development & Health Board v. Brewer	August 2009	Supreme Court

Case (with links to court's opinion)	Date	Court
Brewer v. Burns	August 2009	Supreme Court
Arpaio v. Maricopa County Board of Supervisors	August 2010	Court of Appeals
Arizona Farm Bureau Federation v. Napolitano/Brewer	November 2010	Court of Appeals
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Arizona Assoc. of Chiropractic Physicians v. Brewer	September 2011	Court of Appeals
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Industrial Commission of Arizona, et al. v. Martin	November 2012	Court of Appeals
Cave Creek Unified School District v. Ducey	September 2013	Supreme Court

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her, but never did to the knowledge of the witness. The property was worth $5,000.

Thomas Alston testified that when he and Carr called on Mrs. Warren at the time she executed and delivered the deed he did not see any money paid to her by Carr.

The remaining evidence will be referred to hereinafter.

The contentions of appellants are: (1) The evidence shows that there was no change of possession upon the execution of the deed May 19, 1921. (2) The consideration was not paid. (3) The only consideration that defendant claims was grossly inadequate. Appellants furthermore insist that "each of these three points is considered in law a badge of fraud." It is our contention that, when taken together, they make prima facie proof of fraud, and were sufficient to put the defendant to his proof as to the validity of the transaction.

The only evidence in the record relating to the first proposition indicates that respondents went into possession of the property immediately upon execution of the deed, and remained in possession from that time. Evidence produced by plaintiffs also tends to prove that the $10 mentioned in the deed as the consideration was paid, and that, in addition, Mrs. Warren received $35, but whether she received that each month is not clear. The evidence, moreover, tends to prove that Mrs. Warren was to receive the income from one half of the house—the other half of the double house being occupied by defendants.

[1, 2] The remaining question is as to inadequacy of the consideration. The general rule is that a conveyance based on an inadequate consideration will not be canceled or set aside for that reason alone unless the inadequacy is so great as to shock the conscience and furnish of itself evidence of fraud. 1 Black on Rescission and Cancellation, §§ 169 and 175; 9 C. J. § 35, p. 1174; Bruner v. Cobb, 37 Okl. 228, 131 Pac. 165, L. R. A. 1916D, 377, and annotations. The consideration was grossly inadequate, but that is not the only circumstance disclosed by the record and proper for consideration. The uncontradicted evidence is that Mrs. Warren intended to do what she did; that she knew the value of the property and intended to accept the consideration she received; that the transaction was without any element of undue influence or unfairness, or misrepresentation. No advantage was taken of her in any way. Her mind was clear, and she knew what she was doing, and deliberately executed the deed and delivered possession of the property to defendants. She had no direct descendants, or dependents, or creditors who would be injured by the transaction.

[3] At the oral argument the claim was made by counsel for appellants that the trial court should have probed the conscience of the respondent Carr. Being satisfied that fraud had not been established, the court was under no duty to make an investigation on its own initiative. If appellants desired to probe the conscience of Mr. Carr they could have called him to the witness stand, and could have done what they now suggest should have been done by the court.

We agree with the trial court that a case of fraud was not presented by appellants. The judgment is therefore affirmed.

GIDEON, THURMAN, and CHERRY, JJ., concur.

FRICK, J., did not participate herein.

BLACK & WHITE TAXICAB CO. v. STANDARD OIL CO., et al. (No. 2207.)

(Supreme Court of Arizona. Aug. 28, 1923.)

1. Constitutional law ⟸48—Construed in favor of constitutionality.

A statute will, if fairly susceptible thereof, be given a construction which will sustain its constitutionality, and will not be declared unconstitutional, unless the court is satisfied thereof beyond a reasonable doubt.

2. Statutes ⟸107(9), 123(4)—Highway law held to have but single subject and that expressed in title.

Laws 1923, c. 76, *held* to embrace but one subject, and that expressed in the title, as required by Const. art. 4, pt. 2, § 13, namely, highways, their construction, maintenance, the raising of revenues therefor, and the manner of their expenditure or distribution; the provisions being all directly or indirectly connected with the subject and not incongruous therewith, and the fact that there are several separate projects or road improvements designated not constituting each a separate subject, they being in connection with a general system of road construction.

3. Statutes ⟸107(7)—Highway law not a special appropriation bill embracing more than one subject.

Laws 1923, c. 76, as to highways, *held* not to violate Const. art. 4, pt. 2, § 20, requiring a special appropriation bill to embrace but one subject.

4. Licenses ⟸7(1)—Law imposing gasoline tax held to distinctly state its object.

Within Const. art. 9, § 3, requiring every law imposing a tax to "state distinctly the object of the tax," the provision of Laws 1923, c. 76, disposing of one-half of the three cents per gallon gasoline tax to the counties, *held* to distinctly state its object to be for the maintenance of county roads and highways.

5. Statutes ⟸33—No power to veto alone part of bill imposing tax.

Const. art. 5, § 7, empowering the Governor, when a bill "contains several items of appro-

priations" to veto one or more of them without affecting the remainder of the bill, gives him no power to veto the part of a bill simply imposing a tax.

6. Statutes ⟸33—Apportionments of money from gasoline tax for highways not items of appropriation within veto power.

The apportionments by Laws 1923, c. 76, § 10, subd. 3, par. d, of certain percentages of the money from the tax on gasoline for highways to certain accounts, are not items of appropriation, within the veto power as to such items given by Const. art. 5, § 7.

7. Statutes ⟸33—Provision giving counties half of gasoline tax not "appropriation" within veto power.

The provision of Laws 1923, c. 76, § 10, subd. 3, par. d, giving to the counties half of the gasoline tax imposed by such statute for highways is not an item of appropriation within Const. art. 5, § 7, as to separate veto power; an element of the definition of "appropriation" being that the money appropriated be out of the general revenues of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appropriate—Appropriation.]

8. Statutes ⟸33—Disapproval of apportionment of property tax for highways not within veto power.

The disapproval merely of the apportionment between state and counties, made by Laws 1923, c. 76, § 10, subd. a, of the property tax thereby imposed for highways, is not within the veto power as to items of appropriation given by Const. art. 5, § 7.

Lockwood, Superior Judge, dissenting in part.

Appeal from Superior Court, Maricopa County; Stephen H. Abbey, Judge.

Action by the Black & White Taxicab Company against the Standard Oil Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Baker & Whitney, of Phœnix, for appellant.

Ellinwood & Ross and James S. Casey, all of Bisbee, for appellee Standard Oil Co.

Barnum & Flanigan, of Phœnix, for appellee Kerby.

John W. Murphy, Atty. Gen., A. R. Lynch and Earl Anderson, Asst. Attys. Gen., and H. A. Elliott, of Clifton, for appellee State of Arizona.

ROSS, J. This action was brought by the Black & White Taxicab Company against the Standard Oil Company and James H. Kerby, Secretary of State, to recover 70 cents which the plaintiff claims the Standard Oil Company overcharged it for gasoline. The complaint shows that the defendant Standard Oil Company is a dealer in gasoline and its products within Arizona; that it made such overcharge in pursuance of the terms of chapter 76, Session Laws of 1923, which require every dealer in gasoline to collect from the purchaser thereof three cents per gallon and at stated intervals pay the same to the defendant Secretary of State. It is alleged the three-cent tax was paid under protest. Recovery is sought upon the ground of the unconstitutionality of chapter 76; it being claimed it violates several provisions of the state Constitution. It is also claimed the Governor vetoed the provision of such chapter requiring dealers to collect three cents tax per gallon of purchasers of gasoline. After the suit was instituted, upon the petition of the Attorney General the State was permitted to intervene at his relation. The defendants and the intervener filed general demurrers to the complaint which were sustained, and a judgment of dismissal entered. The effect of the judgment was to hold the law constitutional and the veto ineffective, and to impose upon the defendant oil company and all other dealers in gasoline the duty of collecting the three cents per gallon from purchasers of gasoline, and at stated periods remit such collections to the Secretary of State.

The taxicab company has appealed from the judgment. It is contended that chapter 76 offends section 13, pt. 2, art. 4, Const., section 20, pt. 2, art. 4, section 3, art. 9, and section 9 of article 9.

As the questions raised have to do with the title of the act as well as the body thereof, we give here the title. It is as follows:

"An act to provide funds for the construction and completion of certain designated highway projects, within the state of Arizona, initiated or authorized, but not completed by the board of directors of state institutions and office of state engineer, prior to January 1, 1923; authorizing the refunding, for use on any specific or designated highway project, of funds paid by any political subdivision of the state of Arizona, to the state of Arizona, for the use of the board of directors of state institutions and of said office of state engineer of the state of Arizona, for the construction of such specific and designated highway projects and diverted, prior to January 1, 1923, by said board of directors of state institutions and of said office of state engineer, to purposes other than such specified and designated projects; making an appropriation therefor; providing for the raising of funds to meet such appropriation by means of 25% apportionment of state road tax, tax upon passenger capacity per mile, upon designated common carriers; a tax upon truck tonnage of motor trucks and tax upon gasoline and other distillates of crude petroleum; regulating and providing for the deposit, use, accounting for and disbursement of monies paid to the state of Arizona by such subdivisions of the state of Arizona for the construction of designated road projects and moneys paid to the state of Arizona by the United States of America, by virtue of co-operative agreements between the state of Arizona and the United States of America pursuant to an act of the

Congress of the United States of America entitled 'An act to provide that the United States shall aid the states in the construction of rural and post roads, and for other purposes' or of any amendment thereto, or pursuant to any other act enacted by the Congress of the United States of America for like purposes; providing for the issuance of, registration and payment of negotiable state warrants and providing for the issuance of negotiable treasurer's certificates of the state of Arizona in anticipation of the collection of the taxes authorized by this act; prescribing the form of such warrants and certificates, the due date and rate of interest thereon; defining offenses in violation of this act and providing penalties therefor."

Sections 1, 2, 3, and 4 of the act provide funds or make appropriations to take care of eight federal aid projects already constructed or in course of construction in different parts of the state, and recognize that those projects have been or are being constructed co-operatively by and between the state and the counties of the state, and by and between the state and the United States, and that, in prosecuting the work, funds have been borrowed from counties by the board of directors of state institutions and the state engineer and not repaid, and that all of the federal government's proportionate contribution has not been made. Repayments to the counties are authorized and directed, and the disposition of the federal aid is provided for, as the same is paid in.

Under section 5 the appropriation for such projects and purposes is made out of the 25 per cent. apportionment account of the general fund of the state, and under said section there is further appropriated out of said fund "for the construction and completion of those certain highway projects within the state of Arizona initiated or authorized, but not completed by the board of directors of state institutions and by the office of the state engineer of the state of Arizona prior to January 1, 1923" moneys for forty-eight other named federal aid and nonfederal aid projects located and situated in different parts of the state. The total appropriation out of the 25 per cent. apportionment account for the purposes of repaying borrowed money from the counties and completing all of such federal aid and nonfederal aid projects is $1,550,000.

Section 6 authorizes the board of supervisors to enter into contracts with the board of state institutions to expend upon projects within their counties the 75 per cent. fund hereinafter mentioned and to pay into the state treasury, out of said fund to be credited to a segregated account within the general fund of the state in favor of such aid projects, the sum agreed to be contributed. Said section also provides the method of handling and crediting federal aid funds.

Sections 7, 8, and 9 contain general provisions for carrying out the general objects of the act.

The Governor's veto was directed to provisions of section 10, and we give such parts thereof as we think essential, italicizing those portions thereof disapproved or vetoed by the Governor:

"Sec. 10. For the purpose of providing said sum of $1,550,000.00, appropriated in section 5 of this act, the following moneys, funds and license taxes are hereby designated and created:

"Subdivision I.

"(a) There shall be annually levied and collected in the manner in which other state taxes are levied and collected, by a levy of the officials provided by law, a tax of ten (.10) cents on each one hundred ($100.00) dollars, of the assessed valuation of taxable property within the state, for the purpose of the construction, reconstruction, repairing, improving and maintaining state highways and bridges, *as follows:*

"25% of such tax, herein provided, for, shall be as paid into the treasury of the state of Arizona, deposited by the treasurer of the state of Arizona, in a separate account, in the general fund of the state, to be known and designated as 25% apportionment account.

"Seventy-five per cent (75%) of such 'state road tax fund' herein provided for, shall be apportioned to the several counties in the amount to each county of seventy-five per cent. of the taxes collected under this act, by said county, and such amount shall be subject to be paid out for the construction, reconstruction, repair, improvement and maintenance of public highways roads and bridges in the manner as in this act provided for the work in this act provided for within such county upon the authority and under the direction of the county board of supervisors of such county and the state engineer who are hereby charged with such responsibility.

"Subdivision II.

"(a) *There hereby is authorized to be levied and collected a (one-half mill) tax per each scheduled passenger capacity mile, which hereby is defined to mean a tax of (one-half mill) on each and every unit of seating capacity operating over each and every mile between fixed termini, or otherwise, in the state of Arizona, as per schedules on file with the Corporation Commission, or otherwise.*

"(b) *There hereby is authorized to be levied and collected a (two mill tax) per each scheduled truck ton capacity, or fraction of truck ton capacity mile, which hereby is defined to mean, (a tax of two mills) on each and every actual truck ton or fraction of truck ton capacity load operating over each and every mile between fixed termini, or otherwise, in the state of Arizona, as per schedules on file with the Corporation Commission, or otherwise.*

* * * * * * *

"Subdivision III.

"(a) *That each and every dealer, as defined in this act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of his representative or agents of this state in the sale, use or distribution, as dealers and distributors of gasoline or other distillates of crude petroleum shall not later than the fifteenth (15) day of each calendar month render a statement to the*

Secretary of State of the state of Arizona of gasoline and other distillates of crude petroleum sold, used or distributed by him or them in the state of Arizona during the preceding calendar month, and collect a license tax of three (3) cents per gallon on all gasoline and other distillates of crude petroleum so sold, used or distributed for use in motor propelled or motor driven vehicles, as shown by such statement in the manner and within the time hereinafter provided, which tax shall be added to the sale price of the dealer as herein defined when sold, used or distributed for such use in said motor propelled or motor driven vehicles only.

* * * * * * *

"(d) Said license tax shall be paid on or before the fifteenth (15th) day of each month to the Secretary of State, who shall receipt to the dealer therefor, and promptly turn over to the State Treasurer as are other receipts of his office, *and the State Treasurer shall place one-quarter of the same in said 25% apportionment account in the general fund and one-quarter of the same to the account of the 75% apportionment account of the general fund, and said Secretary of State shall promptly pay the remaining one-half of such tax to the several county treasurers of the state of Arizona, in proportion to the amount of such tax received from the respective counties, which shall be used by the said several counties as may be determined by the board of supervisors thereof, for the maintenance of county roads and highways.* * * *

The rest of the act (sections 11, 12, 13, 14, 15, and 16) contains general provisions in aid of the purpose of the act.

The appellant's assignments of error are:

(1) That chapter 76 embraces more than one subject and matter properly connected therewith;

(2) That such chapter embraces a subject which is not expressed in the title, to wit, the provision that 50 per cent. of the gasoline tax shall be paid to the several counties from which the same is received;

(3) That the use of said 50 per cent. of the gasoline tax by the counties for the maintenance of county roads and highways is for a different use than that indicated by the title of the act;

(4) That said chapter 76 fails to fix the object for which such 50 per cent. of the gasoline tax is to be expended;

(5) That said chapter 76 is a special appropriation bill and embraces appropriations for several different subjects; and

(6) The provision of chapter 76 imposing a gasoline tax of three cents on every gallon was vetoed, and the collection of such tax by defendant oil company was without authority of law, and, appellant having paid it under protest, was entitled to a judgment therefor.

[1] We will take these assignments up and dispose of them, not in the order given, but in the relation they bear to each other. As the first five challenge the constitutionality of chapter 76, we preface their consideration with a general statement of the principles that we shall observe in their disposition:

"The most common application of the maxim ut res magis valeat quam pereat in the construction of statutes is to be found in the decisions which, by the construction of the terms of statutes, sustain them against attacks upon their constitutional validity. When the constitutionality of a statute is questioned it is the duty of the courts, and also a rule of construction, to adopt such construction as will make the statute constitutional if its language will permit. There is a strong presumption in favor of the validity and constitutionality of an act, and courts should not declare acts of the Legislature unconstitutional unless satisfied of their unconstitutionality beyond a reasonable doubt. Where an act is fairly susceptible of two constructions, one of which will uphold the validity of the act while the other will render it unconstitutional, the one which will sustain the constitutionality of the law must be adopted." 25 R. C. L. 1000, § 243.

[2] We have frequently stated that we would not declare an act of the Legislature unconstitutional unless satisfied thereof beyond a reasonable doubt, and that seems to be the rule followed by most of the courts. Does chapter 76 offend section 13, pt. 2, art. 4, of the Constitution, reading as follows:

"Sec. 13. Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title"

We think the title as well as the body of the act has to do generally with the public highways of the state; in other words, the subject expressed in the title and treated in the act as "highways"—their construction, maintenance, the raising of revenues therefor, and the manner of their expenditure or distribution. Closely allied to that general subject and in consonance therewith is the providing for the payment of any highway construction already completed or in the course of completion and the repayment of borrowed money by one of the political units to others, and the ratifying and approving of contracts for future construction and providing funds therefor. Nor does the fact that there may be several separate projects or road improvements designated in the act as "federal aid No. ——" or "nonfederal aid No. ——" constitute each of said proposed improvements separate subjects; they are all a part or segments of the same subject of highways.

Since the passage of chapter 60, First Special Session Laws of 1912, entitled "An act relating to the construction, maintenance and improvement of state roads and bridges; creating the office of state engineer, prescribing the duties thereof and compensation therefor; fixing a tax levy and making appropriation to carry out the provisions of this act, and authorizing and directing the expenditure of such appropriation," the state has had, in fact, a system or systems of highways extending east and west and north and south

across the state under the general charge of the board of state institutions and state engineer; and during the last four or five years there have been expended annually by the state, with the aid of its counties and the federal government, about $3,000,000 in the construction and improvement thereof under a program patterned somewhat after the system laid out in chapter 76, but without the safeguards it provides. So, while segments of the state highway may be constructed under separate contracts and appropriations set aside out of the revenues of the state to take care of said segments separately, they are all a part of the same highway system and are for the accomplishment of the same general object, and their inclusion in chapter 76 does not offend section 13, pt. 2, art. 4, of the Constitution. If the mental horoscope be limited to the language used in chapter 76, some doubt might arise as to whether each piece of road construction therein mentioned was a separate subject and treated as such; but, if the vision be as extensive and broad as our legislation since statehood, the doubt will dissolve itself into an absolute certainty that it is all in aid of the general system of highways constructed and to be contructed in the state.

The conclusion reached by Mr. Justice Cooley in People v. Denahy, 20 Mich. 349, relied upon by appellant, was based upon a very different state of facts. In that case the learned judge held the act contained a plurality of subjects, because each road to be improved was a separate and distinct improvement upon a separate and distinct highway. He says: "The act, it will be seen, is not one which establishes a general system * * * for the construction of state roads," leaving the clear inference that, had the improvements been in connection with a general system of road construction it would have called for a different conclusion.

But it is said there is nothing in the title of the act about any apportionment of the tax levy to the counties for the maintenance of their roads and highways, and, therefore, the allocation of 50 per cent. of the gasoline tax to the counties for that purpose was and is a subject not contained in the title, and the act for that reason violates said section 13 of the Constitution. Wherever, in the title or body of the act, the words "political subdivisions" of the state are mentioned reference is had to the counties of the state. In both the title and act counties are given a prominent part and are supplied with the means of effectually carrying forward their portion of the burden in highway construction. We think the phrase in the title, "Providing for the raising of funds to meet such appropriation by means of 25 per cent. apportionment of state road tax, tax upon passenger capacity per mile, upon designated common carriers; a tax upon truck tonnage of motor trucks and tax upon gasoline and other distillates of crude petroleum;" was a sufficient notice and warning to the members of the Legislature and the people that some disposition of such revenues over and above that given to the 25 per cent. state apportionment would be made, and naturally, since such revenues all come from the counties, the counties would be given an apportionment to be used co-operatively with the state and the United States in the construction of roads within their boundaries and for their maintenance after construction, which is made by the statute the sole duty of the counties. Paragraph 5126, C. C. As was said in State v. Ingalls, 18 N. M. 211, 135 Pac. 1177, in speaking of an act to provide for state license on automobiles:

"The disposition of the funds resulting from the collection of the license was perhaps even a necessary part of the act and certainly is not incongruous to the subject expressed in the title."

Reasoning upon a question somewhat akin to the one before us, in Wilson v. State, 143 Tenn. 55, 224 S. W. 168, the court said:

"It is not essential to the constitutionality of a statute that its title epitomize or recite in detail the provisions contained in its body. State v. Schlitz Brewing Co., supra; State v. Yardley, supra; Memphis R. Co. v. State, 110 Tenn. 598, 75 S. W. 730; State v. Brown, 103 Tenn. 449, 53 S. W. 727.

"The general purpose of the provisions of section 17 of article 2 of the Constitution is accomplished when the law has but one general purpose, which is fairly indicated by its title. It will not be required that every end and means necessary or convenient for the accomplishment of this general object be provided for by a separate act relating to that alone. Such a requirement would not only be unreasonable, but would render legislation impossible. Cannon v. Mathes, supra.

"It therefore may be stated that the true rule of construction, which has been fully established by the authorities, is that any provision of the act, directly or indirectly relating to the subject expressed in the title, and having a natural connection thereto, and not foreign thereto, should be held to be embraced in it.

"We think the act in question embraces but one subject, and that subject may be fairly stated to be the raising of revenue for the purpose of improving, building, and providing a fund for maintaining of public roads in the counties affected by the act. We think it may be said that all of the provisions of the act are directly and inseparably connected with the one purpose of raising revenue for the improvement, building, and maintaining of public roads."

The provision of the Constitution we are considering was before the Supreme Court in Van Dyke v. Geary, 244 U. S. 39-46, 37 Sup. Ct. 483, 486 (61 L. Ed. 973), and it was there said:

"Constitutional provisions requiring the subject of legislative acts to be embraced in the

title are not to be given a strained and narrow construction for the purpose of nullifying legislation."

This court has considered this provision in the following cases: Laney v. State, 20 Ariz. 416, 181 Pac. 186; Coggins v. Ely, 23 Ariz. 155, 202 Pac. 391; State Board v. Buckstegge, 18 Ariz. 277, 158 Pac. 837; Skaggs v. State (Ariz.) 207 Pac. 877. While in the last two cases the legislation was stricken down as not being expressed in the title, nothing said in either case will sustain appellant's contention. In the Skaggs Case, under a title, "An act to establish a penal code," we held a civil statute could not be enacted; in the Buckstegge Case, under a title, "An act providing for an old age and mothers' pension and making appropriation therefor," we held the Legislature could not abolish all county hospitals and other eleemosynary institutions of the state as was undertaken. In both these cases the departure from the title was complete. The titles clearly indicated one thing, and the act thereunder provided for another thing, entirely out of harmony therewith.

[3] Having come to the conclusion that the title of chapter 76 is single, as also the act, and that the provisions of the act are all either directly or indirectly connected with the subject of the act and not incongruous therewith, we think we have successfully disposed of assignments Nos. 1, 2, 3, and 5, and that the act is not in violation of either section 13, pt. 2, art. 4, or section 20, pt. 2, of the said article.

[4] Assignment 4 is that said chapter 76 fails to fix the object for which such 50 per cent. of the gasoline tax is to be expended and therefore offends that provision of section 3, article 9, of the Constitution, reading as follows:

"No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the tax, to which object only it shall be applied."

As we read the provision of chapter 76 disposing of one-half of the three cents per gallon of gasoline tax to the counties, it "states distinctly the object of the tax" to be "for the maintenance of county roads and highways." Martens v. Brady, 264 Ill. 178, 106 N. E. 203.

[5] We now come to the question of the effect of the Governor's veto. We will not set forth here the provisions of chapter 76 that were disapproved, but will refer to them by paragraph and subdivision as set forth in the fore part of the opinion; the part disapproved being printed in italics. The Governor vetoed or disapproved the provision of chapter 76 imposing a three-cent gasoline tax (and also the allocation thereof as made by the Legislature), being paragraph (a) of subdivision 3, § 10. We think it goes without saying, and in this all parties seem to agree, the executive was without power to veto the imposition of such tax as made by the Legislature. To state this proposition is enough to dispose of it. It needs no enlargement or explanation other than a reference to the section of the Constitution granting to the Governor the power to veto—section 7, art. 5. As was said in Fairfield v. Foster (Ariz.) 214 Pac. 310, he has two kinds of veto, one to the whole act and another to items when a bill presented to him "contains several items of appropriation." In attempting to veto the legislative imposition of three cents per gallon, he was not acting in a matter delegated to him by the Constitution, and his act was therefore ineffective, so the license tax of three cents, as made by paragraph (a), said subdivision and section, stands and must be collected by the gasoline dealers of the state, unless the action of the Governor in connection with other portions of said subdivision and section has the effect of relieving such dealers from that duty. It is axiomatic in law that what cannot be done directly may not be done by indirection, and if the executive veto does not extend to a tax levy it is difficult to understand how such tax levy could be affected by a veto applied to some other part of the law creating the tax.

[6] The Governor also disapproved of paragraph (d) of said subdivision 3 of section 10, which provides (as a reference thereto shows) that dealers in gasoline shall pay the said three-cent tax to the Secretary of State, who shall turn over to the State Treasurer to be credited to the 25 per cent. apportionment account one-quarter thereof, and one-quarter to the 75 per cent. apportionment account of the general fund, and pay one-half of such tax to the several county treasurers in proportion to the amount received from the counties, for the maintenance of county roads and highways. The allotments of one-quarter of the three-cent gasoline tax to the 25 per cent. and one-quarter to the 75 per cent. apportionment accounts are clearly not appropriations. The former is appropriated by section 5 of chapter 76, and the latter, if appropriated at all, is by virtue of other provisions of the statute authorizing and directing the board of supervisors to use it co-operatively with the state and United States in constructing highways and bridges within the boundaries of their county. The veto power no more extended to these two apportionments than it did to the legislative levy, or imposition of the tax, as they were not items of appropriation.

