

SUPREME COURT OF OHIO

STATE EX REL. GARY D. ZEIGLER,  
STARK COUNTY TREASURER

CASE NO. 10-1570

Relator

vs.

ALEXANDER A. ZUMBAR,

Respondent

ORIGINAL ACTION IN *QUO*  
*WARRANTO*

\* \* \* \*

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**RELATOR'S BRIEF IN OPPOSITION TO RESPONDENT'S MOTION FOR  
RECONSIDERATION**

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## I. INTRODUCTION

This matter came before the Court upon Relator Gary D. Zeigler's ("Relator" or "Zeigler") Original Action in *Quo Warranto*. In its June 23, 2011 Opinion, this Court held that R.C. 321.38, the statute under which Zeigler was removed from office, was facially unconstitutional and reinstated Zeigler to his position as Stark County Treasurer. *State ex rel. Zeigler v. Zumbar*, 2011-Ohio-2939. It is this Opinion that Respondent Alexander Zumbar ("Respondent" or "Zumbar") has requested that the Court reconsider. Respondent contends that although Zeigler was not criminally culpable or guilty of any malfeasance regarding the public funds stolen by deputy treasurer Vincent Frustaci, he may be liable through a pending civil action for the missing money. Respondent contends it is improper for a sitting county treasurer to also be indebted to the county. Respondent further contends that the election which seated Alexander Zumbar, held subsequent to the unlawful removal of Zeigler, somehow eliminated Zeigler's right to a *quo warranto* action and the remedy of reinstatement. These are the sole reasons Respondent provides for seeking reconsideration.<sup>1</sup> Despite Respondent's contentions, these issues were considered and addressed by this Court or are otherwise not relevant for purposes of the facial constitutional challenge underlying this action.

The Respondent incorrectly asserts that Zeigler voluntarily vacated his office because he did not barricade himself into the treasurer's office after his removal by the Stark County Commissioners. The record clearly demonstrates that Zeigler did not voluntarily relinquish his position. Rather, Zeigler avoided conflict and acted with the responsibility and professionalism that one would desire of a public official by requesting a stay from the judge

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<sup>1</sup> In footnote one in his Motion for Reconsideration, Respondent mentions a typographical error in the Court's opinion. In one paragraph, the opinion references the underlying matter as pending in Summit County rather than Stark County. This is nothing more than a typographical error and has no bearing on the decision.

who paved the way for his removal, immediately appealing the judge's decision and filing this *quo warranto* action within two weeks of his removal -- long before Zumber's election to office.

The Board of Stark County Commissioners unconstitutionally removed Zeigler from office. The Stark County Commissioners and others with political motivations, including Respondent, cannot now complain about the repercussions (namely the Court's reinstatement of Zeigler) of their unconstitutional actions. Plainly stated, the powers that be in Stark County simply do not want to be forced to deal with the consequences of their hasty and illegal acts. Despite Respondent's suggestion that this fact justifies reconsideration of this Court's decision, such is not the case.

Respondent's Motion goes far beyond the reaches of the dissenting opinion, an opinion that did not address the constitutionality of the statute in question. As explained in more detail below, no argument raised by Respondent warrants reconsideration.

## **II. LAW AND ARGUMENT**

### **A. Standard Applied To Motion For Reconsideration.**

The standard to be applied to a motion for reconsideration is "whether the motion . . . calls to the attention of the court an obvious error in its decision or raises an issue for [the Court's] consideration that was either not considered at all or was not fully considered by [the Court] when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, syllabus. However, a motion for reconsideration "is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1997), 112 Ohio App.3d 334, 336. Here, Respondent is unable to establish any valid reason this Court should reconsider or alter the decision rendered in this matter.

**B. The Issues Asserted By Respondent Are Irrelevant For Purposes Of The Facial Constitutional Challenge Addressed By This Court.**

**1. The Court Determined That R.C. 321.38 Was Facially Unconstitutional.**

In this matter, Zeigler asserted a facial constitutional challenge to R.C. 321.38. A facial challenge is meritorious when the challenging party shows that no set of circumstances exist under which the statute would be valid. *See, Harrold v. Collier* (2005), 107 Ohio St.3d 44, 2005-Ohio-5334, citing *United States v. Salerno* (1987), 481 U.S. 739, 745. This is distinct from an "as applied" constitutional challenge, where a statute that is constitutional on its face may be unconstitutional as applied to a certain set of facts. *Harrold*, 107 Ohio St. 3d at 50, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329.

In his Motion for Reconsideration, Respondent attempts to blur the lines between the "facial" and "as-applied" analysis, by asking the Court to consider what Respondent seems to find to be the politically unsavory results of Zeigler's reinstatement. Such considerations are irrelevant for purposes of a facial constitutional challenge and cannot serve as a basis for reconsideration.

