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Resign to Run: A Qualification for State Office or a New Theory of Abandonment?

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unconstitutional as violative of the equal protection clause of the fourteenth amendment. "The differences between the interests of property owners and the interests of nonproperty owners are not sufficiently substantial to justify excluding the latter from the franchise."[28]

Though real property owners may have a somewhat different interest than that of nonproperty owners in the issuance of general obligation bonds,[29] the existence of this difference is no basis for assuming that nonproperty owners will not be substantially affected by the outcome of the election. Nonproperty owners will in effect also be paying a portion of the taxes to finance the general obligation bonds through higher rents and prices for goods and services.[30]

In the author's opinion, the effect of the instant case will be to eliminate property ownership limitations on the right to exercise the voting franchise. The question posed in *Kramer* and *Cipriano* appears to be resolved. Limiting the franchise to those primarily interested is *not* a compelling interest because "when all citizens are affected in important ways by a governmental decision . . . the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise."[31] The United States Supreme Court has yet to allude to a situation in which limiting the voting franchise to a certain class of voters might further a compelling state interest. Furthermore, when applying the stricter "valid state interest" test to determine the constitutionality of voter qualifications, most classifications will inevitably fall since the excluded class of voters can usually show an interest in any election and that they will be affected to some degree by the outcome.

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RESIGN TO RUN: A QUALIFICATION FOR STATE OFFICE OR A NEW THEORY OF ABANDONMENT?

The plaintiff, a Florida Circuit Judge whose term did not expire for three years, intended to run for the office of Justice of the Florida Supreme Court. He was informed by the Florida Secretary of State, that

28. City of Phoenix v. Kolodziejski, 399 U.S. 204, 209 (1970).

29. General obligation bonds may be described as a lien on property within the municipality since the issuers must levy sufficient taxes to service the bonds.

30. Several reasons were set out by the Court to show how non-property holders are affected by the outcome of general obligation bond elections:

a. All residents of Phoenix are affected by this election since it is to finance public facilities;

b. Although property taxes are initially paid by property owners, this expense is passed on to tenants in higher rents and prices; and

c. Although Arizona law calls for property taxes to service general obligation bonds, other revenues are legally available and will probably be used.

31. City of Phoenix v. Kolodziejski, 399 U.S. 204, 209 (1970).

unless he submitted an irrevocable resignation from his office of Circuit Judge, ten days before the date of qualifying, the Secretary would reject his qualification papers for the office of Justice of the Supreme Court. The plaintiff, however, wished to retain his present office in the event that his quest for a seat on the Florida high court should be unsuccessful. He therefore brought a suit for declaratory judgment, contending that the Florida "resign-to-run" law[1] was unconstitutional in that it imposed an additional qualification upon a constitutionally created office. The trial court found section 99.012(2), (3), & (4) of the 1970 Florida Statutes to be constitutional. On appeal to the Supreme Court of Florida, *held*, affirmed: The statute does not relate to the qualifications one must possess in order to hold office, but merely the conditions under which a person may become eligible to become a candidate. *Holley v. Adams*, 238 So.2d 401 (Fla. 1970).

As early as 1934, the Supreme Court of Florida proclaimed that when the state constitution creates an office and names the requirements of eligibility therefor, the legislature has no authority to create additional qualifications for that office.[2] The legislature may establish and modify qualifications for only those offices which it has the power to create.[3] Speaking for a unanimous court, Chief Justice Davies not only laid down the general rule for Florida but also provided its first exception. The Florida Constitution[4] had created the office of County Surveyor without prescribing any qualifications and therefore the legislature could enact a statute[5] which required the registration of all surveyors as a police power

1. (2) No individual may qualify as a candidate for public office who holds another elective or appointive office, whether state, county or municipal, the term of which or any part thereof runs concurrent with the term of office for which he seeks to qualify without resigning from such office not less than ten (10) days prior to the first day of qualifying for the office he intends to seek. Said resignation shall be effective not later than the date upon which he would assume office, if elected to the office to which he seeks to qualify, or the expiration date of the term of the office which he presently holds, or the general election day at which his successor is elected, whichever occurs earliest. With regard to elective offices said resignation shall create a vacancy in said office thereby permitting persons to qualify as candidates for nomination and election to that office, in the same manner as if the term of such public officer were otherwise scheduled to expire; or, in regard to elective municipal or home rule charter county offices, said resignation shall create a vacancy which may be filled for the unexpired term of the resigned officer in such manner as provided in the municipal or county charter. This does not apply to political party offices.