[7] But it is said the provision of paragraph (d), said subdivision and section, giving to the counties one-half of the three-cent gasoline tax, is an item of appropriation within the meaning of section 7, art. 5, of the Constitution, and may be stricken from the act by the veto power. This position is

not tenable. An appropriation or items of appropriation that the Governor may decline to approve are of funds belonging to the State. It is provided in section 3, art. 9, of the Constitution that the Legislature shall provide by law for an annual tax, sufficient, with other sources of revenue, to defray the necessary, ordinary expenses of the state for each fiscal year, and that when such taxes are levied and collected they shall be paid into the state treasury in money only; and section 5 of said article 9 forbids the paying of any money out of the state treasury, except in the manner provided by law. By chapters 8 and 9, tit. 1, Civil Code 1913, concerning the State Auditor and State Treasurer and their duties, the Legislature has provided the manner of paying moneys out of the state treasury. Section 20, pt. 2, art. 4, concerning general and special appropriation bills, has reference to the revenues of the state, and is the source of authority in the Legislature to make appropriations out of moneys paid into the state treasury. The 50 per cent. of the three-cent gasoline tax that goes to the county is not levied for a state purpose and does not become the state's money. It is collected by the gasoline dealers and by them remitted to the Secretary of State, who pays one-half thereof to the State Treasurer to be apportioned as above stated, and remits the other one-half to the treasurers of the different counties from which it has been received. It is the counties' money, levied for a county purpose; it is as though the Legislature had directed the county authorities to collect one and one-half cents tax per gallon on gasoline and apply it to the maintenance of the county's roads and highways, or as though the Legislature had directed the county authorities to make a tax levy upon the property of the county to be used in building, improving, repairing, and maintaining a public courthouse, or a county hospital for their indigent sick and disabled, or any other public purpose or use. Surely, no one would contend that an act of the Legislature authorizing and directing a tax levy to buy grounds at a cost not to exceed $25,000 and to build thereon a courthouse by the county not to exceed $500,000 would be subject to the executive veto except as a whole. Such would not be an appropriation containing different items as that term is used in the Constitution. It calls for the expenditure of money, it is true, but not money that the Legislature has appropriated out of the biennial fund in the state treasury, put there to defray the necessary expenses of the state government. The item or items that may be disapproved are items of money, to be paid out of the state's money levied and collected for the purposes of the state and not expenditures the Legislature may authorize and direct its political subdivisions to make. In Commonwealth v. Powell, 249 Pa. 144, 94 Atl. 746, the court, after holding the act therein involved did not violate the constitutional provision against plurality of subjects in title and context (an act regulating motor vehicles), quoted from the Pennsylvania Constitution—and ours is the same—as follows:

"All other appropriations shall be made by separate bills, each embracing but one subject."

And said:

"That this provision of the Constitution was only intended to apply to the biennial appropriations made by the Legislature out of the general revenues of the commonwealth. It has no application to a fund created for a special purpose and dedicated by the act under which such fund is to be created to a particular use. The appropriation of the fund so created continues as long as the act which dedicates it to a particular use remains in force."

It will be noticed that this gasoline tax is a continuing one, and the 50 per cent. is dedicated to the particular use of maintaining county roads and highways. The contention of counsel that the definition of an "appropriation" as contained in the Fairfield Case is broad enough to cover this 50 per cent. allotment to the countries is not well founded. In that case we defined in a general way an "appropriation." That definition must be examined in view of the particulars of the case in which it was announced. One of the elements of the definition, although not particularly stressed, yet too apparent to be overlooked, was that the money appropriated was out of the general revenue of the state. Whether what was said in any case has any bearing or effect in another case or not depends upon the similarity of facts and circumstances of the cases. If the facts are the same, it is an authority; if different, it would be no authority. In all the cases that we have examined bearing upon the question as to what an appropriation is they have been concerning state funds collected for state purposes. Take the definition of an appropriation cited by counsel for appellee Secretary of State, as found in Menefee v. Askew, 25 Okl. 623, 107 Pac. 159, 27 L. R. A. (N. S.) 537, as follows:

"An appropriation is an authority from the Legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum out of a designated fund in the treasury in a given year to a specified object or demand against the state. * * * No particular expression or set form of words is requisite or necessary to the accomplishment of the purpose. * * * "

The question there was as to whether the Legislature had, by proper and sufficient language, shown an intention to set aside out of the state treasury a definite sum to pay the salaries and expenses of the state game and fish warden, and the definition

must be read with those facts before one to be properly understood. Another authority cited by same counsel is Jobe v. Caldwell & Drake, 93 Ark. 503, 125 S. W. 423–426, and it, too, involved funds in the state treasury and a demand against the state.

[8] The validity of the Governor's veto as applied to certain parts of subdivision (a), § 10, has not been assigned as error, and was not argued before the court or in the briefs of counsel, but, in view of the situation and the probability that the officers whose duty it is to levy and collect these taxes will be in doubt as to what they should do, and to settle the matter beyond further dispute or doubt, we have concluded to pass upon the question. The Constitution provides that the Governor shall give his reasons for doing so, when he declines to approve of an item or items of an appropriation, and shall append his reasons to the bill. The reasons the Governor assigned for his disapproving and vetoing certain parts of subdivision (a), § 10, being the property tax levy, are set forth in his letter in the following language:

"Analysis of the condition of the state highway finances, as such information has been made available to this office, proves conclusively the requirement of emergent provision of funds, in an amount approximately of one and one-half millions of dollars, to complete road projects to which the state has been heretofore committed. In the light of further eliminations of appropriations contained in this act, which I am constrained to make for the reasons hereinafter set forth, and in the appreciation of the fact, that our state is at this time most unfortunately unable to bear the burden of new and additional taxes for road or other purposes, I have determined to meet the emergency, that the levy of ten cents upon each one hundred dollars of assessed valuation, shall be used exclusively in the construction and for the completion of those road projects to which the state has been committed. These projects lie in and through each of the counties of the state, and the expenditure of this fund for such purposes, to the exclusion of any division to the *75 per cent. apportionment account*, is certainly in the interest not only of relieving the present chaotic condition of state highway finances but in the direct interest of road construction for the benefit of each of the counties of the state. To continue *the 75 per cent. apportionment* during the present emergency would entail one of two consequences: Either a tax must be paid in excess of the ten-cent levy to finance state work, which I believe would add a burden unbearable at this time upon the people of the state, or the state highway department must limit itself in the construction of those projects to which the state has been committed, to use of the 75 per cent. fund within the confines of the respective counties. In some of the counties the *apportionment* is more than sufficient, and in others it is far too small, to enable the desired construction to be done, which, on the whole, would result in an utter lack of provision to meet the existing emergency.

"Without committing myself to an expression of an opinion upon the desirability of a permanent elimination of the 75 per cent. fund or account, the following ideas occur and are pertinent in this connection: The reasons which dictated the establishment of the 75 per cent. fund have ceased to exist or are of little relative importance. Apprehension was formerly entertained that, if provision were not made by statute for the equitable division among counties of road moneys, political manipulation would work to the undue advantage of the larger and more politically powerful counties and to the disadvantage of their weaker and smaller sisters. But the advent of federal co-operation in the building of state roads and the consequent supervision by the federal government, resulting in the establishment of the 7 per cent. system and providing for the construction of an unified state system of roads, running through and benefiting all of the counties of the state, have entirely assured the respective counties of a fair and equitable division and expenditure of road moneys, which is at once to the interest of the several counties and of the entire state of Arizona.

"I disapprove and veto for reasons stated, that portion of section 10. * * *" (Italics ours.)

See section 10, supra.

It would seem from this letter and the reasons therein given that the Governor disapproved of the apportionment of 25 per cent. of the levy to the state and 75 per cent. thereof to the counties, but approved of the levy as a whole. If this veto be held good, and has the effect desired by him, the taxpayer will still pay ten cents on the hundred dollars, as it was intended he should, but instead of its being apportioned one-quarter to the state and three-quarters to the counties, it would be covered into the state treasury to be checked out by the agents of the state; in other words, the veto would not only destroy the authority of the state engineer and the supervisors to expend 75 per cent. of the levy, but it would also destroy the allotment, object and purpose of the levy pro tanto. As a matter of fact, the Governor did not veto or disapprove of the use of 75 per cent. of such levy for road purposes, but he objected, for economical and emergent reasons, to its being apportioned to the counties. He disapproved the apportionment as made by the Legislature and nothing else.

In the case of Fulmore v. Lane, 104 Tex. 499, 512, 140 S. W. 405–412, the court had under consideration the veto of the executive and, while holding that the power to veto an item or items was vested in the Governor it was said such power could not be extended beyond that; the court using the following language:

"The executive veto power is to be found alone in section 14, art. 4, of the Constitution of this state. By that section he is authorized to disapprove any bill in whole, or, if a bill contains several items of appropriation, he is au-

thorized to object to one or more of such items. Nowhere in the Constitution is the authority given the Governor to approve in part and disapprove in part a bill. The only additional authority to disapproving a bill in whole is that given to object to an item or items, where a bill contains several items of appropriation. It follows conclusively that where the veto power is attempted to be exercised to object to a paragraph or portion of a bill other than an item or items, or to language qualifying an appropriation or directing the method of its uses, he exceeds the constitutional authority vested in him, and his objection to such paragraph, or portion of a bill, or language qualifying an appropriation, or directing the method of its use, becomes noneffective."

As was said by us in Fairfield v. Foster, supra, referring to State v. Holder, 76 Miss. 158, 23 South. 643, as authority therefor, "the executive cannot veto a condition or proviso of an appropriation while allowing the appropriation to stand. That would be affirmative legislation, without even the concurrence of the Legislature." The aptness of this language is obvious, since in the present case the veto disapproves of the condition that 75 per cent. of the levy be used under the direction of the state engineer and board of supervisors, and also a further condition, all too apparent from the context of the act, that it be used in the county where collected. We conclude that the veto is ineffectual.

The executive also disapproved of paragraphs (a) and (b) of subdivision 2, but, inasmuch as these subdivisions are purely tax-levying statutes, such disapproval did not have the effect of striking out these paragraphs.

The judgment of the lower court is affirmed.

McALISTER, C. J., concurs.

LOCKWOOD, Superior Judge (dissenting). I regret to state that I cannot concur with the majority of the court in the ultimate conclusion reached by them as to the validity of the gasoline tax. Had the matter involved been only a question raised in an action between private parties and one merely of individual interest, I should have contented myself with dissenting without expressing my reasons therefor, but since, as I view the case, the majority opinion lays down a rule of law in regard to the veto power which is unsound in logic, unsustained by the best authorities, and which, in effect, though not in words, nullifies the rule of Callaghan v. Boyce, 17 Ariz. 433, 153 Pac. 773, and Fairfield v. Foster (Ariz.) 214 Pac. 319, so recently redecided by this court, in such a manner as to make it almost certain that for years to come there will be constant conflict and litigation between the executive and legislative branches of the state government, as to the extent and meaning of the special veto power set forth in article 5, § 7, of the Constitution, I feel it my duty to give the grounds of my dissent.

So far as the majority opinion deals with the general unconstitutionality of the act, while a contrary decision would have been supported by perhaps the greater number of authorities, yet where the objection is one of form, even though it be of constitutional form, I believe the more modern and better rule is that the constitutionality of the act should be upheld, if possible, and that every reasonable intendment is in favor of it. The reason for this rule is, of course, the respect due the act of a co-ordinate branch of the government. I therefore concur with the majority, that the act is not obnoxious to article 4, pt. 2, § 13, or to article 4, pt. 2, § 20, of the Constitution.

But when we consider the effect of the veto attempted to be exercised by the Governor the act of the executive is entitled to just as much respect as that of the legislative branch, for the same reason, and it would be proper to say that, as we indulge every intendment in favor of the constitutionality of the act as originally passed by the Legislature, we should also have the same presumption in favor of the constitutionality of the veto.

We are taught in the study of logic that the greatest causes of faulty reasoning are: First, the failure on the part of the reasoner to lay down his definitions and fundamental principles, and test every argument by these admitted rules; and, second, the tendency to modify the principles or change the definitions to meet what seems to be the exigency of the particular case. In geometry, the most logical of all the sciences, we first determine our axioms and definitions, and then, in future problems, test every view presented by these axioms, and, unless the proposition agrees with them, we reject it as false, no matter how plausible it may be.

In logic, we learn the rules of the syllogism, and judge every argument advanced by them, and, unless it conforms to these rules, no matter how alluring the argument may be, we know that somewhere therein lurks a fallacy.

In this case, therefore, I shall advance two fundamental propositions, and when I have shown, as I believe I can, that they are true, I shall endeavor to test every argument, both pro and con, by them, and reject any theory of the law that contradicts them, no matter how plausible it may seem. The first proposition is this: Under the Constitution of Arizona, whenever the Legislature says "Yes" to any appropriation of money, the Governor cannot be deprived of the right to say "No." If the appropriation be single, he must act on the bill as a whole, while if there be several items of appropriation, he may, if he desires, act on each separately

without affecting the remainder of the bill. But, at the same time, and in some manner, this opportunity must be presented to the Governor before any money can be expended under the authority of the Legislature. The second proposition is as follows: An appropriation is:

"The setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other."

The essential parts of the definition, no matter how the wording may be changed, are the "certain sum," the "specified object," and the "authority to spend." Any act, or part of an act, containing all three of these elements is, and always must be, an "appropriation," and nothing more or less, no matter how involved the grammatical construction or peculiar the language used.

In support of the first proposition, I need go no further than cite the case of Fairfield v. Foster, 214 Pac. 319, recently decided by this court, and the provisions of article 5, § 7, of the state Constitution. In Fairfield v. Foster we analyzed the veto power carefully, and anything I might add to the language of that case on this point would be mere elaboration and repetition.

To uphold the second proposition, I cite the following cases: State v. Moore, 50 Neb. 88, 69 N. W. 373, 61 Am. St. Rep. 538; Clayton v. Berry, 27 Ark. 129; Stratton v. Green, 45 Cal. 149; State v. La Grave, 23 Nev. 25, 41 Pac. 1075, 62 Am. St. Rep. 764; Proll v. Dunn, 80 Cal. 220, 22 Pac. 143; State v. Kenney, 9 Mont. 389, 24 Pac. 95; State v. Lindsley, 3 Wash. 125, 27 Pac. 1019; State v. King, 108 Tenn. 271, 67 S. W. 812; Ristine v. State, 20 Ind. 328; Campbell v. State, etc., 115 Ind. 591, 18 N. E. 33; Shattuck v. Kincaid, 31 Or. 379, 49 Pac. 758; Henderson v. Board of Com'rs of State Soldiers' & Sailors' Monument, 129 Ind. 92, 28 N. E. 127, 13 L. R. A. 169.

While the language differs somewhat in the various decisions, yet on analysis it will be found that, where the three elements I have mentioned are present, it has invariably been held that an "appropriation" of some nature was made.

Let us therefore consider the various attempted vetoes from every angle possible, but always remembering that, if any proposed solution violates one or both of the fundamental principles above set forth, no matter how plausible it may be, it must be fallacious. These various vetoes may be divided into seven subdivisions, as follows:

(1) Twenty-five per cent. of such tax, herein provided for, shall be as paid into the treasury of the state of Arizona, deposited by the Treasurer of the state of Arizona, in a separate account, in the general fund of the state, to be known and designated as 25 per cent. apportionment account.

(2) Seventy-five per cent. (75%) of such 'state road tax fund' herein provided for, shall be apportioned to the several counties in the amount to each of 75 per cent. of the taxes collected under this act, by said county, and such amount shall be subject to be paid out for the construction, reconstruction, repair, improvement and maintenance of public highways, roads and bridges in the manner as in this act provided for the work in this act provided for within such county upon the authority and under the direction of the county board of supervisors of such county and the state engineer who are hereby charged with such responsibility.

(3) A one-half mill tax per each scheduled passenger capacity mile, which hereby is defined to mean a tax of one-half mill on each and every unit of seating capacity operating over each and every mile between fixed termini, or otherwise, in the state of Arizona, as per schedules on file with the Corporation Commission, or otherwise.

(4) That each and every dealer, as defined in this act, who is now engaged or who may hereafter engage in his own name, or in the name of his representative or agents of this state in the sale, use or distribution, as dealers and distributors of gasoline or other distillates of crude petroleum shall not later than the 15th day of each calendar month render a statement to the Secretary of State of the state of Arizona of gasoline or other distillates of crude petroleum sold, used or distributed by him or them in the state of Arizona during the preceding calendar month, and collect a license tax of three cents per gallon on all gasoline and other distillates of crude petroleum so sold, used or distributed for use in motor propelled or motor driven vehicles, as shown by such statement in the manner and within the time hereinafter provided, which tax shall be added to the sale price of the dealer as herein defined when sold, used or distributed for such use in said motor propelled or motor driven vehicle only.

(5) And the State Treasurer shall place one-quarter of the same in said 25 per cent. apportionment account in the general fund.

(6) And one-quarter of the same to the account of the 75 per cent. apportionment account of the general fund.

(7) And said Secretary of State shall promptly pay the remaining one-half of such tax to the several county treasurers of the state of Arizona, in proportion to the amount of such tax received from the respective counties, which shall be used by the said several counties as may be determined by the board of supervisors thereof, for the maintenance of county roads and highways.

Now, of course, it is obvious that the Governor was attempting to act under the special veto power set forth in article 5, § 7, of the Constitution. This grants the right to veto "items of appropriation" contained in any bill, regardless of its nature, but nothing else. If, therefore, any of the attempted vetoes above set forth are "items of appropriation" the veto must stand so far as that par-

ticular item is concerned, but otherwise it cannot.

It is too plain to need argument that the third and fourth clauses set forth are exactly the opposite of appropriations, being taxes. An appropriation, as was said before, is "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other," while a tax is the enforced contribution of persons and property levied by the authority of the State, for the support of the government, and for all public needs." Words and Phrases, vol. 8, p. 6868. Therefore, the third and fourth clauses attempted to be vetoed, the act as a whole having been signed by the Governor, are, so far as the veto, in and of itself is concerned, still a part of the law, subject to review on other constitutional grounds only.

The first, second, fifth, sixth, and seventh sections are clearly not "taxes," but are they "appropriations"? It is contended by counsel on one side that these provisions are merely "apportionments" or "allocations," while it is urged with equal vigor by opposing counsel that they are true "appropriations."

"Apportionment" is defined as being "to divide and assign in just proportion." International Dictionary. Clearly every appropriation contains an apportionment, but, unless the words are synonymous, the converse cannot be true. Taking the definitions of the two terms above given, the addition required to make an "apportionment" an "appropriation" is the authority given the executive officers to actually spend the money.

The first clause regarding the 25 per cent. portion of the ten-cent tax, standing by itself, would not authorize the auditor to approve the expenditure of a single penny therefrom. It simply provides for the payment into a certain segregated part of the general fund of the proceeds of certain taxes. The expenditure of those funds is authorized by the provisions of sections 2, 4, 5, and 11 of the act. Therefore the attempted veto of the portion of section 10 of the act referring to the "25 per cent. apportionment account" was not the veto of an appropriation, and cannot stand. The same necessarily follows as to the attempted veto of the disposition of the portions of the gasoline tax going to the 25 per cent. and 75 per cent. apportionment accounts, being clauses 5 and 6.

Let us now examine the veto of the application of 75 per cent. of the proceeds of the ten-cent tax. Is the part vetoed an appropriation? A casual reading of the language, bearing in mind our definition of an appropriation, answers the question. Would the auditor approve a demand on that fund for work of the class set forth in the vetoed portion, if approved by the supervisors and the state engineer, as set forth therein? Obviously, yes. And if his authority was challenged, would he not justify it by that section, and none other? If the vetoed portion of the section be stricken from the act, there is nothing, either in the act itself or the general statutes, or previous session laws which would authorize the expenditure of a single penny of that particular money. How can it be said that the language which alone authorizes the expenditure of over half a million dollars of public money, strictly limiting where, how, and by whom it shall be spent, is not an appropriation? It seems to me that the majority of the court have misread the clause referring to the 75 per cent. of the property tax which was vetoed. In their opinion they say "the latter, if appropriated at all, is by virtue of other provisions of the statute authorizing the board of supervisors to use it co-operatively with the state and the United States in constructing highways and bridges within the boundaries of their counties. The vetoed portion reads as follows:

"Seventy-five per cent. (75%) of such 'state road tax fund,' herein provided for, shall be apportioned to the several counties in the amount to each county of seventy-five per cent. of the taxes collected under this act, by said county, and such amount shall be subject to be paid out for the construction, reconstruction, repair, improvement and maintenance of public highways roads and bridges in the manner as in this act provided for the work in this act provided for within such county upon the authority and under the direction of the county board of supervisors of such county and the state engineer who are hereby charged with such responsibility."

Strike that portion from the act, and it is impossible to find anywhere within its four corners any authority whatever which would justify the expenditure of the 75 per cent. Leave it in, and, as I stated before, both the Auditor and Treasurer would be fully justified in approving, and indeed would be compelled to approve, demands on that fund agreed to by the supervisors and state engineer.

If a vetoed provision authorizes expenditures which cannot be made in its absence, I am certainly at a loss to know what to call it, except an appropriation of money.

Apply the other test given, that there the Legislature says "yes" to the expenditure of money, the Governor cannot be denied the right to say "No." Since several expenditures are set forth in the act, he cannot be compelled to act on it as a whole. Is there any other manner in which the Governor can object to the expenditure of that particular money alone except by a veto of the very section he did decline to approve? Can any other clause or clauses of the act be pointed out, a veto of which would prevent the expenditure of this particular amount, while yet

leaving all other expenditures and provisions of the act in full force? If these two questions can be answered in the negative, as it is apparent they must, then it follows, as the day the night, that the clause, being an authorization of the expenditure of money, and being the only one the striking out of which would prevent the spending of that particular money alone, is subject to the veto of the Governor.

But the majority seems to be of the opinion that the Governor exercised his right because he disapproved of the condition of the appropriation, viz. that part of the money should be spent under one authority and part under another, and cite the case of State v. Holder, 76 Miss. 158, 23 South. 643, approved by us in Fairfield v. Foster, supra, to the effect:

"The executive cannot veto a condition or proviso of an appropriation, while allowing the appropriation itself to stand. That would be affirmative legislation without even the concurrence of the Legislature."

The quotation is indeed the law, and, as we illustrated, when the Governor objects to a proviso, his only method of using the veto is to disapprove both appropriation and proviso. Had the Governor, in this case, selected such portions of the vetoed section only as gave joint control, and stricken them out, leaving the appropriating clause, the veto would indeed have been void. However, he followed here the exact course taken by a previous Governor in the illustration given in Fairfield v. Foster, and vetoed both proviso and appropriation.

I have yet to learn that, because any officer acts legally, but gives the wrong reason for his action, or believes that the result will be different from what it is as a matter of law, his act is void. If we are to say that the legality of a veto is to be tested by what we believe the Governor would have done had he known more fully the results thereof, and not by what he actually did do, it is indeed judicial legislation. For the purpose of determining the legality of the veto, it is utterly immaterial what the Governor might have done, or why he acted. We are concerned only with how he acted. If he had the legal right so to act, his veto must stand, no matter what the consequences or the reasons impelling his actions.

Let us now consider the attempted veto of the disposition of the proceeds of the gasoline tax. I have already referred to the apportionment of the amount going to the "25 per cent. apportionment fund," and to the "75 per cent. apportionment account of the general fund." When we come to the vetoed clause referring to the money to go to the counties, and again apply our test, the same situation applies as to the 75 per cent. of the ten-cent property tax. The vetoed section positively and clearly gives the supervisors authority to spend the money. Should the supervisors of any county spend part of this money, and suit be brought against them under the provisions of paragraph 2442, R. S. A. 1913, under what law would they justify? Under the vetoed section above referred to, and none other.

The majority opinion, referring to the gasoline tax, says:

"An appropriation or items of appropriation that the Governor may decline to approve are of funds belonging to the state."

And further:

"The 50% of the three-cent gasoline tax that goes to the county is not levied for a state purpose and does not become the state's money. It is collected by the gasoline dealers and by them remitted to the Secretary of State, who pays one-half thereof to the State Treasurer to be apportioned as above stated, and remits the other one-half to the treasurers of the different counties from which it has been received. It is the counties' money levied for a county purpose," etc.

I do not find that the special veto power is limited by the Constitution to appropriations of money made for state purposes only. The language of the Constitution is:

"If any bill presented to the Governor contains several * * * appropriations of money, he may object to one or more of such items while approving other portions of the bill." Const. art. 5, § 7.

The act in question certainly was a bill, presented to the Governor, containing several items of appropriation.

Is it seriously contended that, when a state-wide tax is levied by the Legislature, and the act levying the tax provides just how the money shall be distributed, for what purpose it shall be expended, and by whom, merely because the money is directed to be spent in certain counties, and the supervisors, within the limits prescribed by the Legislature, are charged with the duty of seeing that it is spent for the purpose fixed by the Legislature, it is not an appropriation? I cannot find where such a proposition is supported by any language of the Constitution or any decision of a court of last resort.

The case of Com. v. Powell, 249 Pa. 144, 94 Atl. 746, does not deal with the veto power at all, but merely discusses the question of whether a special appropriation of the character set forth therein violates the constitutional provision that appropriation bills, other that the general, should have but one subject. Nowhere in the case is it even intimated that there was not an appropriation.

Suppose, for example, the Legislature levies a tax of any nature and then provides that the proceeds shall be spent in the various counties for the erection of new courthouses, so much to each county, under the direction of the supervisors, is it contended

that the Governor could not veto each or any of the amounts so provided to be spent merely because the proceeds were to be used for county purposes, under the supervision of the county authorities?

Is the provision of the general appropriation bill for the support of the public schools not subject to veto because the money is apportioned to the counties, and spent in the particular districts under the direction of the county superintendent of schools?

The counties are merely political subdivisions of the state which are created and changed from time to time as the Legislature may see fit. They have no power or authority, nor even existence, save and as the Legislature provides. That body has and frequently exercises the right to direct even the expenditure of money raised wholly within the county, and under a levy made by the supervisors. The counties and all the officers thereof are only the agents of the state.

It is said "it is the counties' money, levied for a county purpose." Yes; but it did not become the counties' money until after the Legislature appropriated it to them, nor was the county purpose established until after the Legislature had spoken. It was state money, levied by state authority, and the counties and their officers can only justify the expenditure by reference to the act of the Legislature authorizing it.

It is evident, from the foregoing, that within this act there are at least three positive and unequivocal appropriations of money. The first was the specific sum of $1,550,000 for certain purposes set forth in the various sections of the act. The second was of 75 per cent. of the proceeds of the ten-cent property tax levy, and the third was of 50 per cent. of the gasoline tax. Of course it cannot be contended that, because the latter two are expressed in percentages instead of dollars that they are not appropriations. "That is certain which can be made certain." State ex rel. Ledwith v. Searle, 79 Neb. 111, 112 N. W. 380. The next question is, Are they "items of appropriation"? The majority of the court has already held, and with them I concur, that the act embraces but one "subject of appropriation" in the purview of article 4, pt. 2, § 20. If there be three appropriations for separate objects coming under one subject within one bill, can they be, within the definition of Fairfield v. Foster, anything but items of that subject?

From the above it appears that there were within this act at least three separate "items of appropriation" and the Governor, acting within his constitutional authority, has vetoed two of them.

What is the effect on the act as a whole? We have a property tax levy of ten cents on the hundred dollars, with provision made for the disposition of one-fourth thereof, but no provision for the disposal of the balance. We have a gasoline tax of three cents per gallon, with provision made for the disposition of one-half thereof, but no provision for the disposal of the balance. There is neither "apportionment" nor "appropriation" thereof.

What then shall be done with the proceeds of the taxes? The treasurer may receive them, truly, but he can only permit a fraction thereof to be spent, and, so far as the balance is concerned, it is like Mahomet's coffin, suspended between Heaven and earth, belonging to no particular fund and having no particular purpose. It necessarily falls within the inhibitions of article 9, §§ 3 and 9, of the Constitution.

But the taxes as levied were not divided by the Legislature. Had the gasoline tax itself provided that there should be a one and one-half cent levy for the counties and the same amount for the two apportionment funds, the first levy might fail without affecting the second one. And so would it be with the property tax. But for us to make the division which the Legislature failed to make would be a judicial and not a legislative tax. The chief purpose for which the two taxes were levied having failed, and they being indivisible, the levies as a whole necessarily fail, under the provisions of the Constitution above cited.

