TEXT OF OPINIONS BY SUPREME COURT JUSTICES IN THE CASE OF ROBERTS VS. OLCOTT

Prevailing Opinion of Justice Charles A. Johns, Holding That Present Governor Holds Through Entire Unexpired Term of Late Governor Withycombe, Together With Concurrences and Dissents, Are Published in Full—Court Stands Four to Three in Extending to Executive the Right to Serve Until 1923

Below are printed in full the four opinions that were written by justices of the supreme court in the case of Roberts vs. Olcott, a test case, by which it was determined that Governor Olcott, under the state constitution, has the right to serve as governor through the entire unexpired term of the late Governor Withycombe. By virtue of his being secretary of state Mr. Olcott succeeded to the governorship at the death of Governor Withycombe.

In the supreme court test Justice Johns wrote the prevailing opinion, holding that Governor Olcott serves out the entire unexpired term, or until 1923. Justice Bennett wrote a separate opinion concurring with Justice Johns. Chief Justice McBride and Justice Bean concurred in the Johns opinion though they wrote no opinions. Justice Harris wrote an elaborate opinion dissenting from the opinion of Justice Johns. Justice Burnett wrote a separate opinion concurring with the dissenting opinion of Justice Harris. Justice Benson agreed with Justice Harris, but wrote no opinion. Thus the court stood 4 to 3 in favor of Governor Olcott's side of the case.

The case, instituted by G. M. Roberts, district attorney for Jackson county, was an original proceeding in mandamus which sought to compel Mr. Olcott as secretary of state to include the office of governor in the list of offices certified to county clerks which are to be filled by the elections of this year. The supreme court heard the case in banc. It was argued and submitted on demurrer to the petition for an alternative writ December 18, 1919. Mr. Roberts appeared in his own behalf and Attorney General Brown represented Mr. Olcott. Justice Johns' opinion sustains the demurrer.

The four opinions that were written follow:

Justice Johns' Opinion

Demurrer sustained.

This is an original petition for a writ of mandamus, in which the relator alleges that he is a natural born citizen of the United States, over twenty-one years of age, has been district attorney and a resident of Jackson county for more than one year last past and is now a resident and legal voter therein for all state and county offices, that the defendant is the duly elected, qualified and acting secretary of state; that on November 5, 1918, James Withycombe was duly elected governor of the state of Oregon and duly qualified for that office on January 14, 1919; that the defendant was elected secretary of state on November 7, 1916, and duly qualified on December 26, 1916; that on March 3, 1919, James Withycombe, the duly elected and qualified governor, died; that the office of governor and the duties thereof then devolved upon the secretary of state and that on March 7, 1919, the defendant took the oath of office and assumed the duties of governor. The relator contends that the defendant should hold the office only until the first Monday in January, 1921, and not for the unexpired term of the late Governor Withycombe; that under the laws and constitution of the state of Oregon the office of governor will become vacant on the first Monday in January, 1921; that the said office should be filled at the general election to be held November 2, 1920, by the legal voters; that it is a duty especially enjoined upon the defendant to prepare and furnish each county clerk a statement showing the several state offices for which candidates are to be chosen in the respective counties at the primary nominating election to be held May 21, 1920; and that the defendant has neglected and refused to perform the said duty in this, that he has failed to name in such statement the office of governor of the state of Oregon, for which nomination should be made at the coming primaries. The petitioner demands that the statements sent to the county clerks of the various counties of the state be corrected by naming therein the office of governor of the state of Oregon, charging that the defendant has refused to make such correction. He prays for an alternative writ of mandamus directed to the defendant, compelling him to correct said statements and include therein the office of governor, or show cause why he should not do so. A certified copy of the notice sent to the county clerk of Jackson county with such omission is attached to and made a part of the petition.

The attorney general appeared for the defendant, filing a general demurrer alleging that the petition "does not state facts sufficient to constitute a cause of action."