Bottom-line, Respondent makes no assertion that R.C. 321.38 is constitutional. Rather, he argues that the political ramifications of Zeigler's reinstatement somehow justify a finding that Zeigler was not entitled to the sole remedy available to him in a *quo warranto* action. This baseless argument does not justify reconsideration.

**2. A Public Officer Holder's Potential Monetary Liability To His Political Subdivision Does Not Disqualify Him From Holding Office; Furthermore, Zeigler's Liability Has Yet To Be Determined.**

Respondent contends that it is problematic that the Court's decision did not address the constitutionality of R.C. 321.37 and thus, it is possible that a seated county treasurer (Zeigler) could be found liable to the political subdivision he serves. R.C. 321.37 provides, "[i]f

the county treasurer fails to make a settlement or to pay over moneys as prescribed by law, the county auditor or board of county commissioners shall cause suit to be instituted against such treasurer and his surety or sureties for the amount due, with ten per cent penalty on such amount, which suit shall have precedence over all other civil business." R.C. 321.37.<sup>2</sup> Respondent is correct in one point — nothing in the Court's decision hampers the county's ability to file suit against the treasurer for missing funds.

Contrary to Respondent's assertion, there is nothing improper about a public official being indebted to his/her political subdivision. It is rather routine that a state, county, or municipality official could be liable to his/her political subdivision for expenditures exceeding their authority, delinquent property taxes or unpaid income taxes. As this Court's decision logically allows, the political subdivision could still seek to recoup these unpaid amounts from the public official, yet, the public official could not be unconstitutionally removed from office as a result thereof. There is nothing problematic about such a scenario. A public official's potential liability is a non-issue for purposes of determining whether that same public official was illegally removed from office under a facially unconstitutional statute. Yet, Respondent seemingly suggests that an elected official's indebtedness to the political subdivision he serves should disqualify the public official from office. Here, Zeigler's liability under R.C. 321.37 has not yet even been determined. Zeigler has raised the defense and claim of indemnification under R.C. 2744.07(A)(2) through a motion for summary judgment in the Recoupment Action. If this indemnification provision is found to apply, Zeigler will not be indebted to Stark County. That

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<sup>2</sup> Respondent's assertion that R.C. 321.37 did not exist at the time this Court decide *Hoel v. Brown* (1922), 105 Ohio St. 479 is incorrect, as well as irrelevant to the *quo warranto* action. Near exact versions of R.C. 321.37 existed in the Ohio General Code long prior to the 1922 *Hoel* decision. See Ohio Revised Statute (1880-1910) 1126; Ohio General Code (1910-1953) § 2695.

issue remains pending before the trial court and was not an issue for purposes of determining whether Ziegler was improperly removed from office.

Furthermore, the argument that the county prosecutor is placed in an "unenviable" position with respect to his duties to represent county officers is irrelevant. First, this is the exact position the prosecutor was in when the 321.37 action was instituted. Second, this is why Ohio law provides for the appointment of counsel, which was done in this case, and which relieves the prosecutor of this "unenviable" position.

3. **Zeigler Established His Bond And His Ability To Do So Is Of No Import In This Matter.**

Respondent raises the statutory requirement under R.C. 321.02, that a county treasurer be bonded before commencing his term, as yet another red herring to guide the Court down a path of irrelevance. R.C. 321.02 states that "[b]efore entering upon the duties of his office, the county treasurer shall give bond to the state in such sum as the board of county commissioners directs, with a company authorized to conduct a surety business in this state as surety . . . ." Zeigler did this in 2009 when he began his third term and the Stark County Commissioners accepted that bond. In October 2010, after Zeigler was unconstitutionally removed from office and after this quo warranto action was pending before this Court, the Stark County Commissioners, without authority to do so, adopted a resolution purporting to cancel Zeigler's bond. This hasty decision does not comply with the statutory requirements for cancelling a bond and as such has no legal effect.

The only recognized procedure for releasing a surety from a public official's bond is contained in R.C. 1341.08 through 1341.10. Here, no notice of cancellation was given to Zeigler, the principal on the bond, and none of the statutory requirements (of which notice is one) of R.C. 1341.08 through 1341.10 were followed. At least one State Supreme Court has found an

attempt at bond cancellation by the political subdivision protected thereby to be wholly ineffective under near identical circumstances. See, *Parker v. County Commissioners* (Ala. 1977), 347 So.2d 1321. Furthermore, the position advanced by Respondent now appears moot as the Stark County Prosecutor has informed Zeigler that a new bond has been obtained and will be instituted. Thus, like all other arguments, the bond issue raised by Respondent cannot serve as a basis for reconsideration.