The thought naturally occurs that the final results of the above conclusions would be disastrous to the state, in that the highway department would be substantially without funds. Such indeed might be the result, but in my humble opinion it would be far more disastrous ultimately, if in our natural and proper desire to avoid the Scylla of crippling temporarily the highway department, we fall into the Charybdis of a construction of the Constitution not consonant with fundamental principles, which will inevitably lead to future misunderstandings and conflicts between the legislative and executive branches of government, and a perpetuation of the particular evils, again shown forth in the very language of the highway bill, and the circumstances of its passage, which article 5, § 7, of the Constitution was adopted to prevent.

Believing as I do, for the reasons above stated, that the veto of the Governor of the clauses of the act appropriating 75 per cent. of the property tax and 50 per cent. of the gasoline tax was valid, and that its effect was to render void the gasoline and property tax levies, under article 9, §§ 3 and 9, of the Constitution, I hold that the action of the superior court of Maricopa county in sustaining the demurrer to plaintiff's complaint should be reversed, and the case remanded to that court, for proceedings not inconsistent with this opinion.

Michael K. Jeanes, Clerk of Court
*** Filed ***
7/25/11 8:00am

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000468-001 DT

07/21/2011

HONORABLE JOSEPH KREAMER

CLERK OF THE COURT
E. Rosel
Deputy

CENTRAL ARIZONA WATER CONSERVATION DISTRICT

ROBERT S LYNCH

v.

JANICE K BREWER (001)
DEAN MARTIN (001)
TERRY GODDARD (001)

MARK P BOOKHOLDER

REMAND DESK-LCA-CCC

MINUTE ENTRY

This is an action brought by the Central Arizona Water Conservation District (the "District"), a three-county water conservation district established pursuant to A.R.S. § 48-3701, et seq. The District operates the federal Central Arizona Project (CAP), a 336-mile canal, pumping plant and reservoir project. The case involves a dispute over four acts of the Arizona Legislature, which transferred $20,668,300.00 to the general fund from the Arizona Water Banking Authority's interstate water banking subaccount ("Subaccount"). The Subaccount is a specific subaccount within a special fund established in 1996 pursuant to A.R.S. §45-2425(B)(6). These monies (hereafter the "Nevada Monies") were most of the then-remaining balance from two $50,000,000 deposits to that subaccount made in 2005 by the Southern Nevada Water Authority, a Nevada public agency, pursuant to an amended Interstate Water Banking Agreement (the "Banking Agreement") executed earlier that year. According to the District, the legislature has apparently just swept the last remnant ($312,000), Chapter 24, Laws 2011, Section 108(A)(80), 50th Legislature, 1st Reg. Session, p. 62. This transfer is not before the Court in this case.

The Banking Agreement was entered into by the Arizona Water Banking Authority ("AWBA"), the Arizona Department of Water Resources ("ADWR"), the Southern Nevada Water Authority ("SNWA") and the Colorado River Commission of Nevada ("CRC"). It requires the AWBA to direct the importation of and storage of 1.25 million acre feet of "excess

Colorado River water," i.e. Colorado River water to which Arizona is entitled but which is excess of actual needs in any year in central Arizona, in exchange for a total payment of $330,000,000, beginning in 2005. If this source of water is not sufficient, other water must be acquired to fulfill the contract. The Banking Agreement treats the initial payments in 2005 as being placed in a Resource Account and the subsequent periodic payments of the remainder as being destined for an Operating Account, even though both are to be deposited in the above-referenced Subaccount. The differing labels are accompanied by different provisions and restrictions on each account's use. These differences do not affect the Court's decision.

The 2005 amended Banking Agreement, which provided the program's funding, was preceded by four (4) relevant contracts: (1) a 2002 intergovernmental agreement ("IGA") for the District's services to the AWBA, among the District, ADWR and the AWBA, which IGA also sets forth the AWBA's reimbursement obligations to the District, and which was renewed in January 2009; (2) a July 2002 Master Water Storage Agreement requiring AWBA to pay the District for program water storage at the District's underground storage facilities. The agreement was amended in 2006, but only to add new CAP sites; (3) a December 2002 Storage and Interstate Release Agreement ("SIRA") entered into by the Secretary of the Interior, SNWA, CRC and AWBA, which ensures that the Secretary will release Colorado River water to Nevada pursuant to the interstate water banking program; and (4) also in December 2002 an Agreement for the Development of Intentionally Created Unused Apportionment (the "ICUA Agreement"), entered into between the AWBA and the District, providing the arrangements by which reduced diversions of Colorado River water by reason of California and Nevada requests would be replaced by water stored in central Arizona under the program to maintain CAP water deliveries. Contracts (1) and (4) are specifically referenced in the Banking Agreement. Most recently, a June 2010 Recovery Agreement among SNWA, CRC and the District provides for the cooperative planning for timing, amount, methods and costs of stored water recovery. Together, these contracts provide the necessary structure for the program to accomplish the Banking Agreement's intended purpose. As such, they provide a backdrop for the instant controversy but do not affect this Court's analysis of the sweeps themselves.

The CAP imports, on average, some 1.5 million acre feet of Colorado River water into central Arizona each year, pursuant to a contract (in addition to those mentioned above) with the Secretary of the Interior. The Secretary is the federal official charged with administering the decree in Arizona v. California, 376 U.S. 340 (1964), pursuant to the Colorado River Basin Project Act of 1968, 43 U.S.C. § 1501, et seq. Thus, the District is charged with operating the facilities necessary to transport water pursuant to the Banking Agreement.

The Defendants are the Governor, Jan Brewer, and the State Treasurer, previously Dean Martin and now Doug Ducey (substituted pursuant to A.R.S. Rules of Civ. Proc., Rule 25(e)). The Governor is the chief executive officer of the state and constitutionally empowered

to direct disposition of funds in the general fund pursuant to legislative direction. Ariz. Const. art. V, § 4. The Treasurer is the state officer charged with management of the general fund and other special funds established in the State Treasury. A.R.S. § 35-142. These Defendants question the District's standing, raise numerous defenses concerning the legislature's authority and argue that the District cannot retrieve the swept funds through court action because it failed to invoke the state notice of claims statute, A.R.S. § 12-821.01.

The District alleges that the legislature's actions ordering that the Nevada Monies be "swept" into the general fund are beyond its constitutional authority and void ab initio. The material facts are not in dispute, making this case appropriate for resolution by summary judgment. Orme School v. Reeves, 166 Ariz. 301, 802 P.2d 1000 (1990). The parties filed cross-motions for summary judgment, responses and replies. The Court conducted oral argument on January 28, 2001 and on April 1, 2011. At the latter oral argument, the Court announced that it would rule that the District had standing and that it would rule in the District's favor on the basis of two Arizona Supreme Court decisions: Rios v. Symington, 172 Ariz. 3, 833 P.2d 20 (1992); and League of Arizona Cities and Towns v. Martin, 219 Ariz. 556, 201 P.3d 517 (2009). The Court directed the District's counsel to submit a proposed order and supporting memorandum, provided the Defendants time to respond and scheduled oral argument on the proposed order for June 3, 2011. After the Defendants filed their Response, the District sought leave to file a Reply. The Defendants did not receive copies of the District's motion and the proposed draft until shortly before the hearing scheduled for June 3, 2011 and the Defendants requested additional time to prepare for oral argument in light of the motion for leave and the draft reply. The hearing was reset and held on June 10, 2011. The Court heard oral argument, granted the District's motion for leave to file the reply, directed the District's counsel to provide a Microsoft Word version of the amended proposed form of order to the Court, and invited the Defendants to submit proposed language for the final order to the Court.[1] The Court having reviewed the pleadings, cases and transcripts, now holds as follows:

1. The District has standing to sue. The Interstate Water Banking Agreement provides that the Nevada agencies have the remedy of specific performance should breach of that agreement occur. Specific performance, in the sense of requiring water transportation and storage, could only be achieved by water deliveries through the Central Arizona Project, a fact that the Banking Agreement acknowledges in referring to the IGA and ICUA contracts, to which the District is a party. Such specific performance would have to be accomplished by the District, making the District a necessary party to any such litigation. The presence of that litigation risk and consequent liability confers standing. Town of Gilbert v. Maricopa County, 213 Ariz. 241, 245, ¶ 5, 141 P.3d 416, 420 (Ct. App. 2006). Moreover, two federal court

[1] The Court has adopted most of the proposed order submitted by the District. The Court adopted some language suggested by the Defendants on the notice of claim issue.

decisions have conferred standing on this District and others contractually associated with CAP water deliveries. Central Arizona Water Conservation District v. United States Environmental Protection Agency, 990 F.2d 1531 (9th Cir. 1993); Maricopa-Stanfield Irrigation and Drainage Dist. v. United States, 158 F.3d 428 (1998).

2. The sweeps fail the test announced in Rios v. Symington, supra. In that case, one of the provisions which then-Governor Symington line item vetoed was found not to be an exercise of the legislature's authority to appropriate, and thus not subject to such veto, because it was not monetized by specific revenue streams but dependent on future actions that would determine when and how much each fund might receive. Rios, 172 Ariz. at 9-10, 833 P.2d at 26-27. That uncertainty failed the "certain sum" test to qualify as an appropriation. Ibid. Here the same uncertainty accompanied the establishment of the interstate water banking subaccount in 1996. It was not be until 2005 that these Nevada monies were identified, quantified and available to support the Water Banking Agreement program. In 1996, availability, timing, amount, source, use restrictions, etc. were all unknown. In short, the legislature established only a bank account and that was not an exercise of appropriative authority as Rios defines it. The establishment of the Subaccount (A.R.S. § 45-2425(B)(6)) was not an appropriation, therefore the sweeps of the Nevada Monies were not a subsequent exercise of that authority and thus unconstitutional under Rios.

3. Additionally, the sweeps run afoul of the requirements announced by the Arizona Supreme Court in League, supra. There, two deficiencies were found. First, the sweeps did not identify antecedent appropriative action supplying the monies in question, leaving no basis for finding that the subsequent sweeps were following exercises of the same authority. Without such identification, no prior exercise of appropriative authority could be found to exist. The sweeps here suffer from that same deficiency. Second, in League, the bill language attempted to override substantive law, constitutionally prohibited in an appropriation action. Here, too, the same override language was included, compelling the same result.

4. The District argues that the Court should also rule in its favor on the basis of the decision in Navajo Tribe v. Dep't of Administration, 111 Ariz. 279, 528 P.2d 623 (1974) because of the parallels to this case (foreign money, specific contract purpose) that the District argues that decision addresses. The Court does not agree with the District's position on this issue and Navajo Tribe does not form a basis for relief.

5. During the April 1, 2011 oral argument, Defendants again argued that the sweeps were proper and authorized by a prior appropriation. In support of this contention, Defendants cited for the first time A.R.S. § 35-154(A), which prohibits unauthorized obligations against the state that are not authorized by an appropriation. Defendants argued that the 1996 Act had to be an appropriation else the later banking program expenditures could

not have been authorized. A.R.S. § 35-154, however, does not apply to this case. A.R.S. § 35-154 indemnifies the State from liabilities and/or obligations not expressly authorized by an appropriation. A.R.S. § 35-154 does not, however, create an appropriation where one did not previously exist. Instead, it "operates as a condition subsequent, allowing the [government entity] to avoid its obligations if the requisite funding is not forthcoming." University of Arizona v. Pima County, 150 Ariz. 184, 187, 722 P.2d 352, 355 (Ct. App. 1986). Here, the funding was supplied, and by a Nevada agency. As a result, Defendants' reliance on A.R.S. § 35-154 is misplaced.

6. The District asks that the Court declare the sweeps unconstitutional and, therefore, void ab initio. The Court so finds. The District further requests the Court to order the swept funds returned to the Subaccount with interest, citing City of Bisbee v. Cochise County, 50 Ariz. 360, 370-72, 72 P.2d 439, 444 (1937). The Defendants counter that such latter request is barred because it is a claim subject to the notice of claims statute, A.R.S. §12-821.01, which the District admittedly has not invoked. The Court agrees with Defendants. The Arizona Court of Appeals recently addressed this issue in *Arpaio v. Maricopa County Bd. Of Supervisors,* 225 Ariz. 358 P.3d 626 (App. 2010)("*Arpaio*"). The Court of Appeals found that the plaintiffs' prayer for relief seeking the return of the monies from the Maricopa County treasury, or any subsequent motion for leave to amend to seek payment from the State treasury, required the filing of a notice of claim. The Court explained:

> We agree with the Sheriff that one who seeks declaratory relief need not comply with A.R.S. § 12-821.01. *See Home Builder's Ass'n of Cent. Ariz v. Kard,* 219 Ariz. 374, 281, ¶31, 199 P.3d 629, 636 (App. 2008). However, even assuming a favorable declaration by this court, to the extent the Sheriff then would seek recovery of some or all of the $24 million from the State, such a claim would indeed constitute the type of claim requiring compliance with the notice of claim statute.
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> * * *
>
> The amended complaint, purportedly seeking only declaratory and injunctive relief, does in its formal prayer for relief ask the Court to order the Board to "reinstate" the unencumbered status of the subject funds. In the context of the current status of the litigation, however, it is unclear exactly how such relief could be obtained, even assuming a favorable ruling on appeal. Presumably, the Sheriff would contend via further amendment of the complaint or by separate action that these specialty funds would need to be "replenished," with the Board directing the reallocation of other funding within the County's budget. Under these circumstances, it seems logical to treat the Sheriff's contention as the equivalent of a damages claim, seeking recovery of

> funds he argues were inappropriately taken. Accordingly, such a claim is also subject to the notice of claim statute, and the time for filing that claim has long since passed.

Id., 225 Ariz. at 362, 238 P.3d at 630. The relief sought here is virtually the same. The District seeks the same sort of replenishment rejected in *Arpaio* absent compliance with the notice of claims statute.

The District cites to *State v. Mabery Ranch Co.*, 216 Ariz. 233, 165 P.3d 211 (App.2007) ("*Mabery Ranch*") for the proposition that the notice of claim requirement "makes no sense when nonmonetary relief is sought and thus renders such cases outside the scope of the statute." Plaintiff's Memorandum in Support of Proposed Form of Order ("Memorandum") at p. 11. However, the District here, as in *Arpaio*, is seeking monetary relief from the General Fund whether or not it is seeking to have those monies paid to it. Like the District here, the plaintiffs in *Arpaio* did not have a personal interest in the monies and were not seeking to have the monies paid to them. The relief sought here is virtually the same as the relief contemplated in *Arpaio*.

Moreover, the reasoning provided in *Mabery Ranch* implicitly supports the holding in *Arpaio* that a notice of claim *is* required where the relief sought has the budgetary effect of a monetary award. In *Mabery Ranch*, the Court of Appeals discussed the other case cited by the District, *Martineau v. Maricopa County*, 207 Ariz. 332, 86 P.3d 912 (App. 2004), and noted that the outcome there would not have a direct or indirect budgetary effect and would not have resulted in a monetary award against the State. Here, the order sought by the District will directly impact the State's financial planning and budgeting and would go further than merely restraining government conduct. The order sought would require the Treasurer to pay monies out of the General Fund.

The District argues that "[a]ny monetary settlement that the District might have offered would also make no sense because the Defendants were legally unable to accept such an offer...." Memorandum at p.11. The District further asserts that "[t]he claims statue embodies an implied legislative intent that any mandatory settlement offer be made to an official or entity empowered to accept it." *Id.* However, simply because the Governor and Treasurer may not have been able to settle the claims does not excuse the District's failure to serve a notice of claim upon the entity that could settle the matter, the State of Arizona, or its failure to add the State as a party. As discussed above, it was clear from the outset that the relief sought by the District, if awarded, would directly impact the State Treasury and budget. The District cannot avoid the notice of claim requirements on the basis of its own failure to file a notice of claim with the proper party or on the basis of its failure to sue or join the proper party. *See Blauvelt v County of Maricopa*, 160 Ariz. 77, 80, 770 P.2d 381, 384 (App.1988).

The relief requested by the District is the equivalent of a damages claim requiring the payment of monies out of the General Fund, thus the District was required to file a notice of claim. The District admits that it has not filed a notice of claim and more than one-hundred and eighty days have passed since the passage of any legislation directing the transfer of monies at issue in this case. The relief sought by the District seeking the payment of monies out of the State Treasury is therefore barred.

THEREFORE, IT IS ORDERED the Plaintiff's Motion for Summary Judgment is GRANTED IN PART as set forth above and the Defendant's Motion for Summary Judgment is DENIED. The Court finds that the sweeps were unconstitutional but declines to order the return of the monies swept.

The District seeks an award of costs pursuant to A.R.S. § 12-341. Additionally, the District seeks an award of attorneys' fees pursuant to A.R.S. § 12-348, under the "substantial benefits doctrine" and under the Private Attorney General Doctrine. For the reasons set forth in the State's Response dated May 18, 2011, the Court declines to award fees or costs.

Signed this 21st day of July, 2011,

JUDICIAL OFFICER OF THE SUPERIOR COURT

imposed by the laws of the State of Arizona.

"Herein fail not.

"Done this 4th day of October, 1933.

"Otto E. Myrland [Seal]

"Subscribed and sworn to before me this 4th day of October, A. D. 1933.

"My Commission expires July 1, 1935.

"Mildred B. McGee

"[Seal] Notary Public in and for the County of Pima, State of Arizona."

After and partially over the name "Otto E. Myrland" appears the impression of a notary's seal in reverse. Underneath the name was originally written "Attorney for C. E. Brown," but this, when the document came into the possession of the committee, has been erased with a pencil by some one so that it was not apparent without very close inspection. Thereafter, and in the absence of Fairchild, one Ray Dye, as the agent of Brown, went to the mining claim and presented the instrument to Scott, representing that it was a court order for the delivery of the possession of the machinery. Scott, being a layman and ignorant of legal proceedings, believed in good faith, upon the statement of Dye and inspection of the document, that it was a court order, and therefore delivered possession of the machinery to Dye, and it was taken away by the latter. It was further alleged that the instrument was prepared by respondent for the purpose of presentation to Scott, and with the intention of deceiving him into believing that it was a court order.

[5] We think it goes without saying that, if an attorney attempts to deceive another during pending litigation by inducing him to believe that a document prepared by the attorney is an order by the court, it constitutes unprofessional conduct in the highest degree. It is a fraud upon the party, and, in effect an abuse of the process of the court as a cloak for extortion. That the facts set forth in the complaint are true is not denied by respondent. Indeed, he in substance admitted this, both in a letter addressed to the administrative committee of district No. 5 and in an oral statement before this court. He offered as the sole extenuation for his conduct the claim that he believed Fairchild was unjustly swindling his client and that he had been misguided by his zeal to protect the latter's interest.

[6] Under such circumstances, we have no alternative but to find that respondent was guilty of unprofessional conduct, and that he should be punished therefor. Both the administrative committee and the board of governors have recommended that he be suspended from the practice of law for the period of six months. This court is of the opinion that, in view of the facts in this case, and of other matters which are within the judicial knowledge of the court, but which we need not set forth in this opinion, this is the minimum penalty which we would be justified in inflicting. It is therefore ordered that respondent Otto E. Myrland be, and he is hereby, suspended from the practice of law in Arizona for the period of six months from the date of rendition of this judgment.

McALISTER and ROSS, JJ., concur.

CRANE v. FROHMILLER, State Auditor.

No. 3649.

Supreme Court of Arizona.

June 7, 1935.

1. States ⇐130

Constitutional provision declaring that no money shall be paid out of state treasury, except in manner provided by law, means that people's money may not be expended without their consent, either as expressed in organic law of state or by constitutional acts of Legislature appropriating such money for specified purpose (Const. art. 9, § 5).

2. States ⇐131

Generally, Legislature is supreme in matters relating to appropriations, except so far as there are constitutional restrictions upon it (Const. art. 9, § 5).

3. States ⇐131

Appropriation need not be made in any particular form of words nor in express terms, all that is required being a clear expression of legislative will on subject (Const. art. 9, § 5).

4. Constitutional law ⇐60

Legislature may not delegate its power to make laws to any other person or body, except when authorized by Constitution.

5. Constitutional law ⇐60
States ⇐131

Legislature must make any appropriation which authorizes money to be drawn from state treasury, and it cannot delegate such power to another (Const. art. 9, § 5).

6. States ⇐131

Legislative appropriation, if it is to be paid from general fund, must, to be valid, fix at least maximum amount, although, if payment is to be made only from special fund which is limited in amount, no limit need be stated in act authorizing expenditures and specifying for what purposes money is to be expended (Const. art. 9, § 5).

7. Constitutional law ⇐62
States ⇐131

Act authorizing Governor to issue emergency proclamations to cover expenses of tax suit, which placed no limit on amount of debt which might be incurred, and stated that claims were to be paid from general fund of state, *held* unconstitutional (Laws 1931, c. 61; Const. art. 9, § 5).

8. States ⇐120

Governor's proclamation authorizing tax commission to incur indebtedness for legal services in tax suits *held* not valid under act authorizing Governor to issue emergency proclamations to cover expenses of tax suits, which was passed in view of litigation for which indebtedness was incurred, since no state of facts on which Legislature had had opportunity of acting could constitute an "emergency" justifying Governor in incurring indebtedness (Laws 1931, c. 61).

[Ed. Note.—For other definitions of "Emergency," see Words & Phrases.]

9. States ⇐131

Act authorizing Governor to issue emergency proclamations to cover expenses of tax suits, which placed no limit on amount of liabilities which might be incurred and made claims payable from general fund, *held* not valid as authorizing special emergency appropriation (Laws 1931, c. 61; Const. art. 9, § 5).

10. States ⇐130

State auditor *held* not justified in paying claims for legal services in tax suits against state, where statute under which indebtedness was incurred did not constitute appropriation and there was no other provision authorizing payment (Laws 1931, c. 61; Rev. Code 1928, § 35; Const. art. 9, § 5).

11. States ⇐130

State disbursing officers may not pay valid claims which state is morally bound to pay, in absence of appropriation therefor (Const. art. 9, § 5).

12. States ⇐120

Indebtedness incurred for services of attorney employed by state tax commission to defend tax suits *held* unauthorized, in view of statute prohibiting any state agency, with exception of Attorney General, from incurring indebtedness for legal services (Rev. Code 1928, § 52a, added by Laws 1931, c. 30).

13. Constitutional law ⇐48
Statutes ⇐181(1)

Supreme Court is to seek for intent of Legislature and to give such interpretation to ambiguous language in statute, if possible, as will render act constitutional.

14. States ⇐131

Appropriation for expenses of pending tax litigation, which was included in general appropriation act, *held* not unconstitutional as embracing more than appropriation for a department of state, since money was appropriated for a department of state controlled by chief executive to be expended in his discretion in assisting a department controlled by Attorney General in handling of tax suits other than for costs of legal services (Const. art. 4, pt. 2, § 20).

Original proceeding in mandamus by A. W. Crane against Ana Frohmiller, as State Auditor, to compel respondent to pay two claims against the state. On demurrer to the petition.

Alternative writ quashed.

Emmet M. Barry, of Phœnix, for petitioner.

John L. Sullivan, Atty. Gen., and Dudley W. Windes, Asst. Atty. Gen., for respondent.

Terrence A. Carson, of Phœnix, amicus curiæ.

LOCKWOOD, Chief Justice.

A. W. Crane, hereinafter called petitioner, filed an original proceeding in this court asking for a writ of mandamus against Ana Frohmiller, as auditor of the state of Arizona, hereinafter called respondent, to compel her to pay two claims against the state, one of which was made by petitioner personally and the other of which was assigned to him by Thomas A. Flynn. Respondent demurred to the petition, and the matter is before us upon the demurrer.

An earnest request was made to this court by counsel for both petitioner and respondent that we take up this case out of its regular order and consider it im-

mediately; it being asserted that vital interests of the state were involved therein and that its rights would be greatly prejudiced if a prompt decision of the points involved was not had. It was represented to us by the state tax commission and the Attorney General that there are suits now pending in the federal courts involving many million dollars of taxes; that the state of Arizona is the real defendant in such actions; that plaintiffs are pressing the cases for trial, and, in order that the state might properly present its defense, an immediate determination of the questions herein was imperative. For this reason we have laid aside all pending matters and devoted ourselves to a consideration of the case.

The precise legal question before us is whether upon the facts stated in the petition it is the imperative duty of respondent to approve the claims presented. We therefore summarize its allegations as follows: On the 7th day of January, 1935, which was the date for the convening of the regular session of the Twelfth Legislature, there were pending in the District Court of the United States ten suits, in which various corporations were plaintiffs and the state tax commission, representing the interests of the state, was defendant, contesting tax assessments on the properties of the plaintiffs for the years 1933 and 1934. There were also pending in the superior courts of the state two suits wherein certain other corporations were contesting the assessments of their property for the year 1934. On the 21st of January six of these suits in the district court, filed by one of the corporations, were dismissed without prejudice, and immediately thereafter three new suits were filed by such corporation, contesting the same assessments which were contested in the six suits dismissed. While the Twelfth Legislature was in session, and while all these suits were pending, the Attorney General of the state of Arizona was summoned to appear before a joint session of the Appropriation Committee of the Senate and House for the purpose of determining what provision should be made by the Legislature to provide funds for the defense of the suits. In response to this request, the Attorney General did appear and advised the Legislature that he could not determine what moneys would be necessary to make a defense to the suits and asked it to make such provisions as it deemed necessary to meet the situation. Various members of the Legislature and the Governor discussed the matter, and, after considering what they believed to be the various available remedies, and particularly the provisions of chapter 61 of the Session Laws of 1931, the Governor advised the Legislature that he thought that he could take care of the situation without the necessity of any new legislation. The Attorney General, however, was not satisfied with this, and informed the Legislature that he thought an additional appropriation for the purpose of assisting in the defense of such suits was necessary, and in pursuance of this request there was included in the general appropriation bill of 1935 the following provision:

"Subdivision 33. Governor's Tax Litigation Fund.

	For the 24th Fiscal Year	For the 25th Fiscal Year
Tax Suits..	$10,000.00	

"There is hereby appropriated to the Governor's General Fund the sum of $10,000.00 or so much thereof as may be necessary for the prosecution, defense or settlement of pending tax litigations. Said sum to be used and expended in conjunction with the Attorney General's Office. This appropriation shall be exempt from the provisions of the Financial Code and any balance remaining at the end of the fiscal year shall not revert to the general fund."

About the 21st of March, 1935, and after all the things above set forth had happened, the Legislature adjourned. Thereafter negotiations were entered into for a compromise of the two suits pending in the superior courts of the state, and they were duly settled without expense to the state. It was impossible to settle certain of the suits pending in the federal courts, and on the 25th day of April the Attorney General and the tax commission, being satisfied that those cases would have to be tried upon their merits, requested the Governor to authorize the tax commission to incur debts and liabilities against the state to the amount of $25,000, under chapter 61, supra, for the purpose of defending these suits. In accordance with such request, the Governor, after reciting the facts in regard to the litigation involved, on April 29th by a proclamation stated as follows: "Now, therefore, I, B. B. Moeur, Governor of the State of Arizona, in accordance with the act herein named, declare and proclaim the fact that the Tax Commission is authorized to incur debts and

liabilities against the State of Arizona in defense of said suits herein named in the sum of Twenty-five Thousand ($25,000.00) Dollars, or such amount thereof as may be necessary, to be paid as other claims against the State, from the General Fund."