Johns J. In legal effect, the question now before us is the one which was sought to be presented in the case of Olcott v. Hoff, — Or. —, 181 Pac. 466, but was not then decided, because some members of this court did not think the question was legally before it and for such reason no four members could then agree upon an opinion. The controversy now has to do with whether Mr. Olcott ceases to be governor when his term of office as secretary of state expires, or whether he shall continue to hold that office for the remainder of the unexpired term of the late Governor Withycombe. The vital question to be determined is: What was legally decided in the case of Chadwick v. Earhart, 11 Or. 389; and how far is that decision binding upon this court?

It was the intention of the framers of the original constitution that all of the administrative officers of the state should be elected for the period of four years and at the same election. Section 1 of Article V of the constitution provides:

"The chief executive power of the state shall be vested in a governor, who shall hold his office for the term of four years; and no person shall be eligible to such office more than eight in any period of twelve years."

and section 7 is as follows:

"The official term of the governor shall be four years; and shall commence at such times as may be prescribed by this constitution, or prescribed by law."

Section 16 of that article says:

"When during a recess of the legislative assembly a vacancy shall happen in any office, the appointment to which is vested in the legislative assembly, or when at any time a vacancy shall have occurred in any other state office, or in the office of judge of any court, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified."

In our first code, compiled by Hon. M. P. Deady, section 16 is annotated by him to read, "Governor to fill vacancies by appointment." That construction has been followed, and all appointments to state offices have been made by the governor, who alone is vested with that authority; but there is no provision for the appointment of a governor and there has never been a vacancy in that office. To prevent that and to provide a line of succession section 8 of Article V of the constitution was adopted, reading thus:

"In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of his office, the same shall devolve on the secretary of state; and in case of the removal from office, death, resignation, or inability, both of the governor and secretary of state, the president of the senate shall act as governor, until the disability be removed, or a governor be elected."

Although it is true, as Mr. Justice Harris has pointed out in his opinion in Olcott v. Hoff, that in annotating this section Judge Deady used the words, "Acting governor in case of vacancy or disability," it is also true that in the later code compiled by Deady and Lane the same section was annotated to read, "In case of vacancy or disability."

The decision in Chadwick v. Earhart was rendered by a unanimous court in October, 1884. Hill's code was annotated and published in 1882, and in annotating section 8 of Article V of the constitution, Mr. Hill said:

"Secretary as governor.—The secretary of state entering upon the duties of governor, upon the governor's resignation, may continue to perform the functions of governor for the remainder of the governor's term of office, though he ceases in the mean time to be secretary of state: Chadwick v. Earhart, 11 Or. 389."

Bellinger & Cotton's code was published in 1902 and the compilers then made the following annotation to the section mentioned, citing Chadwick v. Earhart:

"The secretary of state entering upon the duties of governor, upon the governor's resignation, may continue to perform the functions of governor or the remainder of the governor's term of office though he ceases in the mean time to be secretary of state."

Lord's Oregon laws were published in 1910 and the following annotation therein is made to that section:

"Under this provision, when the governor resigns, the duties of the governor's office devolve upon the secretary of state, who continues to perform them for the remainder of the term of the outgoing governor: Chadwick v. Earhart, 11 Or. 389, 4 Pac. 1180."

Mr. Lord was one of the judges by whom the decision in Chadwick v. Earhart was rendered in 1884.

While we respect Judge Deady for both his learning and ability, any construction which he may have placed upon section 8 was given before the decision in the Chadwick case was rendered. It must be conceded that Judge Bellinger and W. W. Cotton were men of equal learning and ability, and their annotation was made after that case was decided. The same is true as to W. Lair Hill, who was recognized as one of the ablest lawyers in Oregon. The decision in the Chadwick case was rendered by a unanimous court then consisting of Chief Justice Waldo, E. B. Watson and W. P. Lord, and it is significant that in compiling his own code, under section 8 of Article V Mr. Lord made the annotation above quoted.