4. **The Level Of Difficulty In Removing A County Treasurer Pursuant To A Method Other Than R.C. 321.38 Does Not Eliminate Zeigler's Right To Reinstatement.**

Respondent would like the Court to find that since R.C. 321.38 was found unconstitutional, it is more difficult to remove a seated public official and this fact somehow justifies reconsideration with regard to the *quo warranto* issue. Simply because those seeking to remove Zeigler from office would now need to employ a constitutionally valid method, such as R.C. 3.07 – 3.09, and the fact that such removal attempt would require a showing of criminal culpability and/or malfeasance, does not equate to Zeigler not being entitled to reinstatement due to his unconstitutional removal under R.C. 321.38.<sup>3</sup> If such were the case, a party could defeat a constitutional challenge simply by arguing that finding a statute unconstitutional would make a course of action more difficult.

This is consistent with this Court's holdings regarding similar arguments in zoning cases, where this Court has held:

In a zoning case where a constitutional process of appeal has been legislatively provided, ~~the sole fact that pursuing such process~~ *would encompass more delay and inconvenience* than seeking a

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<sup>3</sup> While Zeigler adamantly asserts (and the Stark County Prosecutor and Stark County Commissioners have agreed) that he has committed no crime or malfeasance, if such findings existed, Zeigler could be subject to removal under R.C. 3.07 – 3.09. If no such circumstances are present, Zeigler is not subject to removal under R.C. 3.07 – 3.09.

writ of mandamus *is insufficient* to prevent the process from constituting a plain and adequate remedy in the course of law. *State ex rel. Travel Centers of America, Inc. v. Westfield Twp. Zoning Commission* (1999), 87 Ohio St.3d 161, 164, citing, *State ex rel. Kronenberger-Foder Building Co. v. Parma* (1973), 34 Ohio St.2d 222. (emphasis added). Respondent's argument is illogical and certainly cannot serve as a basis for reconsideration here.

Respondent also advances a new assertion that Zeigler was removed from office "because he failed to appear at the hearing and be heard about procedures he had implemented to restore the public's confidence that their tax dollars are protected in the future." Respondent's Motion at 7. This new claimed basis for Zeigler's removal further demonstrates the inconsistent nature of Respondent's positions. In their August 23, 2010 Resolution, the Stark County Board of County Commissioners state "**pursuant to R.C. 321.38**, we remove Stark County Treasurer Gary D. Zeigler from the position of Stark County Treasurer, effective immediately." JT. Stip. Ex. G-2 (emphasis added). The sole basis for removal under R.C. 321.38 was the filing of suit under R.C. 321.37. No assertion of fault, criminal activity, or malfeasance is even suggested. It is disingenuous and again irrelevant, for Respondent to now contend that Zeigler was removed for some other reason and/or that Zeigler's removal was justified.

Contrary to Respondent's newest accusations, Zeigler was not and is not responsible for the loss of any money or the commission of any crime. Zeigler may only be potentially liable for a loss of money, at some point. Responsibility for a crime and potential collateral liability via a *respondeat superior* theory are two wholly different things. The latter does not constitute a harm to the public.

If Zeigler's removal is warranted, Respondent and the voters of Stark County have a mechanism to seek his removal available to them. The fact that using R.C. 3.07-3.09 to remove

Zeigler from office is a less attractive (and likely unsuccessful) alternative, because it may prove to be more difficult than simply having three commissioners arbitrarily remove him, plays no role in determining whether the Court properly decided the *quo warranto* action it faced. It was this Court's duty to decide the propriety of Zeigler's removal, not provide the Respondent or Stark County with new or other methods to seek Zeigler's removal. Here, the Court properly determined that R.C. 321.38 was not constitutional and Respondent has put forth nothing which should cause the Court to re-evaluate that decision.

5. **The Fact That Other Individuals Were Appointed Or Elected To Serve As Stark County Treasurer Since The Time Zeigler Was Unconstitutionally Removed From Office Is Of No Import In A Facial Constitutional Challenge.**

Respondent's final argument suggests that since Zeigler's unconstitutional removal, the successive appointment of two individuals to the position and Respondent's unlawful election extinguishes Zeigler's *quo warranto* action and right to reinstatement. In making this argument, Respondent ignores that fact that Zeigler immediately asked the trial court to continue a temporary restraining order preventing the Stark County Commissioners from meeting to remove Zeigler (that request was denied). Nor does Respondent acknowledge that within days of his removal, Zeigler appealed the trial court's decision declaring R.C. 321.38 constitutional and on September 7, 2010, filed this *quo warranto* action with this Court. Respondent is grasping at straws because he *disagrees* with the Court's position regarding mootness and laches. Where Respondent and the Dissent are incorrect is that Respondent never lawfully held the office of Stark County Treasurer, because one cannot be elected to fill a position that is not vacant. As the removal of Zeigler was *void abinitio*, the office was never vacant, and no election could have been valid.