Shortly thereafter the federal court ordered defendant to answer in certain of the suits aforesaid, and the state tax commission employed Thomas A. Flynn as special counsel, at the rate of $50 per day, who assisted the Attorney General's office to prepare the answers in those cases. It also became necessary to gather evidence in support of the answers, and the commission employed experts for the preparation thereof, among whom was petitioner herein; the compensation of the latter being fixed at the rate of $20 per day. Petitioner and Flynn each performed one day's service under the employment above set forth, and then filed claims against the state of Arizona for such services, based on the provisions of the Governor's proclamation, as aforesaid, which were duly approved by the tax commission, and by it presented to the respondent for her approval as auditor. She refused to give this approval, for the reason that in her opinion the Governor's proclamation authorizing the incurring of liability by the tax commission to the extent of $25,000, as above set forth, was invalid, whereupon this petition was filed.

[1] The question before us is whether on this state of facts it is the duty of the auditor to approve the claims in question. Section 5 of article 9 of the Constitution of Arizona reads in part as follows: "* * * No money shall be paid out of the State treasury, except in the manner provided by law."

Provisions of this nature appear in many state constitutions, and they have universally been interpreted to mean that the people's money may not be expended without their consent either as expressed in the organic law of the state or by constitutional acts of the Legislature appropriating such money for a specified purpose. Dickenson v. Clibourn, 125 Ark. 101–105, 187 S. W. 909; People v. Goodykoontz, 22 Colo. 507, 45 P. 414; State v. Burdick, 4 Wyo. 272, 33 P. 125, 24 L. R. A. 266. The rule is so well known and so generally accepted that no further citations are needed to support it.

[2-6] There can be no contention that the Constitution itself authorizes the payment of the claims in question from the state treasury, and we therefore turn to the statutes to see whether the Legislature has affirmatively and constitutionally given such authorization. It is generally held that the Legislature is supreme in matters relating to appropriations, except so far as there are constitutional restrictions upon it. LeFebvre v. Callaghan, 33 Ariz. 197, 263 P. 589; People v. Pacheco, 27 Cal. 175; Graham v. Childers, 114 Okl. 38, 241 P. 178; State v. Zimmerman, 183 Wis. 132, 197 N. W. 823. And an appropriation need not be made in any particular form of words nor in express terms; all that is required being a clear expression of the legislative will on the subject. Proll v. Dunn, 80 Cal. 220, 22 P. 143; Davis v. People, 78 Colo. 521, 242 P. 995, 996. But there are two limitations, not as a rule expressed in precise language in the various state constitutions, but nevertheless almost universally upheld, as implied therein. The first is that the Legislature may not delegate its power to make laws to any other person or body, except when authorized by the Constitution. Schechter Poultry Co. et. al. v. U. S. (just decided but not yet reported in the U. S. Reports) 55 S. Ct. 837, 79 L. Ed. —; Board of Harbor Commissioners of Port of Eureka v. Excelsior Redwood Co., 88 Cal. 491, 26 P. 375, 22 Am. St. Rep. 321; State v. Keener, 78 Kan. 649, 97 P. 860, 19 L. R. A. (N. S.) 615; State v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N. S.) 339, Ann. Cas. 1913C, 774; 6 R. C. L. Page 164. It therefore must itself make any appropriation which authorizes money to be drawn from the state treasury, and it cannot delegate that power to another. The second limitation is that, when a legislative appropriation is directed to be paid out of the general fund, but not to comprise the whole of such fund, the appropriation must be specific as to a maximum amount and cannot be left indefinite and uncertain in this regard. In the case of Tillotson v. Frohmiller, 34 Ariz. 394, 271 P. 867, 871, we had this last limitation before us. Therein we quoted approvingly from the case of State ex rel. Davis v. Eggers, 29 Nev. 469, 91 P. 819, 16 L. R. A. (N. S.) 630, as follows: "As all appropriations must be within the legislative will, it is essential to have the amount of the appropriation, or the maximum sum from which the expenses could be paid, stated. This legislative power cannot be delegated nor left to the recipient to command from

the state treasury sums to any unlimited amount for which he might file claims. True, the exact amount of these expenses cannot be ascertained nor fixed by the Legislature when they have not yet been incurred; but it is usual and necessary to fix a maximum, either in the general appropriation bill or in the act authorizing them specifying the amount above which they cannot be allowed," and we referred to the cases of Blaine County Inv. Co. v. Gallet, 35 Idaho, 102, 204 P. 1066, and Peabody v. Russell, 302 Ill. 111, 134 N. E. 150, 20 A. L. R. 972, as stating the same rule.

A similar question arose in the state of California, and the Supreme Court of that state in the case of Ingram v. Colgan, 106 Cal. 113, 38 P. 315, 39 P. 437, 438, 28 L. R. A. 187, 46 Am. St. Rep. 221, said as follows: "* * * The fund from which the bounties are to be paid is explicitly designated, but the amount of money in the general fund devoted to the payment of these bounties is not specified. The language lacks the first essential to an efficient appropriation. There is no designated amount, and consequently there is no 'specific appropriation' to be exhausted, unless it can be said that the whole general fund is set aside as a specific appropriation to the end in view,—a proposition not seriously to be considered. Redding v. Bell, 4 Cal. 333. It is freely conceded that the use of technical words in a statute is not necessary to create an appropriation. But, while no set form of language is requisite, upon the other hand there are some things which plainly enough are not severally an appropriation. A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. Usage of paying money in the absence of an appropriation cannot make an appropriation for future payment. Ristine v. State, 20 Ind. [328], 333. The utmost that can be claimed for the act under consideration is that it pledges the good faith of the state to the making of an appropriation. Herein the language of the supreme court of Colorado, in Institute for Education of Mute & Blind v. Henderson, 18 Colo. 105, 31 P. 714 [18 L. R. A. 398], is peculiarly apposite: 'To permit the disbursement of an indefinite amount of money, as these bounty acts contemplate, is to introduce an element of uncertainty into these calculations that will seriously embarrass both the legislature and the departments in giving effect to our state constitution with relation to the levying of taxes to meet appropriations. If the legislature desires to pay bounties, it may do so for all proper purposes by making the necessary appropriations therefor. Thus the public funds of the state will be protected, and the safeguards provided by the vigilance of the framers of our fundamental law will be given a construction best calculated to prevent the evils aimed at.' * * *"

The general rules governing appropriations by Legislatures are exhaustively discussed in Ristine v. State, 20 Ind. 328, and the same principle is upheld, as it is also in People v. Kenehan, 55 Colo. 589, 136 P. 1033; State v. Holmes, 19 N. D. 286, 123 N. W. 884, and In re Opinion of Judges, 48 S. D. 253, 203 N. W. 462. It is true there are a few decisions to the contrary, such as State v. Zimmerman, 183 Wis. 132, 197 N. W. 823, and State v. Henderson, 199 Ala. 244, 74 So. 344, L. R. A. 1917F, 770, but they are contrary to the great weight of authority and to our own holding in Tillotson v. Frohmiller, supra.

We hold, therefore, that, in order to constitute a valid appropriation by the Legislature, it must, if the appropriation is to be paid from the general fund, fix at least a maximum amount beyond which such appropriation may not go, although, if the payment is to be made only from a special fund which is itself limited in amount, no limit need be stated in the act authorizing the expenditures and specifying for what purpose the money is to be expended.

[7-11] With these general rules to guide us, let us determine whether there is a valid appropriation from which the claims in question may be paid. It is the contention of petitioner that this appropriation is found in chapter 61, Session Laws 1931, which reads as follows:

"An act authorizing the Governor to issue emergency proclamations to cover expenses of tax suits.

"Be It Enacted by the Legislature of the State of Arizona:

"Section 1. In addition to the powers granted to the governor under Section 2620, Revised Code, 1928, the governor when requested by the tax commission and the attorney general, for the purpose of providing funds to defend suits brought

against the tax commission contesting tax assessments, may authorize the tax commission to incur debts and liabilities against the state to be paid as other claims against the state from the general fund."

Upon examining this act, it is obvious instantly that it does not comply with the rule in regard to a limit of the maximum which can be expended thereunder. There is no limit placed upon the amount of debts or liabilities which may be incurred, and it expressly states that such claims are to be paid from the general fund of the state. For the reasons above stated, if the act be construed as an attempt to give a blank check upon the general fund to the Governor, the tax commission, and the Attorney General, it is unconstitutional, invalid, and of no effect whatsoever. But, says petitioner, even though it may not be valid as a general and unlimited appropriation, it is nevertheless valid as a special emergency appropriation, under the opinion in LeFebvre v. Callaghan, supra, and it is urged that the act, if so construed, in effect adds a new kind of emergency to those specified in section 2620, R. C. 1928. In that case we discussed the meaning of the word "emergency" as used in the section just cited. Therein we held that no state of facts upon which the Legislature had had the opportunity of acting could, within the meaning of the section, constitute an emergency which would justify the Governor in incurring an indebtedness under its terms. The fact that according to the petition the Legislature was mistaken as to the powers of the Governor to take care of the matter without further legislation cannot affect the principle of law involved. When that body knows of the existence of a situation, and when it acts in view thereof, either affirmatively or negatively, no administrative officer may substitute his judgment for that of the Legislature at a later time merely because the latter has made a mistake in its action. To so hold would be to delegate to every executive officer the right to substitute his judgment for that of the legislative authority in what has been held from time immemorial the exclusive and most important prerogative of that body, to wit, the appropriation of public money.

We therefore hold that upon the facts stated in the petition there was no emergency existing within the true meaning of the law at the time the Governor issued his proclamation in May 1935.

But, even if an emergency did exist, chapter 61, supra, cannot be invoked to aid it, for by its terms any claims arising under it are to be paid from the general fund. The Legislature, when it adopted section 2620, supra, was evidently advised as to the constitutional principles governing appropriations, for it very carefully created a special fund from which alone any indebtedness incurred by virtue of the provisions of the section could be paid, and expressly limited indebtedness to be incurred in excess of that special fund to $350,000. Since chapter 61, supra, does not constitute an appropriation, and since there is no other provision of law which would justify the auditor in paying the claims in question, the proclamation of the Governor authorizing the incurring of the indebtedness, as shown by the claims involved herein, would not justify or permit her to approve such claims, and she was only performing her duty when she rejected them, for, even though they be valid claims against the state, which it is morally bound to pay, it is universally held, under a constitution like ours, that the disbursing officers of the state may not pay such claims in the absence of an appropriation therefor.

Section 35, R. C. 1928, expressly states the duty of the auditor when a claim is presented to her involving a valid debt of the state for which no appropriation for payment has been made. She is required to issue a certificate of indebtedness, which can be presented to the Legislature at a later date with a request that an appropriation be made for the payment thereof.

[12] We might conclude our opinion at this point, but, in view of the important principles involved, we think it best to state other reasons why one, at least, of the claims is for an indebtedness incurred without authority of law. Chapter 30, Session Laws of 1931, reads in part as follows:

"Sec. 52a. *Legal Advisor of Departments.* The attorney general shall be the legal advisor of all departments of the state, and shall give such legal service as such departments may require. With the exception of the industrial commission, no official, board, commission, or other agency of the state, other than the attorney

general, shall employ any attorney or make any expenditure or incur any indebtedness for legal services. The attorney general may, when the business of the state requires, employ assistants."

This is an explicit statement that no official, board, commission or agency of the state, with the exception of the Attorney General, is permitted to incur any indebtedness for legal services, and the latter is required to furnish any such services that may be required by any department of the state. This necessarily includes the state tax commission. The Legislature realized, of course, that the Attorney General could not in his own person perform all of the many legal services required in the administration of the government, and expressly authorized him to employ assistants. There is but one limit to this authority, and that is that he may not incur an indebtedness for the services of such assistants in excess of the appropriations made by law for their payment. Chapter 34, Session Laws 1931. The petition alleges that the state tax commission employed Thomas A. Flynn to perform legal services for it in the defense of the suits in question. This it was expressly prohibited by chapter 30, supra, from doing, and we know of no later provision of the law which has repealed that chapter. If the tax commission felt the need of a special legal advisor, it was its duty to present the matter to the Attorney General, and it was his discretionary right to employ such assistants as he thought necessary to perform those services, within the limitation of the appropriation made by the Legislature for that purpose.

It was earnestly contended by petitioner that, if the proclamation of the Governor authorizing the expenditure of the $25,000, set forth therein, is held to be illegal, the state of Arizona may suffer the loss of many million dollars of taxes. We are of the opinion that petitioner is unduly alarmed as to the results which will flow from our decision. If the Governor, Attorney General, and the tax commissioners are honest and capable public officers, as of course we know they are, they have full power and ample means to protect fully the interests of the state in the pending litigation. So far as legal services are concerned, the Attorney General is required by law to furnish them. If for any reason he feels that he is personally unable properly to represent the state in the pending litigation, the Legislature has given him unlimited power to choose any competent attorneys as assistants, and has provided in the general appropriation bill a fund of nearly $20,000 per annum which he may, if he desires, use to such extent as may be necessary for the compensation of such assistants. In the case of Wiggins v. Kerby (Ariz.) 38 P.(2d) 315, 317, we said: "* * * When there are charges fixed by general law against an appropriation of this kind, such, for instance, as the salary of the head of an office or department, they should be deducted from the total and the balance used to pay the legal and necessary obligations of the office *as they arise* until the appropriation is exhausted. In planning how the appropriation should be spent he should, of course, use his best efforts to reduce the expenses of administering his office to such a point that the appropriation will cover the cost of all the necessary duties thereof, but in any event the obligations so incurred must be paid from the appropriation *in the order in which they arise*, no matter what effect such action may have in exhausting the appropriation." (Italics ours.)

If it be necessary, in order to secure competent legal talent to assist the Attorney General in the discharge of his duties in regard to the pending litigation, to exhaust the appropriation for that purpose, so that other matters arising at a later date cannot properly be taken care of, he should perform the instant duty with the utmost economy consistent with efficient service, and leave to the proper authorities of the state, to wit, the Governor and the Legislature, to determine whether it is necessary at a later time to provide him with additional funds. So much for the legal aspects of the litigation.

[13, 14] It is, of course, important, and at times absolutely necessary, in extended litigation to incur other expenses beside those for strictly legal assistance. The Legislature realized this, and made an appropriation of $10,000 by subdivision 33, supra, "for the prosecution, defense or settlement of pending tax litigation." Petitioner urges that this appropriation is invalid, for the reason that it violates article 4, pt. 2, § 20, of the Constitution, in that it embraces more than an appropriation for a department of state;

in effect operates to amend section 2614, R. C. 1928; attempts to delegate a power of expending money which is not given under any existing law; and gives the Governor power to employ counsel and to incur expenses for legal services, contrary to the provisions of chapter 34, supra. The constitutional provision just cited reads as follows: "Section 20. The general appropriation bill shall embrace nothing but appropriations for the different departments of the State, for State institutions, for public schools, and for interest on the public debt. All other appropriations shall be made by separate bills, each embracing but one subject," and it is urged that in the case of Sellers v. Frohmiller (Ariz.) 24 P.(2d) 666, we have held an appropriation of similar character to that of subdivision 33 to be invalid as embracing general legislation. We reaffirm the principles of law stated in the Sellers Case, but think they are not applicable to this case. In the former case section 6 of the General Appropriation Act of 1933 removed from the various state agencies the power which they had previously had of expending, according to their discretion, the funds appropriated for their use for operation and travel, and vested such power and discretion in the Governor. It also appropriated money for the salary of a secretary to the Governor to assist in the exercise of such discretion. We held that the provisions of section 6, which took away from the various agencies of government the discretion which they had previously had in expending appropriations made for them, and giving that discretion to some other agency of government, was legislation of a general character, and could not be included in the general appropriation act, and, since such provisions must fall, any appropriation made to aid in carrying out the invalid part of the act fell also.

But in subdivision 33, supra, there was no such attempt at general legislation. Bearing in mind the rules of statutory construction that we are to seek for the intent of the Legislature and to give such interpretation to ambiguous language in a statute, if possible, as will render the act constitutional, we hold that the true meaning of subdivision 33 is that the Legislature has appropriated for that department of state controlled under the law by the chief executive the sum of $10,000, to be expended by him in his discretion in assisting the department controlled by the Attorney General in the handling of tax suits. He is not authorized to use the money in payment for legal services, for that matter is vested exclusively in the Attorney General by chapter 34, supra, and the costs of such services are provided for in the appropriation made for that office. The Governor may not compel the Attorney General to accept such assistance, for the exclusive right to conduct litigation on behalf of the state is given by general law to the latter. But he may, if requested by the Attorney General, use the appropriation for the costs of such matters properly connected with the litigation, other than legal services, as he thinks proper. Subdivision 33, thus interpreted, does not violate the constitutional provision above set forth. State ex rel. Whittier v. Safford, 28 N. M. 531, 214 P. 759. It is true that this appropriation will not be available until the 1st day of July, 1935. We are satisfied, however, that, if the Attorney General represents to the federal District Court the true situation and that such appropriation will be available on the 1st day of July for the purpose of securing evidence necessary in the defense of such litigation, that court will grant him such reasonable time after that date as may be necessary properly to prepare his case.

If all of the nearly $30,000 thus available for the conduct of the impending litigation is about to be exhausted after as careful and economical an expenditure thereof as is consistent with efficiency, there is no excuse for any one to fear that the rights of the public will be endangered. Under the Constitution the Governor may, at any time and on the shortest notice, convene that body to which the appropriating power has been confided by the people, to take such steps as may be necessary, paraphrasing the old Roman formula, "to see that the state takes no harm."

The alternative writ of mandamus heretofore issued is quashed.

McALISTER and ROSS, JJ., concur.

In Arizona & New Mexico Railway v. Clark, 235 U. S. 669, 35 Sup. Ct. 210, 59 L. Ed. 415, L. R. A. 1915C, 834, this statute was construed in opinions which discuss at some length the conclusions reached. A dissenting opinion by Mr. Justice Hughes, referring to the construction placed upon the statute by the prevailing opinion of the court, says:

"It should be supposed that it was the legislative intent to protect the patient in preserving secrecy with respect to his ailments, and not to give him a monopoly of testimony as to his condition while under treatment."

This fairly expresses the argument of the appellant with reference to this question. The dissenting opinion further goes on to say:

"Here not only did the plaintiff introduce the evidence of his nurse, describing in detail his bodily injuries and the medical treatment, but the plaintiff offered himself as a witness and voluntarily testified as to his bodily condition. His testimony covered the time during which he was under the physician's examination, and it was upon this testimony that he sought to have the extent of his injuries determined by the jury and damages awarded accordingly. To permit him, while thus disclosing his physical disorders, to claim a privilege in order to protect himself from contradiction by his physician as to the same matter, would be, as it seems to me, so inconsistent with the proper administration of justice that we are not at liberty to find a warrant for this procedure in the statute unless its language prohibits any other construction."

This quotation clearly indicates that the precise question was before the court in that case which is raised on this appeal, and the decision of the court expressed in the majority opinion is adverse to appellant's contention. Mr. Justice Pitney there says:

"To construe the act in accordance with the contention of plaintiff in error would not only be a departure from its language, but would render it inapplicable in all cases where the 'physical or supposed physical disease' is the subject of judicial inquiry, and where any averment respecting it is made in pleading or evidence upon the subject is introduced at the trial in behalf of the patient. This would deprive the privilege of the greatest part of its value, by confining its enjoyment to the comparatively rare and unimportant instances where the patient might have no occasion to raise an issue or introduce evidence on the subject, or where the patient's disease might happen to be under investigation in a controversy between other parties. We are constrained to reject this construction."

The construction of the statute in question as embodied in this quotation is the law of this state. In accordance with it the ruling of the trial court excluding the testimony of the physician was correct.

No other questions are raised by this appeal.

The judgment of the trial court will be affirmed.

ROSS, J., and FAIRES, Superior Judge, concur.

FAIRFIELD, State Auditor, v. FOSTER.
(No. 2150.)

(Supreme Court of Arizona. April 14, 1923.)

1. Appeal and error ⟹539—Stipulation as to what issues are not binding on Supreme Court.

A stipulation as to what the issues are is not binding on the Supreme Court.

2. Courts ⟹90(1)—Question involving limitation of Governor's veto power considered as matter of first impression.

A question involving delimitation of the Governor's veto power, being extremely important to the state, considered as a matter of first impression, notwithstanding partial consideration thereof in an earlier case.

3. Statutes ⟹26—Governor's veto power may be exercised only as provided by Constitution.

The Governor's veto power, which was originally based on a similar power exercised by the English sovereign, is essentially legislative, though negative only and exercised by an officer whose functions are principally executive, but may be exercised only in the cases and the manner provided by Const. art. 5, § 7.

4. Constitutional law ⟹20—Statutes ⟹214—Where language is ambiguous, courts may consider construction by co-ordinate branches of government and evil sought to be remedied.

The courts cannot go outside the plain, unambiguous language of a statute or Constitution to determine its meaning, but, where the language is ambiguous, particularly in the case of constitutional provisions, wherein broad subjects must be covered with few words, they may consider the meaning previously given it by co-ordinate branches of the government and the evil it was intended to remedy.

5. Constitutional law ⟹20—Legislative construction as limiting Governor's veto power is of no weight.

The legislative construction of a Constitution, while sometimes given weight, particularly if acquiesced in for many years, is of no weight where it involves limitation of the constitutional control of a co-ordinate branch of the government over the Legislature, as in the case of limitation of the Governor's veto power.

6. Evidence ⟹29—Purpose of constitutional provision enabling Governor to veto items in appropriation bills matter of common notoriety.

It is a matter of common notoriety that the purpose of Const. art. 5, § 7, authorizing the Governor to veto separate items of appropriation bills was to permit him to object to ex-

penditure of money for a specified purpose and amount, without having to refuse to agree to another expenditure approved by him.

7. Statutes ⟸33—Executive cannot veto condition or proviso of appropriation and allow the appropriation to stand.

The executive cannot veto a condition or proviso of an appropriation, while allowing the appropriation itself to stand.

8. Statutes ⟸33—Appropriation for rate clerk out of amount appropriated for Corporation Commission held separate item subject to veto by Governor without affecting others.

The provision of Laws 1922 (Sp. Sess.) c. 42, § 1, subd. 5, appropriating $2,100 per annum for a rate clerk out of a sum appropriated by such subdivision for salaries and wages as part of the appropriation for the Corporation Commission, *held* not merely a direction as to how certain moneys were to be expended, but a particular item, which the Governor, under Const. art. 5, § 7, could veto without affecting other items.

9. Statutes ⟸33—Governor may not alter amount of specific appropriation, but may veto item appropriating specific sum for specified purpose only.

While the Governor may not alter the amount of a specific appropriation, a specified sum which the Legislature provides shall be spent for a specified purpose only is an item which may be disapproved by the Governor without affecting other items.

Appeal from Superior Court, Maricopa County; Frank H. Lyman, Judge.

Mandamus by James H. Foster to require Charles W. Fairfield, as Auditor of the State of Arizona, to audit, allow, and draw a warrant on the state treasury. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions to deny writ and dismiss action.

John W. Murphy, Atty. Gen., and A. R. Lynch and Earl Anderson, Asst. Attys. Gen., for appellant.

Baker & Whitney, of Phœnix, for appellee.

LOCKWOOD, Superior Judge. This is a proceeding in mandamus, commenced in the superior court of Maricopa county, praying that the state auditor be required to audit, allow, and draw a certain warrant on the state treasury.

Plaintiff claims that his demand was made under the authority of subdivision 5, § 1, c. 42, of the Session Laws of the Fifth Legislature of the State of Arizona, Special Session of 1922. Defendant answers, setting up that the particular provision of said chapter 42 relied on by plaintiff was vetoed by the Governor.

[1] The record was brought to this court on a stipulation of fact, and it was agreed in said stipulation:

"That the only issue in this case is whether the Governor legally vetoed a part of subdivision 5 of section 1, c. 42, Session Laws of the Fifth Legislature of the State of Arizona. The appropriation bill and the attempted veto of a part of the same was filed in the office of the secretary of state of the state of Arizona in due time, and are fully set out in pages 268-296 of said Session Laws."

While, of course, a stipulation of this kind cannot bind this court as to what the legal issues found in the record really are, yet there is no doubt that in this case it correctly states them.

[2] The action is one of extreme importance to the state, involving, as it does, a delimitation of the veto power of the Governor. For this reason we have determined to consider it as though a matter of first impression in this jurisdiction, and review the case of Callaghan v. Boyce, 17 Ariz. 433, 153 Pac. 773, where the question presented herein was partially considered.

[3] In order that we may do this properly, it is necessary that we first analyze the veto power and determine its nature. As is well known, our forefathers adopted most of their political institutions from England, adapting them to the changed circumstances under which they found themselves, and it is a notorious fact that the veto power granted the chief executives by the federal and various state Constitutions was originally based on a similar power exercised by the English sovereign.

Now this power, though exercised by an officer whose functions were principally executive, was essentially legislative in its nature. 1 Blackstone, Com. 361. And it has never been seriously questioned that the veto power of our Governors was of the same kind, though negative only in character. Black, Const. Law, § 67; Cooley, Const. Law, 49 (2d Ed.); Stuart v. Chapman, 104 Me. 17, 70 Atl. 1060; State v. Deal, 24 Fla. 293, 4 South. 809, 12 Am. St. Rep. 204; State v. Junkin, 79 Neb. 532, 113 N. W. 250. Under our system of government in Arizona, it is as necessary that the Governor act on a law as that the Legislature itself do so. Even though a bill carry unanimously in both houses, it must still go to the Governor for his approval or disapproval, and, in case of the latter, must follow the constitutional course before it becomes a law.

But this power, conferred by a Constitution, must be exercised only in the cases and the manner provided by that Constitution, and in Arizona it is governed by the provisions of section 7, art. 5, of our fundamental law.

Examination of this section discloses that two kinds of veto are bestowed on our Governor. The first is the original, historic method, where he either approves or rejects the bill as a whole. This, of course, is sim-

ple, and requires no other explanation than that set forth in the Constitution itself. But in the last paragraph of the section is contained the special veto power under consideration here. It is as follows:

"If any bill presented to the Governor contains several items of appropriations of money, he may object to one or more of such items while approving other portions of the bill. In such case he shall append to the bill at the time of signing it, a statement of the item or items which he declines to approve, together with his reasons therefor, and such item or items shall not take effect unless passed over the Governor's objections as in this section provided."

It is obvious that the construction of this paragraph depends on the meaning given to the words "several items of appropriations of money."

Provisions of this general character, practically unknown in our various state Constitutions until near the time of the Civil War, are now found in almost every state in one form or another, and the different Governors have exercised the rights given thereunder freely. In spite of this fact, there are but few decisions on such constitutional provisions, and among these we find considerable difference, both in reasoning and conclusions. Attempts are generally made to base the decision on the precise language of the particular Constitution construed, but a careful examination of the reasoning in each case will disclose that the conclusion is really based on the view the particular court takes as to the general nature of the veto power and the purpose to be accomplished by the special constitutional provision.

These divergent views may be divided into three general classes:

First, where it is held that the Governor, acting in his legislative capacity, may lower, though he may not raise, the amount of a particular appropriation, as well as strike out the item entirely. Com. ex rel. Elkin v. Barnett, 199 Pa. 161, 48 Atl. 976, 55 L. R. A. 882.

Second, where it is claimed that, though he must either approve or reject any amount mentioned as a whole, yet, when the Legislature sets aside a named amount to a named purpose, even though it be included within a general amount and purpose also, each detailed amount is an "item" and subject to a special veto. People v. Brady, 277 Ill. 124, 115 N. E. 204; State v. Jones, 99 S. C. 89, 82 S. E. 882; Fulmore v. Lane, 104 Tex. 499, 140 S. W. 405–421, 1082.