We have no record of the oral arguments, but as pointed out in our opinion in Olcott v. Hoff two questions were raised in the respective briefs filed in the Chadwick case. Mr. Earhart, then secretary of state, contended first that Mr. Chadwick was not entitled to the salaries of both governor and secretary of state, after he had become governor by the resignation of that office by Mr. Grover, but to that of secretary of state only; and second, that he was not entitled to the salary of the governor's office after he ceased to be secretary of state. Mr. Chadwick claimed that he was entitled to the salaries of both offices during the time he was secretary of state and governor, and to the salary of governor for the two days that he held that office after he ceased to be secretary of state. Both of Mr. Chadwick's contentions were sustained by the unanimous decision of the court. On the second point, the right to the salary of governor after he ceased to be secretary of state, the court held:

"This question must also be answered in favor of the appellant and judgment be entered accordingly."

By reason of that decision Mr. Chadwick was paid the salary for the two days that he held the office of governor after ceasing to be secretary of state. The cause of action was for a lump sum of money which included both claims and for the reason stated in the opinion each of his claims was allowed. The conclusion is inevitable that the second claim could be allowed only upon the theory that Mr. Chadwick continued to be governor in fact after he ceased to be secretary of state.

It is significant that since the rendition of that opinion, without an exception the annotators of the code, W. Lair Hill, C. B. Bellinger, W. W. Cotton and W. P. Lord, all men of the highest type in their profession, have construed the decision to mean that now, under the existing facts, Mr. Olcott should hold the office of governor for the remainder of the late Governor Withycombe's unexpired term. Such annotations will be found under section 8 of Article V of the constitution in every code compiled and published since the rendition of that decision, which for thirty-five years has not been disturbed.

Three different efforts have been made to change section 8 of Article V of the organic law of the state; the first on November 5, 1912; the second on November 3, 1914, and the last at the special election of June 3, 1919. On the last occasion a committee composed of Gus C. Moser, state senator, and Chris Schuebel and William G. Hare, representatives, presented an argument in the voters' pamphlet in favor of the proposed amendment, saying:

"The duties of the office of governor will continue to be performed by Governor Olcott for the remainder of the term of office for which the late Governor Withycombe was elected."

To this might be added that Arizona, Utah and Wyoming are the only other states in the Union which have a constitution providing that in the event of the governor's death the secretary of state succeeds to his office or performs the duties thereof yet every attempt to change that section of the constitution has been defeated by the vote of the people.

It is vigorously contended that the people should have an opportunity of choosing their own governor. In the instant case they have had and exercised that right. Under the express provisions of the constitution, when they elected Mr. Withycombe governor and Mr. Olcott secretary of state, they elected Mr. Olcott to become governor upon the death of Governor Withycombe; and every voter who cast his ballot for Mr. Olcott as secretary of state legally knew that upon the death of Governor Withycombe the duties of his office would devolve upon the secretary of state. There is no such provision in the constitution as to any other state office. Section 16 of Article V provides that in the event of the death or resignation of the incumbents, all other offices shall be filled by appointment by the governor. Further, there is no provision in either statutes or constitution for an election to fill an unexpired term of the office of governor. Such a proceeding would have to be read into the constitution, would be based upon implied construction only, and would overrule the precedent of Chadwick v. Earhart.

Should the attorney general, for example, die, there would then be a vacancy in that office which could be filled by appointment by the governor, under section 16 of Article V of the constitution. But when the governor dies, his office, under section 8 of the same article, "shall devolve upon the secretary of state." That is to say, this section provides a line of succession to the office of governor; and upon the death of the incumbent the secretary of state automatically becomes governor. Upon the death of the secretary of state while in the office of governor the president of the senate becomes acting governor. There is a marked distinction between the meaning, force and effect of section 16 and section 8 of Article V. Under section 16 a vacancy occurs which the governor may fill by appointment. While the line of succession remains unbroken, as we construe section 8, there is no such occurrence as a vacancy in the office of governor; and sections 1 and 7 of Article V expressly provide that the term of the governor shall be four years. There is no provision by which anyone is authorized to appoint a governor. Section 8 provides a line of automatic succession; it was adopted to prevent a vacancy in the office of governor. Therein lies the distinction between the instant controversy and the state ex rel. v. Johns, 3 Or. 533, and State ex rel. v. Ware, 13 Or. 380.