(3) Any incumbent public officer whose term of office or any part thereof runs concurrent to the term of office for which he seeks to qualify and who desires to resign his office pursuant to the provisions of this section shall execute an instrument in writing directed to the governor irrevocably resigning from the office he currently occupies. The resignation shall be presented to the governor with a copy to the department of state. The resignation shall become effective and shall have the effect of creating a vacancy in office as provided herein, and the public officer shall continue to serve until his successor is elected or the vacancy otherwise filled as provided in subsection (2).

(4) Nothing contained in subsections (2) and (3) shall relate to persons holding any federal office.

FLA. STAT. § 99.012(2), (3), (4) (Supp. 1970).

2. State v. Ward, 117 Fla. 585, 158 So. 273 (1934).

3. *Id.* at 586, 158 So. at 274.

4. FLA. CONST. art. 18, § 10 (1885).

5. Fla. Laws 1931, ch. 15657.

measure designed to regulate a public profession. In *State v. Ward*,[6] the statute was held to be a reasonable exercise of the legislature's power over public professions because it established

> *certain reasonable standards* of professional fitness for those persons otherwise qualified who aspire to hold particular offices implying some additional qualification in the nature of a professional or technical fitness or training to be possessed by the office holder. . . .[7]

Eighteen years after *Ward*, the Supreme Court of Florida was again called upon to decide the power of the legislature to impose additional qualifications upon a constitutional office.[8] The legislature had enacted a school code,[9] part of which required candidates for the office of Superintendent of Public Instruction to hold a valid Florida Graduate Teacher's Certificate.[10] However, the constitution never mentioned any such requirement or qualification for the office.[11] The court agreed that it might be desirable to have certain educational, physical, mental, and moral qualifications definitely prescribed for the office of County Superintendent of Public Instruction, and conceeded that such qualifications would very likely improve the efficiency of the educational system. However, the court noted that the County Superintendent of Public Instruction is not merely an employee, but that he is a constitutional officer and, if the qualifications for this office prescribed by the legislature conflict with those prescribed by the state constitution, the statute prescribing those qualifications must be declared invalid.[12] The constitution prescribes in no uncertain terms that certain persons are disqualified to hold certain constitutional offices, such as, Governor,[13] Members of the Legislature,[14] Justices of the Supreme Court and Judges of the Circuit and Criminal Courts.[15] The constitution further excludes from the offices it creates all persons convicted of certain high crimes and misdemeanors.[16] According to the court, these enumerated qualifications were to be taken as exclusive of all other criteria, whether in the affirmative or negative.

> These plain and unambiguous specifications of disabilities exclude all others unless the Constitution provides otherwise. The effect of this declaration in the Constitution that certain offices are not qualified carries with it the necessary implication that all others are qualified.[17]

6. 117 Fla. 585, 158 So. 273 (1934).
7. State v. Ward, 117 Fla. 585, 586, 158 So. 273, 274 (1934) (emphasis added).
8. Thomas v. State, 58 So.2d 173 (Fla. 1952).
9. FLA. STAT. §§ 230.25, 231.17, 231.20, 231.24 (1951).
10. FLA. STAT. § 230.25 (1951).
11. FLA. CONST. art. 8, § 6 (1885).
12. Thomas v. State, 58 So.2d 173, 175 (Fla. 1952).
13. FLA. CONST. art. 4, § 3 (1885).
14. FLA. CONST. art. 3, §§ 4, 7, 8 (1885).
15. FLA. CONST. art. 5, § 3 (1885).
16. FLA. CONST. art. 6, § 5 (1885).
17. Thomas v. State, 58 So.2d 173, 185 (Fla. 1952).