Third, where it is held that the word "item" applies only to a general subject of appropriation, which must be approved or rejected as a whole, and that the naming by the Legislature of special objects and amounts of expenditure within the general purpose does not present "items" which the Governor can strike out separately. Regents, etc., v. Trapp, 28 Okl. 83, 113 Pac. 910.

[4] While it is true that courts cannot go outside of the plain, unambiguous language of a statute or Constitution to determine its meaning, yet when the highest courts of the different states disagree as to the interpretation of the same phrase, used in the same context, it seems to me it is a proper case for the application of the rule that, where the language is ambiguous, we may consider among other things, the meaning previously given it by co-ordinate branches of the government, and the evil it was intended to remedy.

Particularly is this true with constitutional provisions, for, since broad subjects must be covered therein with few words, it is impossible for their framers to state explicitly every detail or shade of meaning intended. Corpus Juris, vol. 12, p. 700, and cases cited.

[5] So far as construction placed on it by co-ordinate branches of the government is concerned, we can get but little light. Our Constitution has been in force for only 11 years, and it is probable any action taken by the Governor since 1915 has been based on the decision in Callaghan v. Boyce, supra. It does not seem the argument of counsel that the State Financial Code defines what shall be considered an "item" needs much consideration. Laying aside the fact that this interpretation was immediately challenged by the executive branch of the government in the exercise of the veto power which is questioned in this very case, while it is true that legislative construction of a Constitution is sometimes given weight, particularly if that construction has been acquiesced in for many years, yet where it involves the limiting of the constitutional control of a co-ordinate branch of the government over the act of the very body which adopts the construction, I think the old rule of law that "no man should sit as judge in his own case" is very applicable.

[6] We therefore should resort for our principal source of guidance to the apparent purpose of the framers of the Constitution, and here we can have but little of the evil they foresaw, and how they desired to meet it. It is a matter of common notoriety that the reasons which placed this clause in our Constitution were the same as those which caused its insertion in every one which has a similar one—reasons which have been again exemplified in the last session of the Congress of the United States.

I cannot better illustrate them than by the language of the court in Com. ex rel. Elkin v. Barnett, supra:

"The Legislature, in framing and passing a bill, had full control over every subject * * * that it contained, and the Governor, as a co-ordinate branch of the lawmaking power, was entitled to at least a negative of the same extent. But by joining a number of different sub-

jects in one bill the Governor was put under compulsion to accept some enactments that he could not approve, or to defeat the whole, including others that he thought desirable or even necessary."

We see this situation in every session of Congress. The annual "pork barrel" is presented to the President, and he is under the necessity of signing it without "dotting an i or crossing a t," or suspending the operations of a necessary department of the government.

Again, quoting from Com., etc., v. Barnett, supra:

"In ordinary bills the single subject is a unit which admits of approval or disapproval as a whole, without serious inconvenience, even though some of the details may not be acceptable. But every appropriation, though it be for a single purpose, necessarily presents two considerations almost equally material, namely, the subject and the amount. The subject may be approved on its merits, and yet the amount disapproved. * * * If the Legislature, by putting purpose, subject, and amount inseparably together, and calling them an 'item,' can coerce the Governor to approve the whole or none, then the old evil is revived which this section was intended to destroy."

It cannot be questioned that the preceding quotations state the evil which our Constitution makers wished to prevent. In plain English, they wished the Governor to have the right to object to the expenditure of money for a specified purpose and amount, without being under the necessity of at the same time refusing to agree to another expenditure which met his entire approval.

[7] Now it is very true, as stated in State v. Holder, 76 Miss. 158, 23 South. 643, that the executive cannot veto a condition or proviso of an appropriation, while allowing the appropriation itself to stand. That would be affirmative legislation without even the concurrence of the Legislature. Certainly if, for example, the Legislature appropriates, as it did once in Arizona, a certain sum for a girls' dormitory at the University, on condition that a like sum be raised by outside contributions, the Governor cannot so use his veto as to make void the condition, while letting the appropriation stand, for the Legislature might well have been willing to have spent a certain amount for the given purpose, if others would do likewise, but been utterly averse to the unconditional appropriation. And the veto power was then used in the only constitutional manner, on both proviso and appropriation.

[8] But in the present case there was no attempt on the part of the Governor to imitate the action of the executive in State v. Holder, supra. The particular part of chapter 42, § 1, under which plaintiff claims reads as follows:

"Subdivision 5. For the Corporation Commission:

"For salaries and wages..... $53,880

"For the following positions not to exceed the annual rates herein specified:

* * * * * *

"1 rate clerk..... $2,100 per annum.

* * * * * *"

The veto of the Governor is in this language:

"Bearing in mind the pressing need of economy in the administration of state government, it is my opinion that the following items, which I herewith disapprove, can be dispensed with without interfering with the efficiency of the departments for which they have been made:

* * * * * *

"Subdivision 5. For the Corporation Commission:

* * * * * *

"1 rate clerk..... $2,100 per annum.

* * * * * *"

It is contended by plaintiff, however, that the only "item" which can be considered by the Governor is the whole subdivision "For the Corporation Commission" which amounts to $72,880, or, at the most, "For salaries and wages," which is $53,880, and that the positions and salaries specified are merely a "direction" by the Legislature as to how certain moneys are to be expended, but not an "appropriation" of a particular "item," and that the case of Regents, etc., v. Trapp, supra, is in point.

While the decision in that case is specifically based on the holding that the bill in question was not one of the type which under the Oklahoma Constitution was subject to the special veto power, yet the reasoning set forth in that opinion as to what constitutes an "item" undoubtedly would uphold the construction of our Constitution maintained by plaintiff.

The act construed reads in part as follows:

"Section 1. There is hereby appropriated * * * the sum of two hundred eighty-five thousand, eight hundred ten and twenty three hundredths dollars * * * for the support and maintenance of the State University. * * *

"Sec. 2. The appropriation for the State University at Norman shall be apportioned as follows:

Salary.	1909–10.	1910–11.
President	4,000.00	4,000.00
* * * * * *		
Current expenses		
For printing.....	1,500.00	1,500.00
* * * * * *		
For rent.....	1,000.00	1,000.00
* * * * * * *		

Laws Okl. 1909, c. 3, art. 26.

and so on down the list of some 27 specific matters of necessary expense for the proper maintenance of the university.

The court says:

"The bill in the case at bar does not embrace distinct items of appropriations. It embraces a

single item, with direction how that item shall be expended. * * *."

I am compelled to say that I can in no wise agree with such a construction. It is not in accord with the ordinary definition of the word "item." The International Dictionary gives "item" as a "separate particular in an enumeration, account or total." See, also, Lovell v. Drainage District, 159 Ill. 188, 42 N. E. 600; Baldwin v. Morgan, 73 Miss. 276, 18 South. 919. The veto power in Texas is governed by a constitutional provision very similar to ours, and the dissenting opinion of Judge Ramsey in Fulmore v. Lane, supra, shows very clearly that in that jurisdiction, matters like the one under consideration here are held to be "items."

But the conclusive argument to my mind against the construction contended for by plaintiff is that it renders utterly nugatory the attempt of the constitutional convention to meet the very definite evil above referred to. If we follow that line of reasoning, the Legislature may simply make a separate appropriation in any lump sum for each department, or, by proper language in the general appropriation bill, consolidate the funds for almost the entire state government, and, under guise of "directing" the expenditure of the money, limit its application to matters and amounts which the Governor believes to be highly injurious in part to the best interests of the state, practically compelling him to choose between abandoning the veto power, or suspending the operations of the government, thus nullifying the provisions of the Constitution under consideration, and going back to the very conditions its makers sought to avoid.

The form of the appropriation bill under consideration, if we take the view of plaintiff, is a step in that very direction. Like the bill in Regents, etc., v. Trapp, supra, it endeavors to make a lump appropriation for a certain department of the government, and then to determine exactly to the last dollar just how that money shall be spent; yet, according to plaintiff, the Governor must either take the nauseous dose to the last drop, or stop the operation of the Corporation Commission for two years. If this construction be upheld, obviously the next step for a Legislature hostile to a future Governor will be a further consolidation of the "items" of the appropriation bill, with a "direction" of how the money shall be spent, until the special veto is practically abolished.

I am decidedly of the opinion that the reasoning of the Trapp Case, and any others like it, is utterly untenable on any theory of construction consonant with the plain purpose of the Constitution.

[9] We do not wish to have it understood, by the fact that certain parts of the Barnett Case are quoted, that we approve of the conclusion arrived at by the majority of the court in that case, to the effect that the Governor may alter the amount of a specific appropriation. Such may possibly be the law in Pennsylvania, under the Constitution of that state, but it is not so in Arizona. On the contrary, we believe such a rule would transform the merely negative legislative power of the Governor into an affirmative one, and that it would be in consonance with neither the plain language of the Constitution nor the purpose of its makers.

But certainly, whenever the Legislature goes to the extent of saying in any bill appropriating money that a specified sum of money raised by taxation shall be spent for a specified purpose, and that alone, while other sums mentioned in the bill are to be used otherwise, no matter what language it may be disguised under, it is, nevertheless, within both the spirit and letter of the Constitution, an "item" within the bill, and may be disapproved by the Governor without affecting any other items of appropriation contained therein.

The decision of the superior court of Maricopa county is reversed, and the case remanded, with instructions to deny the writ and dismiss the action.

McALISTER, C. J., and ROSS, J., concur.

HEIGHES v. PORTERFIELD et al.
(No. 2759.)

(Supreme Court of New Mexico. March 29, 1923.)

(Syllabus by the Court.)

Landlord and tenant ⊂⊃110(2)—Taking possession of leased premises by landlord to protect property held not acceptance of surrender by tenant.

Taking possession of the leased premises by the landlord, merely for the purpose of protecting the property, upon the abandonment thereof by the tenant, does not constitute an acceptance of the surrender of the lease by the tenant.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by Wm. B. Heighes against Joseph Porterfield and another. From an order sustaining a demurrer to the complaint and dismissing the cause, plaintiff appeals. Reversed and remanded, with directions.

Katherine B. Mabry and Thos. J. Mabry, both of Albuquerque, for appellant.

Heacock & Grigsby, of Albuquerque, for appellees.

less it is unavoidable. The rule which we have laid down will make benefits for injuries of the same kind arising under the same circumstances uniform and certain, and insure that all persons holding the status of employee within this state will be insured the protection of its beneficent laws.

For the foregoing reasons the award of the Industrial Commission is affirmed.

ROSS, C. J., and McALISTER, J., concur.

HUNT, Governor, et al. v. CALLAGHAN, State Treasurer. (No. 2653.)

Supreme Court of Arizona. June 22, 1927.

1. Taxation ⟸1—"Tax" is enforced contribution of persons and property levied by authority of state for support of government, and for public needs.

A "tax" is enforced contribution of persons and property levied by the authority of the state for the support of the government and for all public needs (citing Words and Phrases, "Tax").

2. Words and phrases—"Apportionment" is act of dividing and assigning in just proportion.

"Apportionment" is an act of dividing and assigning in just proportion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Apportionment.]

3. States ⟸131—"Appropriation" is setting aside sum of money from public revenue for specified object.

"Appropriation" is setting aside from public revenue of a certain sum of money for specified object in such manner that executive officers of government are authorized to use money for that object, and no more.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appropriate—Appropriation.]

4. Statutes ⟸205—Court, if possible, must construe act so as to give harmonious effect to all sections.

It is the duty of the court in construing an act to give such an interpretation to all sections thereof, if possible, that it can take effect as a harmonious whole, and carry out purpose of Legislature.

5. States ⟸131—Financial Code of itself held not to have made appropriation for support of highway department.

Financial Code *held* not of itself to have made appropriation for support of highway department, in view of history of legislation (Laws 1912, c. 66; Laws [1st Sp. Sess.] 1912, c. 27; Civ. Code 1913, pars. 5123, 5138; Laws 1921, c. 116, and chapter 157, § 2), and any appropriations authorizing the expenditure of money must appear in some other act.

6. Highways ⟸122—Law providing for tax for support of highways authorizing continuing apportionment with partial continuing appropriation held to remain in effect (Laws 1923, c. 76).

Laws of 1923, c. 76, imposing various taxes for support of highway department, and authorizing a continuing apportionment for all taxes created therein with continuing appropriation only of 75 per cent. apportionment account, and 50 per cent. of gasoline tax going directly to counties, *held* to continue in effect, in that it does not expressly provide for termination of tax, and the language used contemplates continuous taxes.

7. Taxation ⟸53—Requirement of tax law to state tax and object for which it shall be applied held applicable only to property tax and not to excise tax (Const. art. 9, § 9).

Const. art. 9, § 9, requiring every law imposing, continuing, or reviving tax to state tax and object for which it shall be applied, *held* applicable only to property, and not to excise, tax.

8. Taxation ⟸53—Gasoline and mill taxes held not within constitutional provision requiring law imposing tax to state tax and object; "excise tax" (Laws 1923, c. 76; Const. art. 9, § 9).

Gasoline and mill taxes, imposed by Laws 1923, c. 76, *held* not within Const. art. 9, § 9, requiring every law imposing, continuing, and reviving a tax to distinctly state tax and object for which it shall be applied, since they are "excise taxes" to which such constitutional provision does not apply.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Excise.]

9. Taxation ⟸30—Property tax, imposed by law stating purpose for which it was levied, held not in violation of constitutional provision requiring tax law to state tax and object (Laws 1923, c. 76; Const. art. 9, § 9).

Property tax, levied by Laws 1923, c. 76, expressly stating that it was levied for purpose of construction, reconstruction, repairing, improving, and maintaining state highways and bridges, *held* not in violation of Const. art. 9, § 9, requiring every law imposing tax to state tax and object.

McAlister, J., dissenting in part.

Original mandamus proceeding by George W. P. Hunt, Governor, and others, as members of and constituting the Board of Directors of State Institutions, and another, against J. C. Callaghan, State Treasurer. Alternative writ previously issued made permanent.

John W. Murphy, Atty. Gen., and A. R. Lynch, Earl Anderson, and Frank J. Duffy, Asst. Attys. Gen., for plaintiffs.

Mathews & Billby, of Tucson, for defendant.

LOCKWOOD, J. This is an original proceeding in this court against J. C. Callaghan as treasurer of the state of Arizona, herein-

after called defendant, by George W. P. Hunt, J. C. Callaghan, and C. M. Zander, as the board of directors of state institutions of the state of Arizona, and W. C. LeFebvre, state engineer, hereinafter called plaintiffs, to compel defendant to credit to what are known as the "25 per cent. apportionment account" and the "75 per cent. apportionment account" within the general fund of the state of Arizona certain moneys realized from the gasoline tax imposed by chapter 76, Session Laws of 1923.

Technically speaking, we might limit our decision to the formal question raised by the pleadings, which is as to the crediting of certain moneys paid the treasurer. The matter, however, was treated both by plaintiffs and defendant on the oral argument as an attempt to determine, not merely the crediting of the money, but the status of the taxes imposed by chapter 76, supra, which raised such funds, and it was agreed that the ultimate determination of the matter would require our decision on two questions: First, are the various taxes imposed by chapter 76, supra, still in force, or have they ceased by operation of law; and, second, if they are still in force, are they now available in any part for the use of the state highway department without further legislation? In view of the vital importance to the state of a prompt settlement of the whole matter, while it may be we could dispose of the case on technical grounds, we have determined to consider it rather on the merits of the two questions last stated.

In order to arrive at a correct understanding of the situation, it is necessary that we discuss the history of highway legislation in Arizona since statehood, so far as funds raised by state, as distinct from county, taxation are concerned. We will consider first the property tax. It appears that, when the first state Legislature met, there was a sharp difference of opinion as to the fundamental principle which should apply to the construction of roads and highways in the new state. One part of the Legislature believed that the entire control of funds raised by state-wide taxation for road purposes should be placed in the hands of the state authorities, to be expended by them in such manner as they should think proper. The other portion claimed this would mean the counties which paid the bulk of the taxes and maintained their roads to a great extent out of county funds would be compelled to build highways for the benefit of the less wealthy counties, and insisted the money should be spent where it was raised. After considerable argument, a compromise was reached, which appeared in our statutes originally as chapter 66, Session Laws of 1912, and which was carried into the 1913 Code almost verbatim. The part of this chapter necessary for us to consider is paragraph 5123, R. S. A. 1913, Civil Code, which reads, so far as material, as follows:

"5123. There shall be annually levied and collected in the manner in which other state taxes are levied and collected, by a levy by the officials provided by law, a sufficient tax to raise the sum of two hundred and fifty thousand dollars annually, said levy to be made upon the taxable property within the state, for the purpose of raising a fund to be known as the state road tax fund, to be expended for the construction, reconstruction, repairing, improving and maintaining public highways, roads and bridges as follows:

"Twenty-five per cent. of the 'state road tax fund,' herein provided for, shall be subject to be paid out upon the authority and under the direction of the state board of control and state engineer, who are hereby charged with such responsibility. * * *

"Seventy-five per cent. of such state road tax fund herein provided for, shall be apportioned to the several counties in the amount to each county of seventy-five per cent. of the taxes collected under this act, by said county, and such amount shall be subject to be paid out for the construction, reconstruction, repair, improvement and maintenance of public highways, roads, and bridges in the manner as in this act provided, for the work in this act provided for within such county, upon the authority and under the direction of the county board of supervisors of such county and the state engineer, who are hereby charged with such responsibility. * * *"

[1-3] It will be seen upon examination of this section that it contains three things: A tax levied; an apportionment of the proceeds thereof; and an appropriation. It may be well to define these three terms, for a confusion in regard to their meaning is apparently the cause of many of the errors into which those concerned with the question have fallen. A tax is "the enforced contribution of persons and property, levied by authority of the state for the support of the government and for all public needs." 8 Words and Phrases, p. 6868; an apportionment is "the act of dividing and assigning in just proportion." Webster's New International Dictionary, 1925 Ed.; while an appropriation is "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other." State v. Moore, 50 Neb. 88, 69 N. W. 373, 61 Am. St. Rep. 538; Clayton v. Berry, 27 Ark. 129; Stratton v. Green, 45 Cal. 149.

It will therefore be seen that the difference between an "apportionment" and an "appropriation" is that, to make the "appropriation," there must be added to the dividing and assigning of funds which constitutes the "apportionment" the specific authority to spend. This difference is of vital importance in the consideration of this case.

The state road tax, then, was at first a continuing one, and was divided into two portions, 25 per cent. being subject to the sole control of the state authorities and 75 per

cent. to be expended in accordance with the amount paid by each particular county, within its own boundaries, under the joint control of the supervisors and the state engineer.

In 1917 (Laws 1917, c. 69), paragraph 5123, supra, was amended by fixing the tax at ten cents on the hundred dollars valuation of property, and by striking out certain portions of the original paragraph, the purposes of which were merely temporary. In 1921 it was repealed in toto, but chapter 157, Session Laws of that year, in section 2 contained provisions almost identical in their nature with the repealed paragraph, except that the tax rate was made five cents instead of ten. Each Legislature to 1922, then, which dealt with the subject, made a specific and continuing tax, apportionment, and appropriation of a definite amount, which continued in force without further legislation until it was repealed by the act of a subsequent Legislature, and the tax, the apportionment and the appropriation were all contained in the same act.

It will also be seen that for ten years the Legislature had provided for a division of highway funds of various kinds on the basis of 25 per cent. to be expended under the authority of the state alone and 75 per cent. requiring the joint action of the counties and the state authorities. So firmly had this custom become inbedded in our statutes that it was considered sufficient in other legislation aside from paragraph 5123, supra, to refer merely to the "25 per cent. apportionment account" and the "75 per cent. apportionment account" without any description thereof to such an extent that we may take it whenever such phrases were used by the Legislature, they referred to certain highway funds which were handled respectively by the state authorities alone or by the county and state authorities jointly.

In 1922 the Legislature passed chapter 35 of the Session Laws of that year, commonly known as the Financial Code. Section 126 thereof reads as follows:

"Section 126. That chapter VII of title 50, Revised Statutes of Arizona, 1913, Civil Code, be and the same is hereby amended by inserting therein a paragraph to be known as paragraph 5123 and in lieu of paragraph 5123 as construed by Senate joint resolution No. 1, Session Laws of Arizona, 1915, Second Special Session, and as repealed and amended by chapter 157, Session Laws of Arizona, 1921, Regular Session as follows:

"5123. For the construction, reconstruction, repair, improvement and maintenance of public highways, roads and bridges, under the authority and direction of the board of directors of state institutions and of the state engineer a sum of money shall be paid out, upon duly itemized and sworn claims, approved by the state engineer, on the state auditor, who shall draw his warrants therefor on the state treasurer, *who shall pay the same out of the general fund and the appropriation for the board of directors of state institutions for that purpose, authorized in the General Appropriation Bill;* provided, that twenty-five (25%) per centum of said sum of money shall be subject to be paid out upon authority and under the direction of the board of directors of state institutions and the state engineer, for the payment of all salaries and expenses of whatsoever kind of the office of state engineer, and for the construction, reconstruction, repair, improvement and maintenance of public highways, roads and bridges; and seventy-five (75%) per centum of such sum of money shall be apportioned by said board of directors of state institutions to the several counties, in the amount to each county of seventy-five (75%) per centum of the taxes collected under this chapter, by said county, and such amount shall be subject to be paid out for the construction, reconstruction, repair, improvement and maintenance of public highways, roads and bridges, in the manner as in this chapter provided, within said county, upon the authority and under the direction of the county board of supervisors of such county and the state engineer, who are hereby charged with such responsibility." (Italics ours.)

It will be seen upon comparing this section with the previous statutes in regard to highways that it departs from the former policy of having each act contain within itself a continuing tax, apportionment, and appropriation, and lays down as a general rule for the future for the construction and maintenance of public highways that, while the apportionment for highway purposes is continuing, the appropriation must be authorized by and in the General Appropriation Bill, which in the ordinary course of affairs is passed biennially.

The second important source of revenue for road purposes raised by state taxation is what is known as the motor vehicle tax. Chapter 27 of the First Special Session Laws of 1912, afterwards carried over substantially into the Code of 1913, fixes a certain continuing license tax on all motor vehicles to be paid to the secretary of state. Paragraph 5138 of said Code directs "the amount of the fees secured by the secretary of state, as in this chapter provided, shall be paid into the state treasury to the credit of the state road tax fund."

The proceeds of this tax, therefore, were divided in 1913 in the same manner and proportion as the proceeds of the property tax under paragraph 5123, supra, as originally passed. No change was made in paragraph 5138, supra, although the method of collecting and remitting the license tax was altered somewhat from time to time. In 1922, however, the Financial Code in section 5 provided this tax should be credited to the "state highway account, twenty-five per centum apportionment, in the general fund."

The third great source of highway funds, the gasoline tax, was first provided by chapter 116, Session Laws of 1921, which established a continuing tax of one cent per gallon to be paid, after deducting certain expenses,

to the state road tax fund, and necessarily to be apportioned to the two accounts in the same manner as the property and motor vehicle taxes. In 1922, though, the Financial Code in section 5 thereof diverted the gasoline tax from the road tax fund, which was then abolished as a separate fund, and placed it in the general fund, to be credited to the 25 per cent. apportionment account.

From the foregoing history of legislation in regard to the chief sources of state-wide revenue for road purposes it appears that, after various changes from 1912 on, the Legislature of 1922 declared in the Financial Code that the three taxes discussed were in the future to be apportioned permanently thus: The property tax, 25 per cent. to what was known as the "25 per cent. apportionment account," to be expended under the discretion of the state authorities, and 75 per cent. to what was known as the "75 per cent. apportionment account," to be expended under the direction jointly of the respective county supervisors and the state engineer, and the gasoline and motor vehicle taxes to the 25 per cent. apportionment account.

Such was the apportionment of the three funds, but what was the effect of the Financial Code in regard to appropriations for the support and maintenance of the highways of the state? Certain parts of the title and body of the Code are pertinent to this question, and we quote them as follows:

"An Act * * * Providing that All Expenses of Whatsoever Kind of All State Agencies as Defined and Provided in this Act, be Paid out of the General Fund and the Appropriation for the Respective Agencies Authorized in the General Appropriation Bill; * * * Abolishing the Use of Indirect Revenue Used by State Agencies not in Consequence of an Appropriation Act Specifying a Specific Amount, Excepting Therefrom the University of Arizona, Gasoline Tax and Motor Vehicle Tax. * * *

"Section 2. When a general appropriation shall be made * * * it shall be so construed that all balances whatsoever, except the balances for roads, buildings and the University of Arizona, shall be discontinued at the close of the fiscal year next after the adjournment of the Legislature, except that portion of which is incumbered, and shall no longer be applicable to the purposes of the original appropriation. * * *"

"Section 5. * * * No money belonging to, or for the use of the state, shall be expended or applied by any state agency, except as appropriated, unless otherwise herein authorized; provided that, all moneys received by the university and normal schools * * * shall be credited immediatey upon receipt by the state treasurer to their respective accounts in the general fund, * * * and that all fees and taxes received from the licenses of motor vehicles and the gasoline tax, shall be credited, immediately upon receipt by the state treasurer, to the state highway account, twenty-five per centum apportionment, in the general fund. * * *"

"Section 9. The phrase 'out of the general fund and the appropriation for,' when and wherever used in this act, shall not be construed to mean, that the appropriation contemplated, constitutes a specific or special fund, and the same shall remain an unsegregated part of the general fund, subject to application to the purposes of such appropriation, authorized in the General Appropriation Bill. * * *"

"Section 14. When and wherever the words 'credit,' 'appropriation,' or words of similar meaning or import are used in this act, or in any law of this state, providing an appropriation of money payable from the general fund, they shall not be construed to mean that a special or specific fund is created within the general fund, and the credit authorized, and the appropriation provided shall remain an unsegregated part of the general fund, subject to application to the purpose of such credit or appropriation, authorized by law."

[4] It is the duty of the court in construing an act to give such an interpretation to all sections thereof, if possible, that it can take effect as a harmonious whole, and carry out the purpose of the Legislature. It appears to us on careful examination and comparison of the sections quoted, including section 126 set forth hereinabove, that the purpose and effect of the Financial Code was as follows: First, to abolish all continuing appropriations and special funds, except those expressly set forth in section 3 of the act; second, to provide that all expenses for every kind of state agency not chargeable to one of the twenty special funds named in section 3 be paid out of the general fund, and through appropriations authorized only in the General Appropriation Bill; third, to enact that indirect revenue could not be used, unless a specific amount was appropriated from it, except that the proceeds of certain indirect taxes might be appropriated in toto for the University of Arizona and the highway account, without the amount appropriated being specified; fourth, to order that, after the passage of each general appropriation bill, at the end of the current fiscal year after the Legislature adjourned any balance unspent or unincumbered of an appropriation previously made should lapse and return to the general fund, except that balances of such appropriations made for the University of Arizona, the roads, or for building purposes of any nature, should be carried over and be used in ensuing fiscal years. We think this is the only reasonable interpretation of the language of the Financial Code when it is considered together with its title.

This construction is borne out by the subsequent action of the same Legislature which adopted the Financial Code. In the General Appropriation Bill of 1922, subdivision 18 thereof appropriates specifically from the general fund a property tax of five cents on the hundred dollars, and also the gasoline and motor vehicle taxes, which by section 5 of the Financial Code were already credited to the

25 per cent. apportionment account in the general fund for the use of the highway department for the fiscal year ending June 30, 1923. It also appropriates for the use of the University of Arizona not only the eighty-five one-hundredths of a mill property tax referred to in section 128 of the Financial Code, but also all moneys received by the University and already provided to be credited to it under section 5 of the Financial Code. Evidently the Legislature of 1922 did ont think that Code of itself appropriated any of these taxes, but believed their expenditure must be specifically authorized in the General Appropriation Bill.