Under our constitution the governor is the chief executive officer of the state, in whom only the power of appointment is vested, and in the very nature of things a vacancy in that office would destroy the whole plan of the state government. A governor was elected in November, 1918, and qualified in January 1919, and one has been elected and qualified every four preceding years since the adoption of the constitution. Under sections 1 and 7 of Article V of the organic law the term for which a governor is selected is absolutely fixed at four years and there is no provision in either the statutes or constitution for the election of a governor for any portion of an unexpired term. Hense, under the terms of these sections, if a governor should be elected at the next general election, he would hold office not only for the remainer of the unexpired term of the late Governor Withycombe but for a full four year period from January, 1921, to January, 1925. That would disarrange and destroy the whole plan of the framers of the constitution.

The rule of stare decisis is well stated by Mr. Justice Burnett in dissenting opinion in Kalich v. Knapp, 73 Or. 587, 145 Pac. 27, thus:

"Another doctrine equally well settled is that of stare decisis, to the effect that, when a decision has once been rendered, it amounts to an authoritative construction of the law, and should not be disregarded or overturned, except for very cogent reasons showing beyond question that on principle it was wrongly decided. The principle is that laws are largely conventional rules of action, and it is more important that the rule be settled as a guiding precept to the public than that by the action of the courts the law should be made to fluctuate like the tides." citing authorities.

and it applies with peculiar force to the decisions of courts on questions of constitutional law. The same doctrine is announced in re City of Seattle, 62 Wash. 218, 113 Pac. 762, where the supreme court of Washington said:

"The rule of stare decisis is peculiarly applicable to the construction of the constitution. The interpretation of that document should not be made dependent upon every change in the personnel of the court. When one of its clauses has been construed, that construction should not be set aside except for the most cogent reasons. Certainly if the law is of first importance."

In Multnomah County v. Sliker, 10 Or. 65, 66, Mr. Chief Justice Lord said:

"The matter here is the constitutionality of a statute, and the rule is said to be almost universal in construing statutes and the constitution, to adhere to the doctrine of stare decisis."

In State v. Frear, 142, Wis. 320, 327, the supreme court of that state said:

"Decisions on the constitutional questions that have long been considered the settled law of the state should not be lightly set aside, although this court as presently constituted might reach a different conclusion if the proposition were an original one."

Black's Constitutional Law, 3d Ed., page 81, subdivision 15, lays down the rule thus:

"The principle of stare decisis applies with special force to the construction of constitutions, and an interpretation once deliberately put upon the provisions of such an instrument should not be departed from without grave reasons."

The authorities are uniform upon the force and effect of stare decisis in regard to a constitutional question.

In face of the decision in Chadwick v. Earhart, and with knowledge of such collateral facts, the people have always opposed any amendment to section 8 of Article V of the constitution. That decision was upon the constitutional question and under the facts it cannot be said that it is not sustained by reason and authority. Whatever may be our present opinions, it must now be held, under the principle of stare decisis, as binding upon this court. The writ is denied and the demurrer is sustained.

By Justice Bennett

Bennett, J. (specially concurring). This case is fully stated in the opinion of Mr. Justice Johns, to which we refer.

The same questions herein presented were discussed at great length in Olcott v. Hoff, — Or. —, 181 Pac 466. These questions seem now squarely before us for decision. Every citizen is interested in who shall be governor of the state and in the enforcement of the law by which the election of a governor is submitted to the voters, at the time contemplated by the provisions of the constitution of the state; and a mandamus proceeding may be maintained in a case like this at the relation of such a citizen. Otherwise, the rights of the voters could be ignored entirely, and the election of a governor postponed from time to time, at the will of the secretary of state, and there would be no remedy. State v. Ware, 13 Or. 380.