When questioned as to the eligibility of an incumbent governor to run for re-election under rather dubious circumstances, the court in *Ervin v. Collins*,[18] reasoned that doubt or ambiguity as to eligibility for office should be resolved in favor of the peoples' right to choose their elected officials.

> The lexicon of democracy condemns all attempts to restrict ones right to run for office. . . . Florida is committed to the general rule in this country that the right to hold office is a valuable one and should not be abridged except for unusual reason or by plain provision of law.[19]

This commitment was found to be somewhat less than absolute when it was applied in *Jones v. Board of Control*,[20] wherein the court sustained the validity of a Board of Control rule which required its employees to resign before running for office. *Jones* held that the right to seek public office is not a constitutional absolute, but a privilege subject to reasonable restraints and reasonable conditions.

In *State v. Adams*,[21] the court was presented with an incumbent office-holder seeking to qualify for two different offices in an upcoming primary election. After first deciding that there were no statutory or constitutional bars to an incumbent becoming a candidate for another office, even if the terms were inconsistent, the court held that multiple candidacies were contrary to a sound public policy and therefore subject to reasonable restrictions in the public interest.[22]

In a *per curiam* decision, the court in *Maloney v. Kirk*[23] held that a statute[24] which authorized the making of a decree voiding a gubernatorial election for failure to comply with statutory regulations[25] regarding campaign contributions and election expenses was an unconstitutional attempt to add to the qualifications prescribed by the constitution[26] for candidates for the office of Governor. Justice Roberts, concurring specially, argued that the legislature could not by indirection do what it was prohibited from doing directly.[27] The statute "in effect disqualifies the candidate from holding the office notwithstanding the election."[28]

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18. 85 So.2d 853 (Fla. 1956).
19. *Id.* at 858.
20. 131 So.2d 713 (Fla. 1961).
21. 139 So.2d 879 (Fla. 1962).
22. Subsequent to this decision the Florida Legislature enacted FLA. STAT. § 99.012 (1969) subsection one of which reads as follows:

> (1) No individual may qualify as a candidate for public office whose name appears on the same or another ballot for another office, whether federal, state, county or municipal, the term of which or any part thereof runs concurrent to the office for which he seeks to qualify. This, however, does not apply to political party offices.

23. 212 So.2d 609 (Fla. 1968).
24. FLA. STAT. § 104.27 (1967).
25. FLA. STAT. § 99.161 (1967).
26. FLA. CONST. art. 4, § 3 (1885).
27. Maloney v. Kirk, 212 So.2d 609, 613 (Fla. 1968).
28. *Id.*

In a recent opinion[29] the Florida Supreme Court invalidated a statute[30] setting up a six month residence requirement for the constitutional[31] office of County Commissioner. The statute was held invalid because it prescribed qualifications for the office in addition to those prescribed by the Constitution. The court made it clear that it was following the settled law of *Thomas v. State*[32] and *Maloney v. Kirk*.[33]

The decision reached in the case *sub judice* represents not so much a retreat from established constitutional interpretation as an escape from literal interpretation into the dimension of reasonability. Faced by conflicting decisions in other jurisdictions construing similar statutes,[34] the Florida Supreme Court was forced to rely on its own reasoning and a handful of previous decisions. The pattern traced by these earlier decisions is extremely ambiguous. On the one hand, the tradition of the Florida Supreme Court has been one of summarily invalidating any legislation which might create, modify or remove qualifications for constitutional offices. On the other hand is the growing propensity of the same court to sustain police power measures which can be shown to be reasonably necessary to correct troublesome or potentially troublesome situations.

The *Holley* court was forced to apply these apparently conflicting precedents to an act with the stated legislative intent of modifying, in some measure, the qualifications for becoming a candidate for a constitutional office.[35] Evidently the court perceived a duty to sustain the act if at all possible.[36] The apparent semantic shuffling of the court in seeking a basis for sustaining the act probably resulted from the attempted performance of this duty.