Moreover, this Court has already addressed the issue regarding subsequent office holders and held that "[t]he fact that here have been three successors since Zeigler's removal does not bar his *quo warranto* claim. If this were true, an appointing authority could insulate its improper removal of a public officer by appointing multiple persons to office in quick succession. We decline to interpret the pertinent law to sanction such an unreasonable result." *State ex rel. Zeigler v. Zumbar*, 2011-Ohio-2939 at ¶ 13. In the cases cited by Respondent, the parties seeking the writs waited over 25 days to file their challenges or waited until an election occurred to initiate their action. That is not the case here. Zeigler acted swiftly to protect his right to office. Moreover this *quo warranto* action was not an "election case." It was an action to oust a usurper from office based on the unconstitutional method under which Zeigler was purportedly removed. Pursuant to Civ. R. 25(D)(1), with each successive appointment or election, the new usurper was substituted as respondent.

Under Respondent's scenario, in order to protect his *quo warranto* action, Zeigler would have had to attempt to prevent the Stark County Commissioners from removing him from office (Zeigler attempted to do this), immediately file an action challenging the authority to remove him from office (Zeigler did this too), and remain holed up in his office until such time he was reinstated. Zeigler took all the actions Respondent suggests he should have taken except for the dangerous, wild-west like action of remaining holed up in his office until such time he was forcibly removed or declared reinstated to office. Such sideshow type actions cannot be what is required in order for a public official to assert his/her right to office.

Here, within days of his removal, before any election took place, Zeigler instituted actions before the Fifth District Court of Appeals and before this Court challenging his removal and seeking to oust anyone who unlawfully usurped his duly elected office. It is disingenuous to assert that the swiftness of Zeigler's actions could validate the unlawful election that followed

from his unconstitutional removal, as the same has been declared *void abinitio*. Respondent was well aware of the risks of assuming or being elected to a position for which the vacancy of that office was being contested.

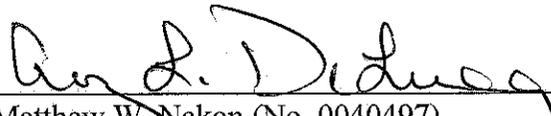
It should not be forgotten that Zeigler is the victim here. He has had to sacrifice every financial resource he has, every piece of real property he owns, and incurred several hundred thousand dollars worth of expenses in order to vindicate himself. Respondent and Stark County have been more concerned with making a martyr of an innocent man, than following the law and attempting to recoup that which the taxpayers have lost.

This Court found that Zeigler's removal was unconstitutional and so was any subsequent election, which was a result of said unconstitutional removal. As a result, Zeigler was found to lawfully hold the position of Stark County Treasurer. That holding should not be disturbed.

### III. CONCLUSION

For the foregoing reasons, Relator respectfully requests that Respondent's Motion for Reconsideration be denied.

Respectfully submitted,



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ATTORNEYS FOR RELATOR, GARY D. ZIEGLER

**PROOF OF SERVICE**

This is to certify that a copy of the foregoing Relator's Brief in Opposition to Respondent's Motion for Reconsideration has been sent by ordinary United States mail, postage prepaid, on this 14<sup>th</sup> day of July, 2011, to:

Ross Rhodes, Esq.  
Kathleen O. Tatarsky, Esq.  
Stark County Prosecutor  
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Matthew W. Nakon  
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(Cite as: 347 So.2d 1321)

**C**

Supreme Court of **Alabama**.  
Horace PARKER

v.

JEFFERSON COUNTY COMMISSION et al.

SC 2271.

May 6, 1977.

Rehearing Denied July 29, 1977.

Following reversal of his impeachment conviction, county treasurer sought declaration that he was lawful county treasurer, reinstatement of bond and back pay and allowances. The Circuit Court, Jefferson County, William C. Barber, J., denied relief and appeal was taken. The Supreme Court, Maddox, J., held that (1) declaratory judgment rather than quo warranto was appropriate, (2) treasurer's bond had not been properly cancelled pursuant to statute, (3) there was no vacancy in office of treasurer by reason of impeachment conviction but treasurer was suspended from holding office during pendency of appeal from impeachment conviction, (4) treasurer was not entitled to any pay and allowances while suspended, that is while his impeachment conviction was on appeal, but was entitled to all pay and allowances from date of certificate of judgment reversing impeachment conviction until end of his term and (5) treasurer was not entitled to attorney's fees.

Affirmed in part, reversed in part and remanded.

West Headnotes

**[1] Declaratory Judgment 118A**  **202**

118A Declaratory Judgment

118AII Subjects of Declaratory Relief

118AII(K) Public Officers and Agencies

118Ak202 k. Eligibility and Right to Office. Most Cited Cases

**Quo Warranto 319**  **11**

319 Quo Warranto

319I Nature and Grounds

319k9 Exercise of Public Office

319k11 k. Trial of Title to Office. Most Cited Cases

Declaratory judgment and not quo warranto was appropriate vehicle for county treasurer to use in asserting his right to office following reversal of impeachment conviction. Code of Ala., Tit. 7, § 167.