After much consideration and some hesitation I feel compelled to concur in the opinion of Mr. Justice Johns upon the ground of stare decisis only. It seems to me that the case of Chadwick v. Earhart, 11 Or. 389, 4 Pac. 1180, is directly in point and is controlling.

If it were not for that case and if the question was here as a matter of first impression, I should be governed by the reasoning of Mr. Justice Harris, when the question was under consideration of Olcott v. Hoff, which seems to be to present, as a matter of logic, the stronger considerations.

The reasoning of the Chadwick case does not appeal to me as being by any means conclusive in its logic or even very cogent. The court in that case, seems to have concluded that the relation of secretary of state to the office of governor, was exactly the same as the relation of vice president to the office of president in the federal government. There does not seem to me to be such analogy. The president of the United States is elected to a four year term. There is no provision in the constitution or laws, by which in case of death or resignation, his successor could be elected at any intervening time. It follows as a matter of course that the vice president shall take his place in case of death, and hold his office for the full remainder of the original term, because there are no means or provisions by which a successor can be elected at any intervening time.

The case of governor and secretary of state under our constitution is different. Here we have general elections every two years over the entire state, when the people may (if the constitution is not construed to prohibit) elect a governor at the same time as the other general officers, and the members of the legislative assembly.

Neither does the reasoning of the court in that case, by which it was concluded that section 8 of Article V of the Oregon constitution, made the "office" of governor itself, devolve upon the secretary of state and entitle the occupant of the secretary of state's office to take that office personally, and hold it after he ceases to be secretary of state, seem to me altogether satisfactory.

It seems to me a better construction of the constitution would have been, that the duties of the office, rather than the office itself, devolved upon the secretary of state, and that he exercised those duties only by virtue of his office and as long as his office of secretary of state continued. And that the office of governor itself, became vacant upon the death or resignation of the governor, and could be filled at the next general election.

But we must accept some things as settled. Otherwise, there would be no end to controversy and litigation, and no one would know what his rights really are or who is entitled to administer the laws under which he lives.

While not entirely satisfied with the reasoning, I find myself unable to accept the contention of the relator, that the opinion of the court in the Chadwick case was mere dictum; or to follow the reasoning of Mr. Justice Harris by which that case is distinguished from the case at bar.

It is plain there were two independent questions presented in the Chadwick case. First, whether the duties of the office of governor devolved upon the secretary of state and gave him the right to the salary of the office while he was such secretary.

Second, whether he continued to perform the duties of the office of governor after his office as secretary expired and during the term from which the outgoing governor had resigned; and was he therefore entitled to the salary of governor during the remainder of that term.

It is plain that what was said by the court in relation to the first question has no bearing upon this case.

If we strip the opinion down to what is strictly pertinent here it will be short and I think clear and will read as follows:

"Two questions are submitted in this case. The first and principal one is, whether, when, under section 8 of article V of the constitution of Oregon, the duties of the office of governor devolve upon the secretary of state, he has a right to the salary of the office. Second. If this question be answered in the affirmative, whether he shall continue to perform the duties of the office **for the remainder of the term of the outgoing governor,** or shall he perform those duties only as long as he shall continue to be secretary of state. * * *

"The principle on which the second question is to be decided namely, whether the appellant shall cease to be governor when he ceases to be secretary of state, seems to be this: If an office be appendant, as the expression is in 1 Leon., 321, to another office, the determination of the first office will determine the second. * * *

"On the contrary, if the nomination or appointment to an office be by descriptio personarum of one who holds some office by the title of which he is described, and who on some contingency is to enter and fill another office, the answering the description at the time the contingency arises designates him as the person who is to enter and fill the office, and when, as thus designated, he enters into the office, he holds it in his natural, and not in his official capacity. * * *

"This question, therefore, must also be answered in favor of the appellant, and judgment be entered accordingly."

I have emphasized such words in the foregoing as seem to me to be particularly pertinent.