After first defining "eligible" as being "capable of being chosen" and "qualified" as being "the performance of the acts which the person chosen is required to perform before he can enter into the office," the court decided that Florida Statute section 99.012 did not prescribe additional qualifications for office, but merely regulated the conditions under which one might become eligible.[37]

The importance of the decision in *Holley* lies not so much in the avoidance of the constitutional issue as in the advancement of the propo-

29. Wilson v. Newell, 223 So.2d 734 (Fla. 1969).

30. FLA. STAT. § 99.032 (1967).

31. FLA. CONST. art. 8, § 5 (1885).

32. 58 So.2d 173 (Fla. 1952).

33. 212 So.2d 609 (Fla. 1968).

34. Mulholland v. Ayers, 109 Mont. 558, 99 P.2d 234 (1940); Burroughs v. Lyles, 142 Tex. 704, 181 S.W.2d 570 (1944).

35. WHEREAS, it is generally agreed to be considered inequitable to permit an elected official or appointive official holding office to use the prestige and power of that office in seeking election to a higher or different office, and

WHEREAS, it is generally agreed that by providing for prospective resignations the people of the State of Florida would not be compelled to bear unnecessary cost of special elections occasioned by elected or appointed officials who, while holding one office, seek and obtain another elective office.

FLA. STAT. § 99.012 (Supp. 1970).

36. Holley at 405, *citing* Amos v. Matthews, 99 Fla. 1, 126 So. 308 (1930).

37. Holley *supra*, at 406.

sition that the right to *hold* office as well as the right to *seek* office was subject to reasonable restraints. Prior to the enactment of section 99.012, Judge Holley would have been required to resign his present office only when he accepted and entered upon the duties of his new office.[38] The court decided that section 99.012 operates as an extension of the rule of abandonment of office by those who become a candidate for another office. Moreover, in the court's opinion,

> there is no constitutional provision prohibiting the Legislature from declaring that the mere filing for a second office by the holder of one office under the circumstances covered by [section 99.012] operates as an abandonment of the first.[39]

In the opinion of this writer, the decision reached in the instant case merely represents an attempt to make the best of a bad situation. The Florida high court studiously avoided addressing itself to the constitutional implications of the amendments to Florida Statute section 99.012 spending precious little time exploring the very real differences between eligibility for office and qualifications required for office. However, it did at least advance a plausible theory of voluntary abandonment of office, sufficiently well reasoned to allow the court to sustain a badly needed police power measure.

While there can be little doubt that this ruling will bring order to a confused electoral scene, one must also consider the possible dangers of allowing the legislature the power to tamper with the people's right of free access to constitutional offices. It appears that only Chief Justice Ervine was disturbed by this prospect as evidenced by his extremely cogent dissent.

Lastly, although the instant decision concerned only state officers seeking other state offices, and although section 99.012 states specifically that it does not apply to persons holding federal office, in light of the abandonment theory adopted by the courts, the decision in *Holley* would have been more enlightening if it had adequately explored the dimension of state office-holders seeking federal office. The act would be transparently unconstitutional if it were applicable to present federal office-holders. In the opinion of this writer its application to any prospective federal officer presents the same issues and should result in a finding of invalidity.[40]

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38. State v. Adams, 139 So.2d 879 (Fla. 1962).

39. Holley at 407, *citing* Mulholland v. Ayers, 109 Mont. 558, 99 P.2d 234 (1940).

40. In a companion case, State v. Adams, 238 So.2d 415 (Fla. 1970), the Florida Supreme Court sustained the provisions of § 99.012 as applied to a state officeholder seeking federal office. Subsequently, however, a three-judge federal district court in Stack v. Adams, 315 F. Supp. 1295 (N.D. Fla. 1970), held that § 99.012 did in fact prescribe an additional qualification for office when applied to those seeking a seat in the United States House of Representatives. In the face of this conflict the Supreme Court of Florida granted realtor Davis' petition for rehearing of *State v. Adams, supra,* and stayed its decision pending review by the United States Supreme Court.