**[2] Declaratory Judgment 118A**  **201**

118A Declaratory Judgment

118AII Subjects of Declaratory Relief

118AII(K) Public Officers and Agencies

118Ak201 k. Officers and Official Acts in General. Most Cited Cases

Controversies touching the legality of acts of public officials or public agencies, challenged by parties whose interests are adversely affected, constitute one of the favored fields for declaratory judgment. Code of Ala., Tit. 7, § 167.

**[3] Principal and Surety 309**  **51**

309 Principal and Surety

309I Creation and Existence of Relation

309I(A) Between Individuals

309k51 k. Duration and Termination of Relation in General. Most Cited Cases

Surety did not follow statutory requirements for discharge of bond of county treasurer and, therefore, bond was not properly cancelled. Code of Ala., Tit. 41, § 97.

**[4] Principal and Surety 309**  **89**

309 Principal and Surety

309III Discharge of Surety

309k89 k. Subsequent Release or Agreement.

Most Cited Cases

Where statute provides method whereby surety may apply for release from liability on official bond,

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to procure release, surety must comply strictly with the statute. Code of Ala., Tit. 41, § 97.

**[5] Officers and Public Employees 283 ↪70.5**

283 Officers and Public Employees  
283I Appointment, Qualification, and Tenure  
283I(G) Resignation, Suspension, or Removal  
283k70.5 k. Impeachment or Address.  
Most Cited Cases  
 (Formerly 283k73)

Appeals from judgments of conviction in impeachment trials are preferred cases. Code of Ala., Tit. 41, § 195.

**[6] Officers and Public Employees 283 ↪55(1)**

283 Officers and Public Employees  
283I Appointment, Qualification, and Tenure  
283I(F) Term, Vacancies, and Holding Over  
283k55 Occurrence and Existence of Vacancy  
283k55(1) k. In General. Most Cited Cases

No vacancy in an office is created until impeachment conviction becomes final. Code of Ala., Tit. 41, § 198.

**[7] Officers and Public Employees 283 ↪55(1)**

283 Officers and Public Employees  
283I Appointment, Qualification, and Tenure  
283I(F) Term, Vacancies, and Holding Over  
283k55 Occurrence and Existence of Vacancy  
283k55(1) k. In General. Most Cited Cases

If appeal from impeachment conviction is not timely filed, or if judgment of conviction is affirmed on appeal, there is vacancy in office; otherwise, there is not. Code of Ala., Tit. 41, § 198.

**[8] Counties 104 ↪65**

104 Counties  
104III Officers and Agents

104k65 k. Term of Office, Vacancies, and Holding Over. Most Cited Cases

Where county treasurer was impeached but impeachment conviction was overturned on appeal, there was no vacancy in office of treasurer but treasurer was suspended from holding office during pendency of appeal. Code of Ala., Tit. 41, §§ 195, 198.

**[9] Counties 104 ↪67**

104 Counties  
104III Officers and Agents  
104k67 k. Removal. Most Cited Cases

**Counties 104 ↪74(3)**

104 Counties  
104III Officers and Agents  
104k68 Compensation  
104k74 Particular Officers, Agents and Services  
104k74(3) k. Treasurer. Most Cited Cases

County treasurer had no right to office or to any of the emoluments of it during period between impeachment conviction and overturning of conviction on appeal but was entitled to office and to all emoluments thereof after reversal of impeachment conviction. Code of Ala., Tit. 41, §§ 195, 198.

**[10] Counties 104 ↪64**

104 Counties  
104III Officers and Agents  
104k64 k. Eligibility and Qualification. Most Cited Cases

Where county treasurer's official bond was not cancelled in accordance with law following impeachment conviction, he was under no legal obligation to post new bond following reversal of impeachment conviction.

**[11] Counties 104 ↪74(3)**

104 Counties  
104III Officers and Agents

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104k68 Compensation  
104k74 Particular Officers, Agents and Services  
104k74(3) k. Treasurer. Most Cited Cases

County treasurer was not entitled to pay and allowances for period between impeachment conviction and reversal of conviction, during which period he was suspended from office, but was entitled to all pay and allowances from date of issuance of certificate of judgment reversing the impeachment conviction until end of his term.

**[12] Counties 104 ↪74(3)**

104 Counties  
104III Officers and Agents  
104k68 Compensation  
104k74 Particular Officers, Agents and Services  
104k74(3) k. Treasurer. Most Cited Cases

Fact that county paid salary of county treasurer to another as a de facto officer following impeachment of county treasurer did not preclude county treasurer from recovering back pay and allowances from county for period following reversal of impeachment conviction.

**[13] Officers and Public Employees 283 ↪94**

283 Officers and Public Employees  
283III Rights, Powers, Duties, and Liabilities  
283k93 Compensation and Fees  
283k94 k. In General. Most Cited Cases

Officeholder who has been impeached and whose impeachment conviction is subsequently overturned on appeal is entitled to recover pay for time when he was deprived of office especially when, paying authority is agency responsible for his not assuming his office after his conviction has been reversed.