It seems clear to me that the court by this language, intended to pass in a broad way upon the whole question, and to hold that the office of governor, which had been resigned by Governor Grover, passed to Chadwick personally, and carried with it **all the attributes of that office,** including the right to hold it for the entire remainder of the term, which unquestionably belonged to the previous outgoing governor.

If this view needs any further support than the mere language of the opinion itself already quoted, it is found in the fact that the court reached this conclusion on account of the analogy which it assumed to exist between the offices of governor of the state of Oregon and secretary of state on the one hand, and the office of president and vice president of the United States upon the other; and the court reasoned that the office of governor passed to the secretary of state **in the same way and for the same remainder of the term** that the office of president of the United States passes to the vice president. Part of the opinion reads:

"The constitution of the United States, providing for the contingency of a vacancy in the office of president, is nearly the same with the provisions of our state constitution providing for a vacancy in the office of governor. * * * The vice president holds the office of president until the successor to the deceased president comes to assume the office **at the expiration of the term** for which the deceased president and the vice president were elected."

We may doubt whether the supposed analogy was as complete and perfect as the court assumed, and indeed as to whether there was any analogy at all, but we cannot very well doubt that the court in the Chadwick case intended to hold that the secretary of state, held the office of governor of Oregon, in the same way that the vice president holds the office of president of the United States upon the decease of the president.

When we remember further that the court held that the "office" devolved upon the secretary of state, and when we consider the term "office" when used thus without limitation, has reference to the duration of the position and the term of its occupancy, as well as the duties to be performed, the purpose of the court becomes still plainer.

In People v. Amern, 196 N. Y. 221, it is said in relation to the word, office,

"It means a right * * * to hold the place and perform the duty **for the term** and by the tenure prescribed by law."

In Kendall v. Raybould, 13 Utah, 226, 44 Pac. 1034, it is said:

"An office embraces the idea of tenure, **duration,** emoluments and duty, and these ideas or elements cannot be separated and each considered abstractly. All taken together constitute the office."

To the same effect see Tanner v. Edwards, 31 Utah, 80, 86 Pac. 765.

In State v. Rose, 74 Kan., 262, 86 Pac. 296, it is said:

"An 'office' is a trust conferred by public authority for a public purpose and for a definite term."

In United States v. McCrory, 91 Fed. 295, the court defines the word 'office' as follows:

"An office is a public station or employment conferred by the appointment of governor, the term embracing the idea of tenure, **duration,** employment and duties."

To the same effect see Burrell's Law Dictionary title "office."

In U. S. v. Hartwell, 6 Wall. 385, the supreme court of the United States says of the term "office,"

"The term embraces the idea of tenure, **duration,** emolument and duties."

In People v. Duane, 121 N. Y. 375, it is said of a public office that it means, among other things, the right "to hold the place and perform the duty **for the term** and by the tenure prescribed by law."

It seems plain to me that the court used the word in this sense in Chadwick v. Earhart, when it said in effect that the "office" of governor devolved upon the secretary of state for the remainder of the governor's term, and that it intended to place its decision upon the broad principle, that the office of governor, with all its attributes, included the duration of the term, devolved upon the person who was then secretary of state, who continued to hold it for the entire remainder of the term, the same as the vice president holds the office of president.

It remains to be considered, whether or not the question which the court did decide and which it intended to decide, in the case of Chadwick v. Earhart, and especially the question as to whether or not the secretary of state took the office personally and held the office of governor for the entire term, or only a portion thereof, was fairly within the issue made in that case, or whether, on the other hand, the principles that the court announced in that case were outside of the issues and mere dictum, which settled nothing and binds nobody.

In considering this question we must, it seems to me, remember that this is a great constitutional question in which the whole people of the state are deeply interested. They are interested to know, now and at all times hereafter, who is in truth their governor, and who is entitled to administer their laws. And when that question had once been settled they are interested in having that settlement remain undisturbed. It is far more important that the people shall know for a surety who is of right their governor at a given time, and who is entitled to perform the duties of the highest office of the state, than it is that any one person shall be governor at a given period.