[5] Taking all these things into consideration, we are satisfied that the Financial Code of itself makes no appropriation whatever for the support of the highway department, and that any appropriations authorizing the expenditure of money must appear in some other act. We do not wish to be understood as saying that a subsequent Legislature cannot alter this method of making appropriations; on the contrary, it has full power to do so, and did, exercise such power in chapters 25 and 76 of the Session Laws of 1923, but, except as they are altered or repealed, or are inconsistent with later legislation, the provisions of the Financial Code must still govern.

In the spring of 1923 the Legislature met in regular session. It early appeared that the highway department was in financial difficulties, and an investigating committee of the Legislature finally reported that at least $1,500,000 would be needed as an immediate appropriation to take care of the commitments and contracts already made by the department. With this situation in view the committee recommended the introduction of what is known as Senate Bill 156, which, with some extremely important modifications, was afterwards enacted into law as chapter 76, Session Laws of 1923. This bill, when originally introduced, as appears from the Journals of the House and Senate of that year, was intended solely as an emergency measure for the temporary financing of the highway department so as to pay the expenses of certain very specific projects to which the state was committed, which were named within the bill, and all of the taxes levied by the terms of the bill were to be placed in the 25 per cent. apportionment account, which, as we have indicated, had previously always been expended under the direction of the state authorities alone. It appears, however, from the same sources, that, when the bill reached the House, it was amended in some most important particulars. The property tax levied thereby was increased to ten cents on the hundred dollars, and, instead of being placed in the 25 per cent. apportionment account alone, one-fourth thereof only was so placed, and the remaining three-fourths was directed to be apportioned to the 75 per cent. apportionment account.

The mill tax was altered in its amount, and was "deposited in" the 25 per cent. apportionment account, while the gasoline tax, instead of being "credited" entirely to the 25 per cent. apportionment account, as had been provided by the Financial Code, had one-quarter only "placed in" that account, and one-quarter in the 75 per cent. apportionment account, while 50 per cent. was ordered turned over to the supervisors of the various counties in proportion to the amount of the tax raised in such counties, with express authority to the supervisors to use it for the maintenance of county roads. This occurred almost at the last moment of the session, and the bill as finally presented to the Governor and filed by him in the office of the secretary of state was so interlined and mutilated that the latter officer refused to print it in the usual manner in the official Session Laws, using instead photostatic copies of a considerable portion of it. The Governor attempted to veto certain parts of the bill, his principal purpose, as expressed in his veto message, being to restore it to its original form so far as devoting all the proceeds of the various taxes levied thereby to the 25 per cent. apportionment account was concerned. But this court in the case of Black & White Taxicab Co. v. Standard Oil Co., 25 Ariz. 381, 218 P. 139, held the veto unconstitutional and the act to be a law as finally adopted by the Legislature.

We did not pass, however, on the questions involved in this particular case; and its construction, so far as these matters are concerned, is therefore an open issue. The act itself is extremely lengthy, and we therefore quote only the portions which we consider necessary for the purposes of the case. They read as follows:

"An Act to Provide funds for the Construction and Completion of Certain Designated Highway Projects, * * * Authorizing the Refunding, for use on any Specific or Designated Highway Project, of Funds Paid * * * for the Construction of Such Specific and Designated Highway Projects and Diverted, * * * to Purposes Other than Such Specified and Designated Projects: Making an Appropriation Therefor: Providing for the Raising of Funds to Meet Such Appropriation by Means of 25% Apportionment of State Road Tax.

"Section 1. For the purpose of construction and completion of those certain highway projects hereinafter specified, * * * and for the purpose of refunding for use on specific and designated highway projects * * * the following appropriations, transfers and funds, limitations and authorizations of expenditure of funds and appropriations are made.

"Section 2. For the purpose of refunding for use on the specific and designated highway projects, hereinafter named, * * * the state treasurer is hereby authorized and directed, * * * to make transfers out of any moneys in

the 25% apportionment account in the general fund of the state of Arizona, as follows. * * *

"Section 3. All moneys received from the United States of America, * * * for the construction of any of the projects named in section 2 of this act, * * * shall, when received by the treasurer of the state of Arizona, be by him deposited to the credit of the respective segregated accounts * * * on account of which such moneys were so paid by the United States of America.

"Section 4. The moneys in any of such segregated accounts, as provided in sections 2 and 3, of this act, shall be paid out, for and only for, the purposes as following:

"First: The reimbursement of the state of Arizona for any expenditures by it in the construction of such project. * * *

"Second: For the construction and completion of such project. * * *

"Provided, that, when the above purposes are fully satisfied, any balance remaining in such segregated account, shall be transferred, by the auditor and treasurer of the state of Arizona, to the 25% apportionment account, within said general fund, and may thereafter be available for expenditure for the purposes of such account, as authorized by law. * * *

"Section 5. There is hereby appropriated from the funds and moneys hereafter in this act created or designated, the sum of 1,550,000.00 dollars, which shall be paid when and as available to the credit of said 25% apportionment account, in said general fund, to be expended for, and only for the following purposes:

"First: The refunding for use on any specific or designated highway project of funds paid * * * for the construction of such specific and designated highway project, and diverted * * * to purposes other than the construction of such specific and designated project. * * *

"Second: For the construction and completion of those certain highway projects, * * * named and described as follows: [Naming some forty-eight specific road projects.]

"Section 6. Said board is hereby authorized to enter into agreements with any political subdivision of this state, * * * for the use by the state of Arizona, of bond or other moneys of such political subdivision, for the construction and completion of the road projects, enumerated in section 5, of this act, or for other projects as may be approved by such board. * * *

"On or before the date or dates provided in such contract, * * * such political subdivision shall cause to be deposited the amount of money agreed upon with the treasurer of the state of Arizona, who shall deposit the same in a segregated account within said general fund, in favor of such road project. * * *

"The moneys in any of said segregated accounts, as provided in this section, shall be paid out for and only for, the purposes as follows:

"First: The reimbursement of the state of Arizona for any expenditures by it in the construction of such project. * * *

"Second: For the construction and completion of such project. * * *

"Provided, that, when the above purposes are fully satisfied, any balance remaining in such segregate account, shall be transferred, by the auditor and treasurer of the state of Arizona, to said 25% apportionment account, within said general fund, and may thereafter be available for expenditure from that account, for the purpose of such account, as authorized by law. * * *

"Section 10. For the purpose of providing said sum of $1,550,000.00, appropriated in section 5 of this act, the following moneys, funds and license taxes are hereby designated and created:

"Subdivision I.

"(a) There shall be annually levied and collected in the manner in which other state taxes are levied and collected, * * * a tax of ten (.10) cents on each one hundred ($100.00) dollars, of the assessed valuation of taxable property within the state, for the purpose of the construction, reconstruction, repairing, improving and maintaining state highways and bridges, as follows:

"25% of such tax, herein provided, for, shall be as paid into the treasury of the state of Arizona, deposited by the treasurer of the state of Arizona, in a separate account, in the general fund of the state, to be known and designated as 25% apportionment account.

"Seventy-five per cent. (75%) of such 'state road tax fund,' herein provided for, shall be apportioned to the several counties in the amount to each county of seventy-five per cent. of the taxes collected under this act, by said county, and such amount shall be subject to be paid out for the construction, reconstruction, repair, improvement and maintenance of public highways, roads, and bridges in the manner as in this act provided for the work in this act provided for within such county upon the authority and under the direction of the county board of supervisors of such county and the state engineer who are hereby charged with such responsibility.

"Subdivision II.

"(a) There hereby is authorized to be levied and collected a (one-half mill) tax per each scheduled passenger capacity mile. * * *

"(b) There hereby is authorized to be levied and collected a (two mill tax) per each scheduled truck ton capacity. * * *

"(c) Such (one-half mill) tax * * * and such two-mill tax * * * shall be levied only upon those common carriers operating motor vehicles * * * which said money * * * shall be immediately when received, transferred * * * to the treasurer of the state of Arizona, who shall deposit the same in said 25% apportionment account in the general fund of state. * * *

"Subdivision III.

"(a) That each and every dealer, * * * who is now engaged * * * in the sale, use or distribution, * * * of gasoline or other distillates of crude petroleum shall * * * collect a license tax of three (3) cents per gallon on all gasoline and other distillates of crude petroleum so sold, used or distributed. * * *

"(d) Said license tax shall be paid * * * to the secretary of state, who shall receipt to the dealer therefor, and promptly turn over to the state treasurer as are other receipts of his office, and the state treasurer shall place one-quarter of the same in said 25% apportionment account in the general fund and one-quarter of

the same to the account of the 75% apportionment account of the general fund, and said secretary of state shall promptly pay the remaining one-half of such tax to the several county treasurers of the state of Arizona. * * *

"Section 11. Any moneys remaining in said 25% apportionment account, in the general fund, after the performance of all things required to be done in this act and after the construction and completion of all road projects enumerated in this Act, and all moneys accruing to said 25% apportionment account thereafter, shall be available for the purpose of such account, as authorized by law. * * *

"Section 16. The moneys herein appropriated, and provided to be paid in to said 25% apportionment account except as provided in section 11 of this act, shall be paid out in payment of the costs of construction, including overhead and engineering, *of the road projects herein enumerated.* * * *" (Italics ours.)

It will be noted that, while the act recognized the principle theretofore existing of the 25 per cent. apportionment account and the 75 per cent. apportionment account, there was a highly significant change in the language used in regard to the former from that which had appeared in all previous legislation. In all other statutes which created or continued that account it was always provided it should be "subject to be paid out upon authority and under the direction of the board of directors of state institutions and the state engineer, for the payment of all salaries and expenses of whatsoever kind of the office of state engineer, and for the construction, reconstruction, repair, improvement and maintenance of public highways, roads and bridges; * * *" and the provision in regard to the 75 per cent. fund was that it should be "subject to be paid out for the construction, reconstruction, repair, improvement and maintenance of public highways, roads and bridges, in the manner as in this chapter provided, within said county, upon the authority and under the direction of the county board of supervisors of such county and the state engineer, who are hereby charged with such responsibility." Laws 1922, c. 35, § 126.

In chapter 76, supra, the 25 per cent. apportionment account, however, was governed by the following language:

"25% of such tax, herein provided, for, shall be as paid into the treasury of the state of Arizona, deposited by the treasurer of the state of Arizona, in a separate account, in the general fund of the state, to be known and designated as 25% apportionment account,"

—which gives no authority to spend the money, while the 75 per cent. apportionment account followed the old usage of granting such authority. The reason for the changed language may be readily determined from the report of the committee which introduced the bill.

The act as finally passed levied certain taxes which were apportioned to the 25 per cent. apportionment account as follows: (1) One-fourth of the state road tax of ten cents on the hundred dollars; (2) all of the passenger and freight mill tax; (3) one-fourth of the three-cent gasoline tax; (4) the balances remaining over after the completion of the projects named in sections 2, 3, 5, and 6 of the act. The only specific authorizations to spend anything from the 25 per cent. apportionment account are found in sections 2 and 5 of the act. These authorizations apply, first, to the refund of any diverted funds; and, second, to the construction of some forty-eight named projects, but a limitation of $1,550,000 is placed on the total appropriation for such purposes.

It is contended by plaintiffs, however, that section 11 of the act authorizes the expenditure of all balances and sums accruing to the 25 per cent. apportionment account after the completion of the specified projects named in the act, presumably for general highway purposes. Said section reads as follows:

"Section 11. Any moneys remaining in said 25% apportionment account, in the general fund, after the performance of all things required to be done in this act and after the construction and completion of all road projects enumerated in this act, and all moneys accruing to said 25% apportionment account thereafter, shall be available for the purpose of such account, as authorized by law."

Is such contention tenable?

It is evident from the language of section 11 that there is no authority contained within chapter 76, supra, for the expenditure of these balances, for the section expressly says that it refers to moneys remaining "after the performance of all things required to be done in this act;" and, further, nowhere in the act can there be found any provision declaring the purposes of the 25 per cent. apportionment account to be anything except the construction of the particular projects specifically named in the act, or granting authority to use the account for anything else. The very careful and guarded language in regard to the 25 per cent. apportionment account, so different from that used repeatedly and continuously in previous legislation on the same subject, shows clearly that the Legislature did not intend chapter 76, supra, to make any appropriation of the 25 per cent. apportionment account, beyond the express projects mentioned therein. If, therefore, there is another purpose "authorized by law" for such account, it must be found within some previous statute. The only previous statute in force and dealing with this account is the Financial Code, and, as we have said, the express purpose and language of that Code is that no money can be paid out of the 25 per cent. apportionment account, except from "the appropriation for the board of directors of state insti-

tutions for that purpose, authorized in the General Appropriation Bill."

We are therefore of the opinion that the effect of section 11, supra, is to declare that such balances and future funds shall be available for the purposes of the 25 per cent. apportionment account when and as authorized by the only law applying thereto, to wit, the Financial Code of 1922, and that such Code authorizes expenditures from that fund when and only as authorized in the General Appropriation Bill.

The language of chapter 76, supra, in regard to the 75 per cent. apportionment account, however, is very different. It provides expressly for the expenditure of such account for the purposes set forth in section 6 of the act, and covers, not only the specifically enumerated projects, but any others that may be approved by the board of directors of state institutions and the supervisors of the different counties. Koch v. Johnson, 28 Ariz. —, 243 P. 611.

[6] The appropriation on its face is a continuing one. So far as the 50 per cent. of the gasoline tax paid directly to the counties is concerned, they are authorized to use it indefinitely for the maintenance of county roads and highways. We have therefore a continuing apportionment of all of the taxes created by chapter 76, supra, but a continuing appropriation only of the 75 per cent. apportionment account and of the 50 per cent. of the gasoline tax going directly to the counties. What is the effect of such a situation upon the taxes so levied? Do they continue, or have they expired by operation of law?

Section 10, as it appeared originally in the act introduced, named the object of the various taxes established thereby as being "for the purpose of providing said sum of $1,550,000.00, appropriated in section 5 of this act, the following moneys, funds, and license taxes are hereby designated and created. * * *"

Since the taxes as they appeared in the original bill were appropriated entirely to the 25 per cent. apportionment account, the purpose above quoted was in perfect harmony with the appropriating portion of section 5, which reads:

"There is hereby appropriated from the funds and moneys hereafter in this act created or designated, the sum of 1,550,000.00 dollars, which shall be paid when and as available to the credit of said 25% apportionment account, in said general fund. * * *"

The Legislature, however, at the last moment changed the application of the taxes, so that the purpose thereof was not only to raise the $1,550,000, but to apportion 75 per cent. of both the property and gasoline taxes to entirely different purposes, and to authorize their expenditure for such purposes as a continuing appropriation, for they were not limited to the receipts of any particular years as is provided in the General Appropriation Bill biennially.

The gasoline tax now exists in all but a very few states in the Union. In all of these states, while the amount fluctuates, the tax itself is considered a permanent one. Since the beginning of statehood a property tax for road purposes in some amount has always been levied. While the amount has varied, it has been accepted as the policy of the state that some tax of this nature should exist, as much as the tax for the university or the public schools.

In view of all of the foregoing reasons, we should hesitate to hold it to be the intention of the Legislature that taxes which have ever since their first levy been continued for road purposes were intended to expire, unless the language of the statute so requires. As we have pointed out, nowhere in chapter 76, supra, is it expressly stated that these taxes shall terminate at any particular period, while the language used in establishing them on its face contemplates continuous taxes. The only argument to the contrary which could be drawn from the text of the act is based on the theory that the $1,550,000 is the only appropriation therein contained, and that, when it ceases, the purpose of the law having been fulfilled, the tax is at an end. But, as we have shown, that is far from being the only appropriation, and the argument therefore fails.

[7] It is urged, however, that, if such be the construction of the act, it violates the provision of section 9, art. 9, of the Constitution of Arizona, which reads as follows:

"Section 9. Every law which imposes, continues, or revives a tax shall distinctly state the tax and the objects for which it shall be applied; and it shall not be sufficient to refer to any other law to fix such tax or object,"

—in that, if we hold the portion of the taxes which goes to the 25 per cent. apportionment account has not been appropriated, there is no object in chapter 76, supra, to which such taxes can apply, and it is not sufficient under the constitutional provision that a reference is made to another statute for their purpose. There are many other states which have constitutional provisions similar in a general way to ours, and its seems to be pretty well settled that the proper construction of such consitutional provisions providing that no tax shall be imposed, continued, or revived unless the law distinctly state its object, applies to a property and not an excise tax. Such is the holding of the cases of McGannon v. State, 33 Okl. 145, 124 P. 1063, Ann. Cas. 1914B, 620; In re McKennan, 25 S. D. 369, 126 N. W. 611, 33 L. R. A. (N. S.) 606; and In re McPherson, 104 N. Y. 306, 10 N. E. 685, 58 Am. Rep. 502.

In the latter case the court said:

"It is always uncertain upon whom it will fall [referring to inheritance tax] and how much revenue it will produce. It would have been impossible for the Legislature, perhaps years in advance, to specify the particular objects to which the tax should be applied, and we are of opinion that this section of the Constitution was intended to apply to the annual recurring taxes known at the time of the adoption of the Constitution and imposed generally upon the entire property of the state."

In all the cases in which the above rule is announced an inheritance tax was involved, but, in passing upon the constitutional provisions like section 9, art. 9, supra, the general observation seems to be that the Legislature is required to specify the object of the levy only when it is upon the general property of the state. The same rule seems to have been made in Missouri, etc., v. Meyer (D. C.) 204 F. 140, wherein the question was the right of the state to levy and collect a tax upon coal output, the court quoting from the McGannon Case in this language:

"It is intended to apply only to annually recurring taxes imposed generally upon the entire property of the state and not the kind of tax we are dealing with, which is a special tax."

[8] The gasoline and mill taxes are therefore not within the constitutional provision, as they are excise, and not property, taxes. Texas Co. v. State (Ariz.) 254 P. 1060.

[9] In so far as the ten cent property tax is concerned, the statute expressly states that it is levied "for the purpose of construction, reconstruction, repairing, improving and maintaining state highways and bridges." This is a very distinct and specific statement of the object of the tax, and the Constitution does not require that an appropriation be made, but only that the object for which it shall be applied appear. None of the three taxes in question, therefore, are obnoxious to the constitutional provision, even though portions thereof have not yet been appropriated.

The gasoline tax thus being a valid, subsisting, and continuing tax, of which one-fourth is directed to be credited to the 25 per cent. apportionment account, and the same amount to the 75 per cent. apportionment account, it is the duty of the state treasurer to make such credit of any of that tax as it comes into his possession, paying out that part apportioned to the 75 per cent. apportionment account in the usual manner, and retaining that part apportioned to the 25 per cent. apportionment account until the Legislature direct its expenditure.

It is ordered that the alternative writ heretofore issued be made permanent.

ROSS, C. J., concurs.

McALISTER, J. (concurring in part, dissenting in part). I concur in the judgment directing the state treasurer to deposit in the 25 per cent. apportionment account of the general fund the funds which chapter 76 provides shall be placed to the credit of that account namely, one-fourth of the money paid into the state treasury from the ten cent property levy, one-fourth of the gasoline license tax, and all of the truck and passenger mill tax. It is clear that in the passage of this act the Sixth Legislature intended that all three of these taxes should be collected until a subsequent legislative body should provide otherwise. While it is in all probability true that the act was framed and passed to give the highway department temporary and emergent relief, yet it contains nothing justifying the conclusion, or even suggesting, that it was enacted for a definite period only, or that it would cease to be operative or become functus officio upon the happening of some particular event. Hence I am in full accord with the forceful statement of Judge Lockwood relative to the continuing character of the taxes it directs to be collected.

It is likewise true, as held in this opinion, that the proportion of these taxes which the law directs to be placed in the 75 per cent. apportionment account, namely, three-fourths of the ten cents property levy and one-fourth of the gasoline license tax, is appropriated by the terms of the act itself, and therefore that authority exists for its use without further act of the Legislature. It is also correct that the 50 per cent. of the gasoline license tax apportioned to the counties is appropriated by the terms of the act, and that nothing further is required to authorize its use by the supervisors of the various counties.

The majority are of the view, however, that neither the act itself nor any other provision of the statute appropriates the funds in the 25 per cent. apportionment account other than the $1,550,000 which it provides shall be paid out for the purposes therein enumerated, and hence that no authority exists for the use of the moneys which it is held are to continue to be placed to the credit of this account after this $1,550,000 has been raised and expended. One-fourth of the property and gasoline and all of the mill tax will flow without ceasing into this account, but under the view of the majority they must rest there until their use is authorized by an appropriation in a general or special appropriation bill to be enacted at some future time. The reasoning on this phase of the case is strong, but somehow I am unable to escape the conclusion that it was intended that the funds in the 25 per cent. apportionment account should, if needed, be used as collected for the purposes of that account and not remain idle until the Legislature at some later date should authorize their use in a general or special appropriation bill—perhaps six months or a year after they have begun to accumulate and the highway department has been closed for a lack of operating

funds. This would undoubtedly be at the succeeding biennial session, unless a special one were had before that time and the Legislature continued the policy inaugurated in chapter 76 of making a special appropriation for the highway department, since the occasion for making general appropriations would not likely arise before that time, the other departments of the state government having been cared for in the previous Legislature. The general purview of the act, therefore, and the language used in paragraph 11, are such that it is difficult for me to believe that those responsible for this legislation had in mind that, after the $1,550,000 it specifically appropriates from the 25 per cent. apportionment account had been expended, the funds thereafter accruing to the credit of this account should not be spent without further authorization for the purpose for which it was created and still exists.

A proper construction of the act as a whole, and of paragraph 11 especially, which we quote again for convenience, leads, in my opinion, to this conclusion. It reads:

"Any moneys remaining in said 25% apportionment account, in the general fund, after the performance of all things required to be done in this act, and after the construction and completion of all road projects enumerated in this act, and all moneys accruing to said 25% apportionment account thereafter, shall be available for the purpose of such account, as authorized by law."

In using the words "all moneys" in the phrase, "all moneys accruing to said 25 per cent. apportionment account thereafter," the Legislature undoubtedly had in mind the property, gas, and mill tax which it is agreed should continue to be collected, because there is no other place for it to go, and no other source from which moneys could accrue to this account, the performance of the things required to be done in the act having been completed or the funds designated therefor having been expended, and, in the remainder of the sentence, "shall be available for the purpose of such account, as authorized by law," it provided what should be done with these moneys after they had been placed in this account. The word "available" has practically the same meaning as the expression "subject to be paid out" in subdivision 1, § 10, which, it is admitted, constitutes an appropriation of the funds in the 75 per cent. apportionment account. Webster's New International Dictionary gives, among other definitions of it, "usable," and Funk & Wagnalls' Practical Standard Dictionary "at one's disposal, as funds." Hence it would seem that, when funds are said by the Legislature to be available for a certain purpose, or at the disposal of those whose duty it is to handle them, nothing is required to render the spending of them lawful, except to apply them to that purpose, and therefore, when this has been done, they have been expended "as authorized by law" within the meaning of this expression in section 11. It was not, as I view it, intended by the language "as authorized by law" that some other statute appropriating the funds accruing to the 25 per cent. apportionment account should exist before it could be said that their expenditure is properly authorized. In other words, it was not meant that it should be construed as though it read "as authorized in some existing or future appropriation bill," because, to my mind at least, it does not convey this impression, and for the further reason that in the very act in which it appears the Legislature departed from the policy inaugurated the year before of taking care of the highway department in the general appropriation bill. The members of the Legislature realized that the 25–75 per cent. system in practically the same form as when it was inaugurated in 1912 was still in full force and effect, and consequently it must have intended by this language that the provisions of the statute which continues this account should be looked to to ascertain the purpose for which the law authorizes the funds placed therein to be spent.

Looking, therefore, to the last expression of the Legislature on the subject, namely, section 126, c. 35, Special Session of the Fifth Legislature, commonly referred to as the Financial Code, we find this purpose described in the following language:

"For the payment of all salaries and expenses of whatsoever kind of the office of state engineer, and for the construction, reconstruction, repair, improvement and maintenance of public highways, roads and bridges."

Hence by reading the last ten words of section 11 in the light of this statement the purpose for which the funds in the 25 per cent. apportionment account are available becomes plain, and leaves nothing to be supplied to bring the language within the definition of an appropriation given in the majority opinion.

It is therefore clear to my mind that the purpose of the Legislature will be effectuated if the taxes which it is held are to be collected and placed in the 25 and 75 per cent. apportionment accounts are applied to the purposes of those accounts until the Legislature provides otherwise. To hold that they are to be collected, but that only three-fourths of the property and gasoline tax can be spent without further authorization, is to say in practical effect that none of the tax is appropriated, because, if the one-fourth of the property and gasoline and all the mill tax placed in the 25 per cent. apportionment account is not available for the purpose of that account without further legislative action, there is nothing with which the highway department can operate, since the law requires that all expenses of this nature shall be paid from this account. It was to prevent such an occurrence as this that the Legislature provided

in section 11 that, after the things required in the act to be done had been performed, that is, after the $1,550,000 appropriated for special projects had been expended thereon, the moneys accruing to this account thereafter should be available for the purpose of this account.

The order of the court, therefore, should direct, not merely that the treasurer place the funds in question to the credit of this account, but that he pay them out in accordance with law.

MULLINER v. McCORNICK & CO., BANKERS, et al. (No. 4294.)

Supreme Court of Utah. Feb. 1, 1927.

1. Bills and notes ⇐310—Reasonable price is implied, in case of sale of notes to one at his special instance and request without mention of price.

Where notes are sold to one at his special instance and request, without mention of price, the law implies an agreement to pay a reasonable price, as in like sale of any other article.

2. Banks and banking ⇐227(3)—Evidence held sufficient to support judgment for accounting by bank for notes delivered to it by depositor.

Evidence that a bank depositor, at request of the bank, delivered to it by way of sale or security notes of others owned by him, and that the bank has not accounted to him therefor, notwithstanding demand, *held* sufficient to support a judgment for an accounting.

3. Pleading ⇐380—Evidence must be considered as it relates to complaint after trial amendment.

Where complaint is amended at the trial, the evidence must be considered as it relates to the complaint as thus amended.

4. Pleading ⇐433(10)—Complaint cannot be objected to for duplicity after judgment.

Duplicity in complaint is a formal defect, which must be objected to seasonably, and it is too late after judgment.[1]

5. Banks and banking ⇐121—Right to deposit is not forfeited because bank negotiated therefore away from its building (Comp. Laws 1917, § 1005).

Though Comp. Laws 1917, § 1005, provided that a bank's business shall be conducted at its banking house, and provides a punishment for an officer violating it, a depositor does not forfeit his right to a deposit because the bank negotiated for the deposit away from its building.

6. Banks and banking ⇐98—Bank, under power to "deal in commercial paper," may buy it and give seller credit on his account for price (Comp. Laws 1917, § 981).

A commercial bank authorized, under Comp. Laws 1917, § 981, to "deal in commercial paper," may buy notes and give the seller credit on his account for the price.[2]

7. Bills and notes ⇐210, 211—If notes sold without seller's indorsement were payable to bearer or last indorsement was in blank, buyer got title by delivery (Comp. Laws 1917, § 4093).