**[14] Costs 102 ↪194.40**

102 Costs  
102VIII Attorney Fees  
102k194.24 Particular Actions or Proceedings

102k194.40 k. Declaratory Judgment. Most Cited Cases  
(Formerly 102k172)

County treasurer who obtained declaration that he was entitled to reinstatement following reversal of impeachment conviction was not entitled to attorney fees.

**[15] Costs 102 ↪194.16**

102 Costs  
102VIII Attorney Fees  
102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases  
(Formerly 102k172)

In the absence of contract, statute or recognized ground of equity, there is no inherent right to have attorney fees paid by opposing side.

\*1323 L. Drew Redden and William N. Clark of Rogers, Howard, Redden & Mills, Birmingham, for appellant.

Edwin A. Strickland, Birmingham, for Jefferson County Commission and its members.

James F. Reddoch, Jr., of Starnes, Starnes & Reddoch, Birmingham, for United States Fidelity & Guaranty Co.

MADDOX, Justice.

This is the second time this Court has considered an appeal involving the appellant, Horace Parker.

Plaintiff-appellant, Horace Parker, after getting this Court to reverse his impeachment conviction, Parker v. State, 333 So.2d 806 (Ala.1976), sought to have the trial court declare that he was the lawful treasurer of Jefferson County; that United States Fidelity & Guaranty Company be ordered to reinstate his bond; and that Jefferson County be ordered to pay his back pay and allowances from September 14, 1974 (date of his impeachment conviction), to date. He also asked for costs to be taxed against the defendants and that the court award him a reasonable attorney's fee. The circuit court denied him any relief. He appealed.

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#### ISSUES

1. Can Parker contest his right to office within an action for pay and allowances rather than by quo warranto?
2. Was the bond properly cancelled and can USF&G be required to reinstate the bond?
3. Was there a "vacancy" in the office?
4. Is Parker entitled to any pay and allowances as treasurer of Jefferson County during the pendency of the appeal of his impeachment conviction or from the date of the reversal of that conviction?
5. Is Parker entitled to attorney's fees?

#### STATEMENT OF THE FACTS

Horace Parker was elected to the office of treasurer of Jefferson County in the general election held November 7, 1972. He took office on January 15, 1973. He timely filed the statutorily required bond of \$400,000 with the Jefferson County Commission. The bond commenced January 15, 1973, and was to terminate on January 15, 1977.

On September 14, 1974, following an impeachment trial by jury in the Circuit Court of the Tenth Judicial Circuit, Parker was removed from office as treasurer of Jefferson County. A copy of the judgment of the court was served upon the president of the Jefferson County Commission. Parker filed notice of appeal to this Court immediately following his conviction.

Parker was paid as treasurer through September 14, 1974, but has not received any further pay from Jefferson County since that time.

\*1324 On September 19, 1974, Mr. E. H. Gamble, the Comptroller of Jefferson County, wrote to USF&G advising them to cancel the bond on "former County Treasurer Horace Parker, Bond No. 06-0170-39-73, effective at the close of business September 14, 1974." After receipt of the letter, USF&G forwarded to Mr. Gamble its form of notice of cancellation, bearing the date of September 24, 1974, to be executed by Jefferson County.

By resolution of October 1, 1974, the County cancelled Horace Parker's bond with USF&G, effective September 14, 1974, and authorized the execution of the cancellation. The notice of cancellation was executed for Jefferson County by W. Cooper Green, then president of the Jefferson County Commission, and was returned to USF&G and received by it on October 15, 1974. Neither the County nor USF&G served a copy of the notice of cancellation on Horace Parker.

Pursuant to the notice from the County, USF&G cancelled Parker's bond as of September 14, 1974, and on October 16, 1974, refunded the balance of the premium in the amount of \$4,634 to the Gerald's Agency which had paid the original premium on the bond. Parker was notified orally by Bobby Timmons, the insurance broker who had arranged for the bond, that the bond had been cancelled. The balance of the insurance premium was not paid to Jefferson County until May 26, 1976.

By resolution of September 17, 1974, the Jefferson County Commission, citing as authority s 31, Tit. 12, Code of **Alabama** 1940, appointed Mrs. Geneva Phillips Moore as County Treasurer of Jefferson County, **Alabama**. Mrs. Moore's appointment was contingent upon the Personnel Director of Jefferson County approving a leave of absence for her from her civil service position of Assistant Treasurer of Jefferson County. The Personnel Director ultimately approved successive 120 day leaves of absence for Mrs. Moore. While serving in that position, Jefferson County paid to her an amount equal to that payable by law to the Treasurer of Jefferson County.

On September 17, 1974, a bond was issued in the amount of \$400,000 covering Mrs. Moore as Treasurer of Jefferson County. The bond has been in effect since Mrs. Moore's appointment as a result of successive extensions. Jefferson County has caused the bond to extend to January 15, 1977.

On May 14, 1976, this court reversed the impeachment conviction of the Circuit Court. The State of **Alabama's** Application for Rehearing was overruled on July 2, 1976, and the certificate of judgment was issued by this Court on July 2, 1976.

Within a week following the reversal of the Circuit Court Judgment by the Supreme Court, **Parker**

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called Tom Gloor, a **county commissioner**, and advised him that he intended to return as treasurer of Jefferson County. After an oral request by his attorney to USF&G to advise him of the reason that the bond was allegedly cancelled failed to get any response, on July 21, 1976, he, by and through his attorney, wrote USF&G advising them that he considered the bond still to be in effect and asked that they take the necessary steps to reinstate the bond. No response was received from USF&G.

On August 4, 1976, in a meeting between the Jefferson **County Commissioners** and **Parker's** attorney, his attorney orally demanded payment of the salary and allowances due him during the pendency of his appeal and to date. The Commissioners advised Parker's attorney that before Parker would be qualified to assume office, he would have to properly file an official bond in the amount of \$400,000, as USF&G had asserted that his former bond had been cancelled and that it was no longer liable as surety. By letter of August 12, 1976, Parker's attorney advised Commissioner Gloor of his intent to reassume the office of treasurer of Jefferson County and demanded payment of all salary and allowances due him during the pendency of his appeal.

On August 16, 1976, Parker's attorney delivered to the Jefferson County Commission a "Notice of Reassumption of Office." By letter of September 2, 1976, Jefferson **\*1325** County Commission President, Tom Gloor, notified Parker in writing that USF&G had refused to reinstate or reissue his bond. The notice further stated that before Parker could reassume the office of Jefferson County Treasurer, he must file a legally acceptable bond in the amount of \$400,000 by September 9, 1976.

Parker did not file an additional bond, and by letter of September 28, 1976, Commissioner Gloor certified to the Jefferson County Commission that the fact that Parker had not furnished the bond abrogated any rights which he might have had to the office of treasurer of Jefferson County. On September 28, 1976, the Jefferson County Commission, by a resolution, took notice of the previous appointment of Mrs. Moore as Treasurer of Jefferson County, acknowledged that her appointment was still in effect, and noted that in its opinion, Parker had vacated any right to the office which he might have had.

On June 8, 1965, there went into effect United States Fidelity and Guaranty Company, Public Employees Blanket Bond, Bond No. 10355-08-1442-65. Subsequent to that time, two riders have been added to the bond. The bond has been in full force and effect since June 8, 1965. The last rider to the bond changed the name of the insured from W. A. Morgan, Treasurer, Jefferson County, **Alabama**. That rider was effective as of noon on January 20, 1973.

It has been stipulated by the parties that Parker has been within the week following the reversal of his conviction by this court, ready, willing and able to perform the duties of and to serve as the treasurer of Jefferson County, **Alabama**.

## I

[1][2] Was declaratory judgment and not quo warranto the appropriate vehicle for Parker to use in asserting his right to the office? Under the facts here, we think so. As we shall develop later, there was never a legal vacancy in the office of treasurer under the facts of this case. Most of the facts were stipulated. As we construe the pleadings, the controversy is between the County and Parker not Moore and Parker. Parker claims the County Commission has acted illegally. Controversies touching the legality of acts of public officials, or public agencies, challenged by parties whose interests are adversely affected, is one of the favored fields for a declaratory judgment. Scott v. Alabama State Bridge Corporation, 233 Ala. 12, 169 So. 273 (1936). Furthermore, Title 7, s 167, Code, provides:

"This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respects to rights, status, and other legal relations; and is to be liberally construed and administered. This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees. The remedy provided for by this article shall not be construed by any court as an unusual or extraordinary one but shall be construed to be an alternative or cumulative remedy."

Parker, having shown a justiciable controversy between him and the County, was entitled to a declaration of rights.

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## II

[3] The next question is whether the bond was properly cancelled. We hold that it was not. The surety, USF&G, did not follow the statutory requirements for discharge. Title 41, s 97, Code, provides:

“Any person or corporation who is surety upon the official bond of any county officer or employee, by whomsoever approved, may discharge himself or itself of such suretyship upon making sworn application in writing addressed to the official, court, board or commission required to approve such bonds, setting forth such facts. Upon the filing of such application said official, court, board or commission to whom such application is addressed shall forthwith cause personal written notice to be served upon said \*1326 principal fixing a day not less than fifteen nor more than thirty days after the date of the filing of such application requiring such principal to appear before him or it on and at a certain date and place and give a new bond; and upon the failure of such principal to give such bond within the time specified in such notice, he vacates his office and the official, court, board or commission giving such notice must at once certify such vacation to the appointing power who must fill the vacancy. If a new bond be filed the same must be in such amount and filed and approved as provided in this article. On the execution, approval and filing of such new bond such surety will stand discharged from all liability for any breach of said bond occurring thereafter but said discharge shall not affect the previous liability of any of the obligors, and in case of the discharge of any one or more obligors under this article, the same shall operate as a discharge of all other obligors on said bond. When the sureties on either bond have made any payments thereon on account of the principal obligor therein, they are entitled to the same remedies and recoveries against the sureties in the remaining bonds as was provided by section 67 of this title. Every such new or additional bond approved and filed as in this article provided is binding upon the obligors from the time of its approval and subjects them to the same liabilities, proceedings and remedy as are provided in relation to the first official bond of such officer or employee.”