If notes sold without indorsement by the seller were payable to bearer, or the last indorsement was a blank indorsement, the buyer would get good title by delivery, in view of Comp. Laws 1917, § 4093.

8. Bills and notes ⇐324—Seller is liable as on indorsement without recourse as respects notes, not indorsed by him, payable to bearer or last indorsed in blank (Comp. Laws 1917, § 4093).

If notes sold without seller's indorsement were payable to bearer, or the last indorsement was in blank, the seller would be liable as if he had indorsed without recourse, in view of Comp. Laws 1917, § 4093.

9. Banks and banking ⇐227(1)—Any presumption from bank's receiving notes without depositor's indorsement is that it was satisfied.

Any presumption, in action against bank for accounting for notes which at its request depositor delivered to it by way of sale or security, from fact that it received them without his indorsement, is that his failure to indorse was satisfactory to it.

10. Banks and banking ⇐194—Bank's liability to account for notes deposited is unaffected by their being noninterest bearing.

That notes deposited with bank were not interest bearing does not affect its liability to account therefor.

11. Banks and banking ⇐227(1)—It cannot be presumed, in absence of evidence, in action for accounting for notes received, that they were worthless.

Nonsuit in action for accounting for notes deposited with a bank may not be granted because when plaintiff rested there was no evidence of their value; there being no inference that they were worthless.

12. Banks and banking ⇐118—Vice president of bank held under evidence to have apparent authority to contract for deposit of notes.

Under the evidence, a vice president of a bank, who was in active charge of it, *held* to have apparent authority to contract for deposit of notes by way of sale or security.

13. Estoppel ⇐55—One claiming estoppel may testify to reliance on the other party's representations.

Reliance on representations or conduct being essential to equitable estoppel, one claiming estoppel may testify to reliance on the other party's representations.

[1] Johnson v. Meaghr, 14 Utah, 426, 47 P. 861.

[2] Tracy Loan & Trust Co. v. Merchants' Bank, 50 Utah, 196, 167 P. 353; Anglo-California Trust Co. v. Hall, 61 Utah, 223, 211 P. 991; Neil v. Utah Wholesale Grocery Co., 61 Utah, 22, 210 P. 221.

"6. That the Court erred in overruling defendant's motion for a new trial.

"7. That the Court erred in instructing the jury."

Rule XII of this court is in the following language:

"Rule XII.

"Assignments of Error

"1. All assignments of error must distinctly specify each ground of error relied upon and the particular ruling complained of. If the particular ruling complained of has been embodied in a motion for new trial, with other rulings, or in any motion, or in a bill of exceptions, or in a statement of facts, or otherwise in the record, it must nevertheless be referred to in the assignment of errors, or it will be deemed to be waived.

"2. If the assignment of error be that the court overruled a motion for new trial and the motion is based on more than one ground the same will not be considered as distinct and specific by this Court unless each ground is specially and distinctly stated in the assignment of errors.

"3. Any objection to the ruling or action of the court below will be deemed waived in this Court unless it has been assigned as error in the manner above provided.

"4. If the assignment of error be to the giving of instructions to the jury by the lower court, the appellant must state specifically wherein the instruction complained of is erroneous in its statement of the law applicable to the case, or to any particular fact or facts therein.

"5. If the refusal to give an instruction asked for by appellant in the court below be assigned as error, the assignment must state the applicability of such instruction to the fact or facts of the case."

And our rules for years have been substantially the same.

It is evident on testing the assignments of error by this rule that, with one possible exception, they wholly fail even approximately to comply therewith. We have reiterated the necessity of a compliance with this rule again and again. Federico v. Hancock, 1 Ariz. 511, 25 P. 650; Daggs v. Phoenix Nat. Bank, 5 Ariz. 409, 53 P. 201; Daniel v. Gallagher, 11 Ariz. 151, 89 P. 412; Sanford v. Ainsa, 13 Ariz. 287, 114 P. 560, affirmed 228 U. S. 705, 33 S. Ct. 704, 57 L. Ed. 1033; Liberty M. & S. Co. v. Geddes, 11 Ariz. 54, 90 P. 332; Hardiker v. Rice, 11 Ariz. 401, 94 P. 1094; Williams v. Williams, 37 Ariz. 176, 291 P. 993; Reid v. Van Winkle, 31 Ariz. 267, 252 P. 189. Nor can argument in appellant's brief take the place of proper assignments. Wootan v. Roten, 19 Ariz. 235, 168 P. 640; Pinal County v. Heiner, 24 Ariz. 346, 209 P. 714; Reid v. Van Winkle, supra.

[3] The only assignments that by the utmost liberality can be considered as coming within the rule are Nos. 4 and 5. These may perhaps be taken as an attempt to urge that the evidence does not sustain the verdict and judgment, and we will consider them as such. But in so doing we can only examine the transcript of evidence to ascertain if there is sufficient evidence therein, which, if believed by the jury, would sustain the verdict. Central Copper Co. v. Klefisch, 34 Ariz. 230, 270 P. 629.

On a careful reading of the transcript, we are of the opinion there is ample evidence for that purpose.

The judgment is therefore affirmed.

ROSS, C. J., and McALISTER, J., concur.

KERBY, Secretary of State, et al. v. LUHRS.

No. 3555.

Supreme Court of Arizona.

Oct. 4, 1934.

1. Constitutional law ⇐13

Written instruments are to be construed in light of their purpose, particularly if instruments are Constitutions, which are by necessity general in their nature and presumably intended to remain in force for long period of time.

2. Constitutional law ⇐12

Constitutions are to be construed in light of exigencies and conditions which they are intended to meet and deal with.

3. Constitutional law ⇐9(1)

Constitutional provision that several proposed amendments should be submitted in such manner that electors might vote for or against amendments separately *held* intended to prevent practice of "logrolling," which is practice of including in one statute or constitutional amendment more than one proposition, inducing voters to vote for all.

notwithstanding they might not have voted for all if amendments or statutes had been submitted separately (Const. art. 21, § 1).

[Ed. Note.—For other definitions of "Logrolling," see Words & Phrases.]

4. Constitutional law ⇐9(1)

If propositions in proposed amendment cover matters necessary to be dealt with in order that Constitution, as amended, shall constitute consistent and workable whole on general topic embraced in part which is amended, and if, logically, propositions should stand or fall as a whole, then but one amendment is submitted, but, if any proposition, although not directly contradicting others, does not refer to such matters, or if proposition is not such that voter supporting it would reasonably be expected to support principle of others, then two or more amendments are submitted within constitutional prohibition against submission of several amendments without affording voters privilege of voting for or against amendments separately (Const. art. 21, § 1).

5. Constitutional law ⇐9(1)

Changes suggested to Constitution should represent free and mature judgment of electors so submitted that they cannot be constrained to adopt measures of which in reality they disapprove in order to secure enactment of others electors earnestly desire (Const. art. 21, § 1).

6. Constitutional law ⇐9(1)

Proposed constitutional amendment *held* violative of Constitution providing that several proposed amendments should be submitted in such manner that electors might vote for or against amendments separately, where proposed amendment embraced taxation of copper mines, taxation of public utilities, and established tax commission as constitutional body, and only connection of three propositions was that they were all embraced in general subject of taxation (Const. art. 21, § 1).

Appeal from Superior Court, Maricopa County; M. T. Phelps, Judge.

Action by Arthur Luhrs against James H. Kerby, as Secretary of the State, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Arthur T. LaPrade, Atty. Gen. (Charles L. Strouss, Asst. Atty. Gen., and W. C. Fields and A. R. Lynch, both of Phœnix, of counsel), for appellants.

Lynn M. Laney and Grant Laney, both of Phœnix, for appellee.

LOCKWOOD, Judge.

This is an action by Arthur Luhrs against James H. Kerby, as secretary of state of the state of Arizona, and the clerks of the various boards of supervisors of the state, to enjoin Kerby from certifying to the boards of supervisors, as entitled to be placed on the ballot at the election to be held November 6th, a certain proposed constitutional amendment, and to enjoin the clerks from placing such amendment on the ballots. The superior court issued the injunction, and the correctness of its order is before us on this appeal. Because of the importance to the people of the state of the questions involved herein, we have advanced its hearing in every possible manner. There is no dispute as to the facts involved, and the question presented is solely one of law.

The amendment was an initiated one, and no question is raised as to the sufficiency of the signatures, or of the legality of the form of the petitions, but it is contended that it violates an existing provision of the Constitution which regulates how such amendments should be submitted. A proper understanding of the question can only be had by examining the entire text of the proposed amendment in the light of the constitutional provision which, it is claimed, its submission in its present form violates. The proposed amendment reads as follows:

"Be it enacted by the people of the state of Arizona:

"That Article IX of the Constitution of the State of Arizona be amended by adding thereto three additional sections, numbered Section 12, Section 13, and Section 14, to read as follows:

" 'Section 12. Every person engaged in the mining of copper within the State of Arizona, as owner, lessee, trustee, possessor, receiver, or in any other proprietary capacity shall, in addition to all other taxes or excises imposed by law, pay to the State Treasurer, for the use of the State of Arizona, a license tax as follows:

" 'A tax of one-half cent per pound on all copper produced from ore mined or extracted by open pit or surface operation;

" 'A tax of one-half cent per pound on all copper produced from ore mined or extracted by underground operation where the average grade or copper content of such ore exceeds two percentum, and one-quarter cent per pound where the average grade or copper content of such ore shall equal two percentum or less.

" 'Every person taxable under the foregoing provisions shall quarterly, on the first of January, April, July, and October of each year, make a return to the State Tax Commission, on forms prepared by the Commission, showing the total tonnage of ore mined or produced for the preceding quarter, the average grade of copper content of such ore, the number of pounds of copper produced, and such other information as shall be required by the Commission, and shall on said dates pay to the State Treasurer the tax for the preceding quarter.'

" 'Section 13: The tangible property of public service corporations engaged in the production, sale, or distribution of gas, water, or electricity, shall unless exempted from taxation by law, be assessed for purposes of taxation upon the valuations fixed by the Corporation Commission of Arizona for rate-making purposes.

" 'The Corporation Commission shall on or before May 1st of each year, transmit to the State Tax Commission a statement of the tangible property of each such public service corporation operating within the State, and the valuation of such property fixed by the Corporation Commission for rate-making purposes.'

" 'Section 14: The State Tax Commission of Arizona, as it now exists, and is heretofore created by Chapter 23, Laws of the First Legislature of Arizona, Regular Session, is hereby created and declared a constitutional commission and office.'

"Such Commission shall have charge of the administration of Sections 12 and 13 of this Article, with full power to prescribe and promulgate rules, regulations, forms and penalties for its enforcement.

"Any license tax imposed by Section 12 shall become delinquent on the fifth day after it shall become due and shall bear interest at the rate of ten per cent per annum after delinquency; it shall be a lien upon all property in this State owned by the taxpayer upon whom it is imposed.

"The Commission, its attorneys, auditors and agents, shall at all times have access to the books, records, and returns of any taxpayer under Section 12 of this Article, relating to the mining or production of copper and copper ores, and shall have full power to compel obedience to the provisions of this Section, by attachment or other process.

"The Commission shall have power to appoint and pay auditors, accountants, agents and attorneys necessary to the enforcement and collection of the license taxes imposed by Section 12 hereof, and to the carrying out of any other constitutional or statutory duty imposed upon it, and may bring and defend actions at law or in equity requisite to the proper discharge of its duties.

"The license taxes and interest collected under Section 12 of this Article shall be used in defraying deficiencies and outstanding obligations of the state until the same have been paid; therefore they shall be deposited to the credit of the general fund of the State for the uses of such fund.

"The term 'person,' as used in Sections 12, 13 and 14 of Article IX, shall mean and include any individual, firm, copartnership, company, corporation, association, joint stock company, common law trust, business trust, syndicate, or other concern by whatsoever name, or however organized, found or created.

"Sections 12, 13 and 14 of Article IX are declared to be self-executing, and are intended to be carried out by the State Tax Commission, without legislative intervention which Commission is empowered to impose and promulgate all necessary rules and regulations in the premises, which rules and regulations imposed shall have the effect of law."

And the constitutional provision which it is claimed it violates is in the following language: Article 21, § 1: "* * * If more than one proposed amendment shall be submitted at any election, such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately."

It is contended that the proposed amendment is contrary to the provision quoted, in that, although in name but one amendment, it is in substance actually three or more.

[1-3] It is a cardinal axiom of interpretation of all written instruments that they are to be construed in the light of their purpose, and this is particularly applicable to Constitutions, which are by necessity general in their nature, and presumably intended to remain in force for a long period of time. It is therefore held that they are to be construed in the light of the exigencies and conditions which they are intended to meet and deal with. McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; Home Building & Loan Ass'n v. Blaisdell (Oct. Term, 1933) 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481. It was agreed by counsel for both plaintiff and defendant at the oral hearing of this case that there is no doubt the constitutional provision above quoted was intended to prevent the pernicious practice of "logrolling" in the submission of a constitutional amendment. This

so-called logrolling may be illustrated as follows: Three interested parties are desirous respectively of securing the enactment into law of three distinct propositions, A, B, and C. These propositions are so essentially dissimilar that it is obvious that the legislators, who must pass thereon, will probably be divided in their opinion as to their merit. Some of them may earnestly desire proposition A, while being opposed, though in a lesser degree, to B and C. Others consider the enactment of proposition B of paramount importance, while objecting to A and C, while the members of a third group are willing to sacrifice their convictions on A and B for the sake of securing C. The original framers of the three propositions, realizing this situation, place them all in one measure, so that a legislator must vote either yes or no on the measure as a whole. He is thus forced, in order to secure the enactment of the proposition which he considers the most important, to vote for others of which he disapproves. Such practices have been universally condemned by impartial students of public affairs, and yet they are notoriously prevalent in all Legislatures. Indeed, so true is this, that our Constitution permits the Governor to veto separate items of an appropriation bill, without rejecting the whole bill. Article 5, § 7, Constitution of Arizona. But, if these actions are evil in the Legislature, where they deal only with statutes, much more are they vicious when constitutional changes, far-reaching in their effect, are to be submitted to the voters. The principle involved is well summed up in the dissenting opinion of Justice Graves in State ex rel. v. Gordon, 223 Mo. 1, 122 S. W. 1008, 1018. While in that case Justice Graves was in the minority, in the later case of State v. Gordon, 268 Mo. 321, 188 S. W. 88, the majority opinion in the case first cited was expressly overruled and the reasoning of Justice Graves adopted. He said:

"* * * Propositions relative to the taxing power of the state, and propositions to be voted upon by the plain people, must be plainly stated, and in single and substantial form. Not only so, but they must be so stated as to avoid what has been denominated by the courts as 'logrolling' in the interest of a combined proposition, which would not occur in the interest of a single proposition. The courts in the administration of justice, and without any reference to constitutional mandates, have discovered that doubleness of propositions to be voted upon by the public was inducive of fraud, and that it was uncertain whether either of two or more propositions could have been carried by vote had they been submitted singly. To obviate this fraud upon the taxing power of the state this court, up to the present time, and excepting the present case, has consistently turned its face against doubleness of propositions and the frauds which are the necessary outgrowth thereof.

"However, before going to the holding of the courts of this state, it might be well to submit the general proposition of law resulting from the examination of all cases bearing upon the question. In 21 American and English Encyclopedia of Law (2d Ed.) 47, it is said: 'Two propositions cannot be united in the submission so as to have one expression of the vote answer both propositions, as voters might be thereby induced to vote for both propositions who would not have done so if the questions had been submitted singly.'

"This announcement of the general doctrine is not only in full accord with the cases in Missouri, but with all of the jurisdictions to which our attention has been called. And if we be called upon to assign a reason for this salutary rule, that reason would be that the taxing power of the state should be exercised with the utmost openness and fairness, and without opportunity for 'jockeying' and 'logrolling.' In other words, the courts of the country generally, in matters which go to the exercise of the taxing power of the state, have been exceedingly cautious to see that such power was exercised by a fair expression at the election held for such purpose. The question is not whether a constitutional mandate has been followed, but whether the proposition submitted is one which tended within itself and upon its face to induce 'jockeying' and 'logrolling' in order to carry a combined proposition. That such things may be done is apparent to all thinking minds. * * *"

There is and can be no disagreement as to the evil the constitutional provision was intended to prevent, and many states, recognizing that evil, have adopted provisions in their Constitution like ours in order to prevent it. The difficult question, however, is to determine what test shall be used to ascertain whether there are in reality several amendments submitted under the guise of one.

We have carefully examined all the cases cited by both counsel for the plaintiff and for the defendant. Apparently the first in point of time which lays down such a test is State v. Timme, 54 Wis. 318, 11 N. W. 785, 790. Therein the court said:

"* * * The learned counsel admits that the proposition to change from annual to biennial sessions is so intimately connected with

the proposition to change the tenure of office of members of the assembly from one year to two years, that the propriety of the two changes taking place, or that neither should take place, is so apparent that to provide otherwise would be absurd. And yet it is insisted that the two changes are two separate amendments within the meaning of the constitutional provision above quoted, and must be submitted separately. If they must be submitted separately, why must they? *Certainly they should either both be defeated or both adopted.* Why, then, should the people be permitted or compelled to vote upon each separately? Certainly no good could result from a separate submission which is not equally as well and better accomplished by submitting them together as one amendment; and the separate submission might result in the absurdity of the ratification of the one and the rejection of the other. This illustration is, to my mind, almost conclusive that no such intention was entertained either by the framers of the constitution or by the people who adopted it.

"We think amendments to the constitution, which the section above quoted requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other. * * *" (Italics ours.)

This general rule has been quoted approvingly innumerable times. We mention only a few of the cases which cite it: State v. Cooney, 70 Mont. 355, 225 P. 1007; State v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A. L. R. 731; Jones v. McClaughry, 169 Iowa, 281, 151 N. W. 210; Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008; State v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39; State v. Jones, 106 Miss. 522, 64 So. 241; People v. Prevost, 55 Colo. 199, 134 P. 129, 133; Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77; Lobaugh v. Cook, 127 Iowa, 181, 102 N. W. 1121, 1123; People v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34; Gabbert v. Chicago, R. I. & P. Ry. Co., 171 Mo. 84, 70 S. W. 891; State v. Herried, 10 S. D. 109, 72 N. W. 93; Winget v. Holm, 187 Minn. 78, 244 N. W. 331, 335; McBee v. Brady, 15 Idaho, 761, 100 P. 97; State v. Powell, 77 Miss. 543, 27 So. 927, 931, 48 L. R. A. 652; Mathews v. Turner, 212 Iowa, 424, 236 N. W. 412, 415. Many of them merely quote the language of State v. Timme, supra, or refer to it approvingly, but there are a number which go into the question more fully and elucidate and explain what is meant by propositions which "relate to more than one subject and have at least two distinct and separate purposes not dependent upon or connected with each other."

In the case of Mathews v. Turner, supra, the court says:

"It is argued that if the proposed amendment has 'but one object or purpose' it is valid, even though it may contain many different propositions, if they are related to said 'one object or purpose.' Such, however, is not the provision of section 2, article 10. It provides that if two or more amendments are submitted at the same election they shall be submitted separately, and this is true even though they may pertain to the same general object or purpose. *An entire Code of laws cannot be embodied in an amendment to the Constitution merely because said laws pertain to 'one object or purpose.'*

"By way of illustration, education of the youth of the state is 'one object or purpose.' A constitutional amendment would not be valid, however, which would declare that a schoolhouse shall be erected at every two miles upon certain described highways throughout the state, that schools shall be maintained a certain number of months of the year, that certain salaries shall be paid, that certain text-books shall be used, that directors shall operate the schools, that the cost of the buildings shall not exceed a named sum, and shall be paid from funds derived from taxation, from federal aid, and from fines. Could a court uphold such an amendment on the ground that it had 'one object and purpose,' namely, the education of the youth of Iowa? Under such a proposed amendment a voter might favor any one or more of the propositions embraced in the 'one object or purpose' of education and be opposed to others. It was to obviate just such a situation that section 2 of article 10 was adopted." (Italics ours.)

In Winget v. Holm, supra, the main opinion, written by one member of the court, was concurred in specially by the two remaining members who said that they agreed with the result, but that they felt "that we should make it plain that a multifarious proposition to amend the Constitution will not be sustained simply because, although there are several distinct 'alterations or amendments,' they will yet be held a unit solely because all, if adopted, will operate within one of the three great fields of governmental power—those of taxation, eminent domain, or police."

In State v. Powell, supra, it was said: "* * * Whether amendments are one or many must be solved by their inherent nature, —by the consideration whether they are separate and independent each of the other, so as that each can stand alone without the other, leaving the constitutional scheme symmetrical, harmonious, and independent on that subject, and not upon the mere blanketing of a name, such as 'amendments relating to the judicial department,' or 'amendments relating to the executive department' or to 'the legislative department.'"

And while in a later case the court reached a different conclusion on practically the same facts as to whether there was more than one amendment, yet the test applied was never changed.

In People v. Prevost, supra, the following language was used: "* * * In the Sours Case, it was determined that the Constitution does not require the submission of separate subjects, but only that each amendment be separately submitted, and that it is one amendment if the subjects are germane to the general subject of the amendment, or so connected with or dependent upon the general subject *that one is not desirable without the other*, even though other articles be incidentally affected or constructively amended, or amended by implication. * * *" (Italics ours.)

While in Lobaugh v. Cook, supra, the court, after considering the Timme Case, held: "* * * If the amendment has but one object and purpose, and all else included therein is incidental thereto, and reasonably necessary to effect the object and purpose contemplated, it is not inimical to the charge of containing more than one amendment. We do not understand counsel for appellant to question the rule as stated, save in insisting that the mending of the broken places in other parts of the Constitution shall be limited within the narrowest bounds of strict necessity, or, in their language, 'that an amendment may contain, in addition to the main proposition, such additional provisions as are absolutely necessary to mend any place broken by reason of the adoption of the main proposition, but that the power to mend the broken places would not authorize the reconstruction of such section, or the ingrafting upon it of any provision that should have the effect to do more than cure the ambiguity or inconsistency occasioned by it.' *That the necessity of the incidental change must exist, in order to justify its inclusion with the main proposition, we entertain no doubt.*" (Italics ours.)

Taking into consideration all of the cases cited, it is apparent to us that they agree in substance upon the principle to be used as a test, but differ widely as to the result reached in its application to particular cases. We think that principle, as explained by the cases from which we have quoted, may be restated as follows:

[4, 5] If the different changes contained in the proposed amendment all cover matters necessary to be dealt with in some manner, in order that the Constitution, as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended, and if, logically speaking, they should stand or fall as a whole, then there is but one amendment submitted. But, if any one of the propositions, although not directly contradicting the others, does not refer to such matters, or if it is not such that the voter supporting it would reasonably be expected to support the principle of the others, then there are in reality two or more amendments to be submitted, and the proposed amendment falls within the constitutional prohibition. Nor does the rule as stated unduly hamper the adoption of legitimate amendments to the Constitution. Such a document was presumably adopted deliberately, after careful preparation, as a harmonious and complete system of government. Changes suggested thereto should represent the free and mature judgment of the electors, so submitted that they cannot be constrained to adopt measures of which in reality they disapprove, in order to secure the enactment of others they earnestly desire.

[6] With this clarification of the test laid down in State v. Timme, supra, let us apply it to the proposed amendment. It is evident that there are at least three distinct propositions contained therein, no two of which are necessarily required for a proper operation of the third. On their face they have no direct relation *to each other*. Their only connection is that they are all embraced in a broader general subject, to wit, that of taxation. It is clear that the provision in regard to the method in which copper mines should be taxed is in no way necessary to or concerned with the method of taxation of public utility corporations, and it is equally clear that both of those propositions could be inserted in the Constitution without the slightest need of adopting the one establishing the tax commission as a constitutional body which in effect would be independent of the regular executive and legislative branches of the state govern-

ment in many particulars, and perhaps even of the judicial.

Looking at the proposition as reasonable men, we are of the opinion that the proposed amendment is a most glaring violation of the constitutional provision involved, in that it submits three separate propositions upon which each voter might, and many doubtless would, have widely different opinions, and in such a manner that they are compelled either to reject all three on account of one which they may consider vicious, or else to accept two provisions they disapprove to secure the adoption of one which meets their favor. Such an amendment is logrolling of the worst type, and violates both the spirit and the letter of the Constitution.

For the foregoing reasons, the judgment of the superior court of Maricopa county is affirmed.

ROSS, C. J., and McALISTER, J., concur.

YOUNG v. CARR.
No. 3422.

Supreme Court of Arizona.
Oct. 4, 1934.

1. Bills and notes ⇐49, 460

Accommodation maker of note is primarily liable and may be sued thereon without joinder of comaker (Rev. Code 1928, §§ 2361, 2479, 3732).

2. Bills and notes ⇐52

In suit against accommodation maker of notes, that check to comaker was cashed by comaker's attorney, who was also attorney for plaintiff, and that proceeds were delivered for safe-keeping to comaker's brother, who was also plaintiff's agent for bringing notes sued on into state, did not release accommodation maker (Rev. Code 1928, §§ 2361, 2421, 2479).

3. Bills and notes ⇐52

Rule that creditor's payment to debtor of money which may rightfully be retained to satisfy debt discharges surety does not apply to accommodation maker or other persons primarily liable on note (Rev. Code 1928, §§ 2361, 2421, 2479).

4. Bills and notes ⇐425

Statute providing how negotiable instruments may be discharged is exclusive (Rev. Code 1928, § 2421).

5. Parties ⇐51(4)

Accommodation maker may not require that person accommodated, but who did not sign note sued on, be made a party defendant (Rev. Code 1928, § 2353).

Appeal from Superior Court, Maricopa County; G. A. Rodgers, Judge.

Suit by Ella Carr against M. Jeanette Young. From a judgment for plaintiff, defendant appeals.

Affirmed.

Arthur L. Goodmon and James E. Nelson, both of Phœnix, for appellant.

Austin O'Brien, of Phœnix, and James A. Walsh, of Mesa, for appellee.

McALISTER, Judge.

Ella Carr brought suit against M. Jeanette Young on two promissory notes in both of which she was the payee. One of them was dated May 1, 1930, and obligated the makers, Harriet H. Carr and M. Jeanette Young, to pay $600.00 with six per cent. interest one year after date. The other was dated February 16, 1931, and bound the maker, M. Jeanette Young, to pay $200.00 with interest at six per cent. six months after date. By direction of the court the jury returned a verdict for the plaintiff for the full amount of both notes and from the judgment entered thereon this appeal has been prosecuted.

In her answer the defendant sets up three defenses: First, that she was an accommodation surety and the principal maker, Harriet H. Carr, who was a resident of Maricopa County, Arizona, a fact known to the plaintiff at the time, was not joined in the suit as a codefendant; second, that the plaintiff released the defendant from payment in this way; she had in her possession through her agent money belonging to the latter, the principal maker, and, instead of applying it to the payment of the notes, allowed it to pass from her to the principal maker, Harriet Carr; and, third, that Harriet Carr, the principal debtor, stated to her that the notes had been paid.

The defendant (we will refer to the parties as they appear in the Superior Court) makes three assignments of error but relies upon two propositions of law. The first is that

as these matters are concerned, is identical with that of the code of 1928. We think it is clear that the legislature used the word "void" in our annulment statute as referring to marriages which were subject to ratification or disaffirmance by the injured party, as well as those which could not be ratified, including specifically in 1887, as a ground for annulment, marriages of the class to which that of the beneficiary belongs, but that in 1901 it determined, for reasons best known to itself, that physical impotency should no longer be a ground for annulment, but rather for divorce.