[4] Where a statute provides a method whereby a surety may apply for a release from liability on an official bond, in order to procure a release the surety

must comply strictly with the statute. Cf. Armstrong et al. v. Pugh, 19 Ala. 209 (1851), which holds that the liability of a surety on a county official's bond was not discharged until the statutory method of discharge was followed. Bolen v. National Surety Co., 108 S.C. 403, 94 S.E. 1049 (1918); 67 C.J.S. Officers, s 165f., p. 470.

## III

[5][6][7][8][9][10] Was there a vacancy in the office of treasurer: We hold there was not.

Appeals from judgments of conviction in an impeachment trial are preferred cases (Title 41, s 195, Code), it is unquestionably the law that no vacancy in an office is created until conviction becomes final. If an appeal is not timely filed, or if the judgment of conviction is affirmed on appeal, there is a vacancy. Otherwise, there is not. Title 41, s 198, Code, provides:

“It shall be the duty of the clerk of the supreme court, in all cases, when final judgment of conviction is rendered in that court, on appeal or otherwise, forthwith to certify the vacancy thus created to the appointing power, with a copy of the judgment; and, in like manner, the clerk of the circuit court or person designated to act as clerk, shall certify to the appointing power any final judgment of conviction rendered in such court, from which no appeal is taken.”

While there was no “vacancy” in the office by reason of Parker's conviction, nevertheless he was legally suspended, by operation of law, from holding the office during the pendency of his appeal. Therefore, he had no right to the office or to any of the emoluments of it during that period. After his conviction was reversed, however, he was entitled to the office and to all the emoluments thereof. His official bond was not cancelled in accordance with law; therefore, he was under no legal obligation, at that time, to post a new bond. The County's requirement that he post a new bond was without authority of law, under the facts of this case.

## IV

[11] Parker asked the trial court to declare that he was entitled to pay and allowances from the date of his conviction until the end of his term. We hold he was not entitled to any pay and allowances while he was suspended, that is, while his conviction was on

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appeal, but he was entitled to all pay and allowances from the date this Court's certificate of judgment was issued until the end of his term.

\*1327 [12] The County relies upon Walden v. Town of Headland, 156 Ala. 562, 47 So. 79 (1908), and Irwin v. Jefferson County, 228 Ala. 609, 154 So. 589 (1934), to support its theory that since it paid Mrs. Moore as a "de facto" officer during the entire period, it is not liable to Parker. Both cases do hold, under the facts of those cases, that payment of the salary of a de facto incumbent discharging the duties of the office exonerates the governmental body from payment of the salary of the de jure officer. Insofar as the amounts paid to Mrs. Moore during the pendency of Parker's appeal, the rule of Walden and Irwin are applicable. The County had apparent authority to appoint someone to act while Parker was suspended. However, after Parker's conviction was set aside, the County knew that he was claiming the office. In Irwin v. Jefferson County, supra, this Court inferred that the majority rule was applicable only where the governmental body acted in good faith. We do not mean to say that the County acted with ill will as a bad motive, only that "bad faith," from a legal standpoint, is inferable from the fact that from the date Parker's conviction was set aside, he became legally entitled to the office, and any payment of a salary to another would be at the peril of the County. In this respect, this case is similar to that of Mitchell v. Greenough, 295 Ala. 165, 325 So.2d 158 (1976). There, the personnel board brought an action for declaratory judgment asking that the Court declare that a city employee was entitled to back pay for the period of time when he was placed on leave of absence without pay because of indictments against him, where he was subsequently acquitted of all charges and reinstated. Construing a personnel board rule, this Court held the employee was entitled to back pay.

[13] While Alabama has no statute which specifically provides that an official whose impeachment has been set aside is entitled to pay from the time his conviction is overturned, we think that Alabama procedure envisions that under situations such as we have here, an office holder, whose title to the office has been upheld, is entitled to recover his pay during the time when he was deprived of the office, especially when, as here, the paying authority is the agency responsible for his not assuming his office

after his conviction was reversed.

V

[14][15] Is Parker entitled to his attorney fees? We hold that he is not. In the absence of a contract, statute, or recognized ground of equity, there is no inherent right to have attorney fees paid by the opposing side. White v. State, 294 Ala. 502, 319 So.2d 247 (1975).

AFFIRMED IN PART; REVERSED IN PART,  
AND REMANDED.

TORBERT, C. J., and FAULKNER, SHORES and  
BEATTY, JJ., concur.

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