[12, 13] We hold, therefore, that it is now the law that while all other forms of voidable marriages are subject to annulment, physical incompetency existing at the time of the marriage and continuing to the time of suit is not a ground of annulment, but of divorce only. As to what reasons the legislature had for this change, we cannot say, but it is very evident that this was its intention, and the intent of the legislature must govern. Such being the case, the cause upon which the beneficiary herein secured an annulment of her marriage was not one authorized by law, and the court, of course, had no jurisdiction to render such a judgment. It necessarily follows that the beneficiary is still the wife of Ray Earl Menefee, and is not entitled to set aside the lump settlement which was made by her with the full knowledge and approval of all the parties, including the respondent herein.

The award is set aside and the case remanded for further action.

ROSS, C. J., and McALISTER, J., concur.

STATE et al. v. ANGLE.

No. 4078.

Supreme Court of Arizona.

June 19, 1939.

1. Pleading ⇐214(1)

Demurrers admit substantial allegations of complaint.

2. Master and servant ⇐69

Capitol gardeners, janitors, watchmen, and engineer were engaged in "mechanical" or "manual labor" within protection of minimum wage law, notwithstanding that their tenure and total annual compensation were not uncertain or fluctuating. Rev.Code 1928, § 1350, as amended by Laws 1933, c. 12, § 1.

[Ed. Note.—For other definitions of "Manual Labor" and "Mechanical Labor," see Words & Phrases.]

3. Master and servant ⇐69

Whether workman is engaged in "mechanical" or "manual labor" within minimum wage law depends on generally accepted character of any given type of work, and not on whether labor performed by particular individual has all the usual conditions of the type, and it is the general custom and not the particular instance which determines the classification. Rev.Code 1928, § 1350, as amended by Laws 1933, c. 12, § 1.

4. States ⇐132

The principal purpose of financial code of 1922 was to prevent the incurring of any indebtedness in excess of the amount appropriated by the Legislature. Laws 1922, c. 35.

5. Statutes ⇐159

A later valid act of Legislature supersedes all previous acts with which it is in conflict, whether or not it expressly repeals the earlier provisions.

6. States ⇐131

A "general appropriation bill" can contain nothing but the appropriation of money for specific purposes, and such other matters as are merely incidental and necessary to seeing that the money is properly expended for that purpose only, and any attempt at any other legislation in the bill is void.

[Ed. Note.—For other definitions of "Appropriation Bill," see Words & Phrases.]

7. States ⇐131

An attempt in a general appropriation bill to repeal prior general legislation is invalid.

8. States ⇐132

A provision in the financial code prohibiting state indebtedness in excess of money appropriated unless expressly authorized by law was superseded by subsequently enacted general legislation fixing minimum wages for manual or mechanical labor, in so far as the two were in conflict. Rev.Code 1928, § 2618, and § 1350, as amended by Laws 1933, c. 12, § 1.

9. States ⇐132

A provision in the minimum wage law requiring that certain wages be paid for

manual or mechanical labor "expressly authorized" payment of such wages within statute prohibiting state indebtedness in excess of money appropriated unless "expressly authorized" by law. Rev.Code 1928, § 2618, and § 1350, as amended by Laws 1933, c. 12, § 1.

[Ed. Note.—For other definitions of "Authorized by Law," see Words & Phrases.]

10. States ⇐53

Where appropriation for capitol gardeners, janitors, watchmen and engineer is exhausted, board of directors of state institutions can discharge such workmen. Laws 1937, c. 73, § 1, subd. 18.

11. Master and servant ⇐69
States ⇐132

The employment of capitol gardeners, janitors, watchmen and engineer by board of directors of state institutions after enactment of appropriation law providing less compensation than that fixed by general minimum wage law was "authorized by law" within statute prohibiting state indebtedness in excess of money appropriated unless expressly "authorized by law," and hence state was legally indebted to such employees for difference between amount paid them under appropriation law and amount fixed by minimum wage law. Laws 1937, c. 73, § 2, and § 1, subd. 18; Rev.Code 1928, § 2618, and § 1350, as amended by Laws 1933, c. 12, § 1.

12. Statutes ⇐224

Where a statute is ambiguous, a subsequent amendment may be considered in construing statute.

13. Statutes ⇐190

A statute which is plain and unambiguous in its language must be construed as written unless it is impossible or unworkable in its nature.

14. Constitutional law ⇐67

In determining whether a claim should be allowed against a municipality, the Supreme Court is not to be controlled by equitable considerations, but must declare the law as it is.

ROSS, C. J., dissenting.

Appeal from Superior Court, Maricopa County; G. A. Rodgers, Judge.

Action by C. A. Angle, for himself and as assignee, against the State of Arizona and others to recover judgment for the difference between the amount paid to him and his assignors as salaries authorized and appropriated for that purpose by subdivision 18 of section 1 of chapter 73 of the regular session laws of 1937, and the minimum wage fixed by the Arizona highway commission under the authority of section 1350, Rev.Code 1928, as amended by section 1 of chapter 12 of the regular session laws of 1933. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Joe Conway, Atty. Gen., and Charles Bernstein, Asst. Atty. Gen., for appellants.

T. E. Scarborough and George M. Sterling, both of Phoenix, for appellee.

LOCKWOOD, Judge.

C. A. Angle, plaintiff herein, suing for himself and as assignee, seeks to recover judgment against the state for the difference between the amount paid to him and his assignors as salaries authorized and appropriated for that purpose by subdiv. 18 of section 1 of chap. 73 of the regular session laws of 1937, and the minimum wage fixed by the Arizona highway commission under the authority of section 1350, R.C.1928, as amended by sec. 1, of chap. 12 of the regular session laws of 1933, which reads, so far as material, as follows:

"*Hours Of Labor On Public Work; Wages.* Eight hours, and no more, shall constitute a lawful day's work for all persons doing manual or mechanical labor employed by or on behalf of the state, or of any of its political subdivisions except in an extraordinary emergency, in time of war, or for the protection of property or human life; in such cases the persons working to exceed eight hours each day shall be paid on the basis of eight hours constituting a day's work. Not less than the minimum per diem wages fixed by the state highway commission for manual or mechanical labor performed for said commission or for contractors performing work under contract with said commission, shall be paid to persons doing manual or mechanical labor so employed by or on behalf of the state or of any of its political subdivisions. * * *"

The complaint contains seventeen causes of action, and each one is substantially the same except as to the name of the assignor, the amount of money claimed due, and the character of the labor performed by the latter.

Demurrers to the complaint were overruled, and the defendant electing to stand thereon, judgment was entered in favor of plaintiff, whereupon this appeal was taken.

[1] The demurrers necessarily admit the substantial allegations of the complaint, and we, therefore, state the facts as follows. Causes of action numbers 1, 2, 9, 12 and 15 are for manual labor as watchmen at the capitol building. Causes of action numbers 3, 5, 6, 10, 13, 14, 16 and 17 are for manual labor as janitors. Cause of action number 7 is for manual labor as an elevator operator, and cause of action number 11 is for labor as an engineer at the same place. Causes of action numbers 4 and 8 are for manual labor as gardeners on the capitol grounds.

The highway commission, acting under the authority of section 1350, supra, as amended, had, previous to August 1, 1937, fixed a minimum wage for state employees of the class to which plaintiff and his assignors belonged, and on that date had changed such wage. The general appropriation bill adopted by the thirteenth legislature, in March, 1937, appropriated money in subdiv. 18 thereof, in part, as follows:

"Capitol Buildings and Grounds.

	For the 26th Fiscal Year	For the 27th Fiscal Year
Salaries and Wages:		
* * * * * * * * *		
Watchman (3 at $1,350.00 each)	$4,050.00	$4,050.00
Watchman—Periodic	168.75	168.75
Engineer	1,920.00	1,920.00
Elevator Operator	1,080.00	1,080.00
* * * * * * * * *		
Janitors (6 at $972.00 each)	5,832.00	5,832.00
Janitor—Periodic	283.50	283.50
* * * * * * * * *		
Labor—Periodic	4,218.75	4,218.75"

Plaintiff and his assignors entered the service of the state at various times before January 15, 1938, and from and after their employment and during the 26th fiscal year, up to June 15, 1938, were paid for their services upon the basis of the amount thus above appropriated as being the annual salary intended by the state to be paid for services of the character performed by plaintiff and his assignors, to-wit, $1,350 per year for watchmen, $972 per year for janitors and gardeners, $1,080 per year for elevator operator, and $1,920 per year for engineer. The amount sued for in each cause of action is equal to the difference between the amount fixed in subdiv. 18 as the pay which would be due at the annual rate above set forth, and that which would be due if wages were paid on the basis fixed by the state highway commission. No formal claim for the difference was made until June 15, 1938.

The question before us is whether plaintiff and his assignors were entitled to be paid at the rate fixed by the annual appropriation bill for the various classes of services rendered, or at the rate fixed by the highway commission, under section 1350, supra, as amended.

It is the contention of plaintiff that this last section, being general legislation, fixes definitely the wage which must be paid to state employees of the class referred to therein, and that the failure by the legislature to appropriate a sufficient amount in the general appropriation bill to pay the wages for their services cannot affect the right of plaintiff to recover the minimum wages fixed by the highway department under the section.

It is the position of defendant, (a) that the services rendered were not mechanical or manual labor within the meaning of section 1350 (b) that section 2618, R.C.1928, which reads so far as material as follows: "No officer or state agency shall contract any indebtedness on behalf of the state, nor assume to bind the state in excess of the money appropriated, unless expressly authorized by law." and which is a part of the state financial code, was expressly made a part of the appropriation act of 1937, in the following language: "Section 2. The appropriations herein made are subject to the provisions of the State Financial Code." and being later legislation than the minimum wage law, repeals the latter as far as plaintiff's claims are concerned, so that the appropriation made in the general appropriation bill of 1937 was, in effect, a limitation upon the indebtedness which could be incurred by the defendant for the purposes set forth in the act, and that any attempt to create a debt in excess of that amount was void. We shall consider these defenses in their order.

[2] It is urged that in the case of State v. Ash, Ariz., 87 P.2d 270, 273, we have, in effect, held that services of the nature set up by plaintiff are not mechanical or manual labor. With this contention, we cannot agree. If there be such a thing as manual labor, we think the work of gardeners, janitors and watchmen certainly falls within that classification, while the work of an engineer is undoubtedly mechanical

labor. In the Ash case we said, referring to sec. 1350, supra:

"* * * Its purpose was to protect the man whose work was that of a mechanic or manual laborer in the usually accepted sense of these words, and whose tenure was, therefore, normally so limited and uncertain in duration that he was usually paid wages by the day rather than salary by the month or year, and whose total annual compensation was generally uncertain and fluctuating.

"This does not mean, however, that the minimum wage law does not apply to employees whose occupation is, within the generally accepted sense of the words, truly mechanical or manual labor, merely because it may happen that for some reason or another their compensation may have been fixed on an annual or monthly basis rather than a per diem. The method of compensation is but one of the tests used to determine the real issue, and it cannot be used to evade the law."

[3] While it is true that under the general appropriation bill the tenure of the plaintiff and his assignors was fairly certain and their total annual compensation was not uncertain nor fluctuating, yet work of the character performed by them is ordinarily both fluctuating in tenure and uncertain in compensation, and the classification set up in sec. 1350, supra, refers to the generally accepted character of any given type of work, and is not affected by the fact that labor performed by a particular individual does not have all the usual conditions of the type. One gardener may happen to retain his position for life, while another may be employed but for a day, but they are both manual laborers, for it is the general custom, and not the particular instance, which determines the classification.

We are of the opinion that plaintiff and his assignors were all within sec. 1350, supra, as amended, as manual or mechanical laborers.

[4] But does sec. 2618, supra, change the situation? It was originally adopted as part of the financial code of 1922, (Laws 1922, c. 35). One of the principal purposes of that code was to prevent the incurring of any indebtedness in excess of the amount appropriated by the legislature, and the only exception thereto allowed by the section was when an officer was expressly authorized by law to exceed the appropriation. The intent and the value of the rule thus laid down cannot be questioned. It applies by its terms to all appropriations made by the legislature from that time on, unless suspended or repealed by the authority which adopts it. This provision was reenacted in the code of 1928.

[5] In chapter 48 of the regular session laws of 1933, the legislature, by a special act, did suspend the application of a part of the financial code for the fiscal years 1933–1935, but at the end of the specified two years the code automatically resumed its full force. It is, however, the unquestioned rule that a later valid act of the legislature supersedes all previous acts with which it is in conflict, whether it expressly repeals the earlier provisions or not. State Board of Health v. Frohmiller, 42 Ariz. 231, 23 P.2d 941; City of Bisbee v. Cochise County, 44 Ariz. 233, 36 P.2d 559. What then is the latest legal expression of the legislative will on the subject?

[6-10] A number of cases have come before us raising the question as to how far the biennial appropriation bill can contain in its provisions legislation other than the mere appropriation of money for the purposes set forth therein. Carr v. Frohmiller, 47 Ariz. 430, 56 P.2d 644; Sellers v. Frohmiller, 42 Ariz. 239, 24 P.2d 666; State Board of Health v. Frohmiller, supra; Andrews v. State, Ariz., 90 P.2d 995, decided May 29, 1939, but not yet reported in State reports. After a careful review of the cases, we think the rule laid down thereby may be stated as follows. The general appropriation bill can contain nothing but the appropriation of money for specific purposes, and such other matters as are merely incidental and necessary to seeing that the money is properly expended for that purpose only. Any attempt at any other legislation in the bill is void. An attempt, therefore, to repeal the general legislation set up in sec. 1350, supra, in the general appropriation bill would necessarily be invalid and of no effect. Since sec. 1350, supra, as amended in 1933, was the latest general legislation on the subject, it supersedes sec. 2618, supra, in so far as the two are in conflict. We see, however, no conflict in the two. In sec. 2618 the state officers are specifically authorized to contract any indebtedness, even though in excess of the appropriation, if it be expressly authorized by law. It would seem that a direction by the legislature to pay certain wages to be fixed by the highway commission is not only an express author-

ization but a specific order to all public officers to pay such wages.

[11] A somewhat analogous situation arose in the case of O'Neil v. Goldenetz, Ariz., 85 P.2d 705, 708, and therein we said: "It is quite true that notwithstanding the provision in chapter 79, supra, which authorized the printing of the rules in question, when the commission found that its funds available for that purpose had been exhausted, it could have declined to order the printing or to ratify in any manner an unauthorized order therefor, and it could not have been compelled to act, for a public officer cannot be compelled to incur official obligations when no appropriation is available for that purpose. But this does not mean that if an obligation, which is authorized by law, has been incurred and there are no funds appropriated and available for its payment, that the claim is illegal and must be rejected."

If, therefore, when the board of directors of state institutions found that the appropriation for services of the character set forth in subdiv. 18, supra, was exhausted, they had discharged plaintiff and his assignors for that reason, no legal exception could have been taken to their action. But having continued to employ them to perform services which were certainly intended by the legislature to be continued during the full year, we think that the employment was "authorized by law", and since the latest general law on the subject fixed the wages to be paid such employees at a certain figure, the state is legally indebted to them in the amount sued for. O'Neil v. Goldenetz, supra.

It is urged that the legislature certainly never contemplated a situation like the present one when it enacted the minimum wage law, and that this is evidenced by the fact that in chapter 42 of the regular session laws of 1939 it again amended section 1350, supra, by adding thereto the following provisions:

"(b) Not less than the minimum per diem wage fixed by the Arizona state highway commission for manual or mechanical labor performed for said commission, or for contractors performing work under contract with said commission, shall be paid to any person doing manual or mechanical labor, employed by or on behalf of the state or any political subdivision thereof. The commission shall determine and publish such minimum per diem wage not later than April 15 of each odd numbered year.

"(d) This section shall not be construed to apply to any position or employment the salary or wage for which is determined by the state general appropriation therefor."

[12-14] Were the provisions of section 1350, supra, as it existed in 1933, ambiguous in their nature, we might well consider the subsequent act of the legislature as throwing light on its intention in 1933, but the section is plain and unambiguous in its language, and when such is the case we must construe it as written, unless it is impossible or unworkable in its nature. Palmcroft Dev. Co. v. Phœnix, 46 Ariz. 200, 49 P.2d 626, 103 A.L.R. 802; State Tax Com. v. Shattuck, 44 Ariz. 379, 38 P.2d 631; Automatic Reg. M. Co. v. Pima County, 36 Ariz. 367, 285 P. 1034; Industrial Com. v. Price, 37 Ariz. 245, 292 P. 1099.

That it never occurred to the legislature that the minimum wage law authorized and required the payment of wages greater than those provided in the general appropriation bill for certain state employees may be true. That the action of plaintiff and his assignors in accepting without question compensation on the basis of the annual appropriation bill for many months, and then claiming the greater amount to which they were entitled by the terms of section 1350, supra, may be characterized as not according to the best ethical standards, is at least arguable. But this court must declare the law as it is, leaving the question of whether equity requires that an appropriation shall be made to pay, to the judgment of the legislature.

We are compelled to hold, as a matter of law, that the defendant State of Arizona is legally indebted to the plaintiff in the amount set forth in the judgment of the trial court, and such judgment is necessarily affirmed.

McALISTER, Judge (Specially concurring).

I concur in the opinion of Judge LOCKWOOD. It is well stated and, in my judgment, reaches the correct conclusion as to the law of the case. My only reason for making this special statement is that I do not feel that there is under the facts any occasion even to question the ethical or moral right of the plaintiff and his assignors to recover from the state, if they

can, what the opinion so clearly shows they are entitled to as a matter of law.

It is true that in March, 1937, the Thirteenth Legislature appropriated the amount it intended the plaintiff and his assignors to receive each month, during the two-year period beginning July 1, 1937; that on August 1 thereafter the highway commission raised the minimum per diem wages to be paid manual and mechanical workers employed by the state or any of its political subdivisions, among whom were the plaintiff and his assignors; and that, instead of claiming the increased amount from that time on, they continued for months to accept that given them in the general appropriation bill and only a short time before the one-year period of limitation had run against any portion of the increased wage filed suit therefor. The ethics of their act in asking for the additional sum, after accepting the lesser amount, is said to be "arguable." To my mind, their action in this respect is not questionable from an ethical, moral or any other standpoint. They were entitled legally to the additional sum but they realized that if it were paid them each month it would mean that the appropriation would be exhausted before the year expired and this would leave no funds with which to continue the work for the remainder of the year, in which event they would either be discharged or compelled, if they worked, to run the risk of the legislature's taking care of the amount due them at its next regular session. With this situation confronting them, there is no reason whatever why they should not have waited as long as the statute of limitations permitted to initiate proceedings to collect the increase.

And besides, this course rendered possible the doing of the work they were employed to perform and at the same time enabled them to live and receive for their labor the full amount the minimum wage law intended them to have, provided, it is true, the lawmaking body should later decide that the state should live up to the principle the Eleventh Legislature established as the state's public policy when, by passing chapter 12, Session Laws of 1933, it amended section 1350, Revised Code of 1928, in such a way as to provide that all those performing manual or mechanical labor for the state or any of its political subdivisions should be paid at least the minimum per diem wages fixed by the highway commission for that class of work.

The fact that the legislature, in making the appropriation in March, 1937, for the care of the capitol building and grounds, may not have thought any change in the wage rate made by the highway commission would affect the wages of those employed for this work during the biennium which that appropriation covered is wholly immaterial. It had given that commission the power to fix the minimum per diem to be paid those performing manual or mechanical labor for the state or any of its political subdivisions and made the wages so fixed, whether an increase or decrease, binding upon the employer and immediately effective. This being true, it became the duty of the officer or officers controlling the employment to pay the new wage from the day it was fixed by the commission and of plaintiff and his assignors to work for no less, City of Glendale v. Dixon, 51 Ariz. 206, 75 P.2d 683, but the officers did not do this because the appropriation was insufficient and the plaintiff and his assignors, though anxious to receive the increased amount, did not insist on its being paid them for the reason just stated and perhaps for the further reason that they were somewhat fearful that doing so might to some extent jeopardize their jobs. Under these circumstances it is, to my mind, unthinkable that the action of plaintiff and his assignors in seeking to recover the amount the law says they are entitled to should be characterized as "arguable," from an ethical, moral or any other standpoint. The fact that they accepted the lessor amount until the one-year limitation had almost run against the additional sum in order that the appropriation might not be exhausted before the end of the year and their continuance in their jobs rendered doubtful does not, as I see it, furnish any more ground for questioning their action, morally or ethically, than it does legally.

ROSS, Chief Justice (dissenting).

I am very sorry not to be able to agree with the other members of the court as to the disposition of this case. It seems to me the question for decision is, Which is the correct rule for determining the compensation of employees of "the capitol building and grounds" for the fiscal years 1937–1938 and 1938–1939, the one announced by the legislature or the one under the minimum wage law?

The capitol building and grounds are under the charge and control of the board

of directors of state institutions. Section 2918, Revised Code of 1928. The legislature has not by any provision of law designated the number and kind of employees for the capitol building and grounds but has left that, under the provisions of sections 62 and 2922, Id., to said board. The legislature, presumably upon a list of such employees, together with a schedule for salaries and wages to be paid them, furnished by the board, on March 23, 1937, provided in the general appropriation bill (Chapter 73, Laws of 1937) as follows: "Section 1. The following sums herein set forth are hereby appropriated for the fiscal years beginning July 1, 1937, and ending June 30, 1938, hereinafter designated as the 26th Fiscal Year, and beginning July 1, 1938, and ending June 30, 1939, hereinafter designated as the 27th Fiscal Year, for the several purposes and objects as hereinafter specified, * * *."

Here follow 74 subdivisions of section 1, subdivision 18 being as follows:

"Subdivision 18. Capitol Buildings and Grounds.

	For the 26th Fiscal Year	For the 27th Fiscal Year
Salaries and Wages:		
Salary-Custodian	$ 2,400.00	$ 2,400.00
Watchman (3 at $1,350.00 each)	4,050.00	4,050.00
Watchman—Periodic	168.75	168.75
Engineer	1,920.00	1,920.00
Elevator Operator	1,080.00	1,080.00
Maid	972.00	972.00
Head Gardener	1,620.00	1,620.00
Janitors (6 at $972.00 each)	5,832.00	5,832.00
Janitor—Periodic	283.50	283.50
Porter	1,455.00	1,455.00
Labor—Periodic	4,218.75	4,218.75
Total Salaries and Wages	$24,000.00	$24,000.00
Operation	10,000.00	10,000.00
Repairs and Replacements	1,200.00	1,200.00
Total Appropriation	$35,200.00	$35,200.00

$70,400.00."

These are the sums the board of directors of state institutions may expend during the fiscal years 1937–1938 and 1938–1939 for the objects and purposes named. Such board may not expend or contract any sum or sums, as I view it, in excess of these appropriations.

As I understand it, the board of directors of state institutions employed and paid the help, including plaintiff and his assignors, for the capitol building and grounds in accordance with the appropriation, which items of course were considered by the state tax commission in fixing the rate of taxes for the biennium 1937–1938 and 1938–1939.

In August, 1937, the state highway commission, in disregard of the items of the budget for state expenses, raised hourly wages of such employees to 62½¢. The plaintiff and his assignors accepted the wages or salaries as fixed by the legislature and thereafter sued the state for the difference, amounting to $6,311.28, and on this sum they ask 6% from June 21, 1938.

The legislature is the body that makes the laws. It created the highway commission and gave it all the powers it possesses. The legislature can take from the commission any power it has given it. It may do this directly or indirectly. While the legislature has said the wage standards fixed by the highway commission shall be paid certain employees of the state and its subdivisions, that standard cannot be substituted for a salary or wage fixed by the legislature itself.

To allow a recovery in this case is to ignore the legislative intent as expressed in the general appropriation bill. An intent clearly expressed in such bill is just as enlightening and binding as if expressed in any other legislation. As before said, the plaintiff and his assignors were appointed or employed under the provisions of sections 62 and 2922, supra. Section 62 will bear quotation in full. It reads:

"§ 62. *Deputies; employees; salaries.* Every state officer, board or commission may appoint deputies, if authorized by law, and may appoint assistants, clerks, and employees for the prompt discharge of the duties of the office. *No salary or compensation, however, shall be paid unless the same is authorized in the appropriation for that office, board or commission. The salaries and compensation of all deputies, assistants, clerks and employees shall be in the amount as fixed in the appropriation for that office in the general appropriation bill.*" (Italics ours.)

This section has not been repealed or amended. It stands as an expression of the legislative intent today as much so as it did when it was passed. It was suspended for two years. See State Board of Health v. Frohmiller, 42 Ariz. 231, 23 P.2d 941). According to such section, salaries and compensation of plaintiff and his assignors is the "amount as fixed in the appropriation for that office in the general appropriation bill." Under such section, the board of directors of state institutions is not

permitted to pay out for the capitol building and grounds any sum other than the appropriation made therefor.

Another straw indicating clearly the intention of the lawmaking body is found in section 2 of the 1937 general appropriation bill reading: "Section 2. The appropriations herein made are subject to the provisions of the State Financial Code. * *"

Section 2618, Revised Code of 1928, part of the Financial Code, provides that "* * * No officer or state agency shall contract any indebtedness on behalf of the state, nor assume to bind the state in excess of the money appropriated, unless expressly authorized by law. Amounts paid from the appropriations for personal service of any officer or employee of the state shall be full payment for all services rendered between the dates specified on the pay-roll and no additional sum shall be paid to such officer or employee. * *"

The reference in the general appropriation bill of 1937 to the Financial Code expresses the legislative intent, wish and desire, and that is, or should be, the controlling factor so far as this court is concerned. As we have seen, the act of the highway commission in August, 1937, fixing wages at 62½¢ per hour could not possibly set aside the act of the legislature fixing a different compensation for employees of the capitol building and grounds. It is true the minimum wage statute quoted by Judge LOCKWOOD'S opinion says not less than the wages fixed by the highway commission shall be paid certain kinds of employees of the state, but that is a general rule. It cannot prevail against an act of the legislature specifically fixing wages and salaries of employees.

The legislature has said and done everything it can to keep officers and employees from exceeding budgets, which are regularly prepared by the different officers, agencies, boards and commissions of the state under law for the protection of the taxpayers, and I do not see myself how we can disregard that legislation. I believe the legislature should still "hold the purse strings."

The STATE of Arizona, Appellant, v. Arthur RALSTON, Appellee.
No. 4077.

Supreme Court of Arizona.
June 19, 1939.

Appeal from Superior Court, Yavapai County; Richard Lamson, Judge.

Joe Conway, Atty. Gen., and Charles Bernstein, Asst. Atty. Gen., for the State.

O'Sullivan & Morgan, of Prescott, for appellee.

LOCKWOOD, Judge.

It has been stipulated by the parties to this action that the questions of law arising on this appeal are the same as those involved in the case of State of Arizona, Guy M. Jackson, Secretary of Board of Directors of State Institutions, and Ana Frohmiller, State Auditor, Appellants, v. C. A. Angle, Appellee, Ariz., 91 P.2d 705, and that judgment shall be entered herein in accordance with the opinion and decision of the court in the case last cited.

The judgment of the superior court of Yavapai County is, therefore, affirmed.

ROSS, C. J., and McALISTER, J., concur.