It is not so very important to the people of the state of Oregon, whether Mr. Olcott or some other competent person shall act as governor for the ensuing two years. But it is important—exceedingly important—that whoever does act as governor shall have undoubted and unquestioned authority—so that his acts may be valid and the people may know them to be valid, and that their validity is beyond doubt or cavil. We do not want any possibility of two governors in the state; or two persons claiming to be governor, each with some shadow of authority and with a divided fealty behind him.

It is because of such possibilities no doubt, that the authorities recognize that the doctrine of stare decisis rests with peculiar and exceptional force, upon such great constitutional questions.

Mr. Black, in his work on Judicial Precedents, p. 222, says:

"The principle of stare decisis applies with especial force to the construction of constitutions, and an interpretation once deliberately put upon the provisions of such an instrument, should not be departed from without grave reasons."

And at another place, p. 223:

"Former decisions should not be departed from merely because the court, as at present constituted, entertains a different opinion as to the meaning or application of a given provision of the constitution from that announced by its predecessors."

And again, on p. 224:

"It is said that the principle of stare decisis, as applied to the construction and interpretation of the constitution, is especially imperative, when the former decisions were rendered at an early day and have long been considered as settling the law."

In Lewis' Sutherland on Stat. Const. (2d Ed.) Sec. 473, it is said:

"When a judicial interpretation has once been put upon a clause, expressed in a vague manner and difficult to be understood, that ought of itself to be sufficient authority for adopting the same construction."

It is true that questions not fairly within the issue made by the pleadings and presented to the court, cannot be authoritatively passed upon in any case, and if the court goes outside of these questions and decides others which are not before it, its utterance is a mere dictum which binds no one; and we must always assume that the court only intended to pass upon the questions that were really presented in any case for decision.

But I do not understand, that in order to make the decision in one case a controlling precedent in another, the two cases must be in all respects exactly identical.

On the other hand, as I understand the rule, if the doctrines announced in one case are necessary to the decision—necessary to the conclusion which the court reached in that case, and a part of the reasoning upon which the court reached that conclusion, they become established principles which govern all other cases, which come within them.

"Whenever a question fairly arises in the course of a trial, and there is a distinct decision thereon, the courts ruling in relation thereto, can in no sense be regarded as mere dictum." R. E. Co. v. Price, 159 Fed. 332.

"No matter what the situation may appear to be, as to the unjust operation of a law, courts should not struggle to change it as it has been understood to exist and has been plainly written into its decisions for years, by fine distinctions between cases, and by rejecting the reasons upon which they were grounded as obiter." Lewis' Sutherland on Stat. Const. (2d Ed.) Sec. 484.

"A judicial decision is to be regarded as conclusive, not only of the point presented in argument, but of every other proposition necessarily involved in reaching the conclusion expressed." Id. Sec. 486.

Our own court has gone farther than most courts—farther than it has seemed to me sometimes it ought to go—in extending the doctrine of stare decisis. In the case of Wilcox v. Warren Construction Co., decided at this term, the majority of the court held that a previous decision that a mother took to the exclusion of a father under the Employers' Liability law, upon the death of a child, was controlling as to the relative right of the widow and children under the same law on the death of the husband and father, although the court in the previous decision had not even attempted to decide the rights of the latter in any way, and there was a very broad ground for distinguishing between the two.

In Olcott v. Hoff, already cited, the majority of the court held that an authoritative and controlling decision could be made, as to how long and for what term the secretary of state could hold the office of governor; and even as to whether he could resign the office of secretary of state and still hold the office of governor, although neither of these questions were at all presented in the pleadings, and the only question really at issue, was whether or not the state treasurer should have honored a warrant drawn of his salary, while he was still secretary of state, and while the office of governor was still unquestionably vacant except for his incumbency.

In that case Mr. Justice Harris, in an opinion in which Mr. Justice Benson concurs, says:

"We can with propriety discuss and **determine** the question as to how long Ben W. Olcott is entitled to hold the office of governor and thus decide the rights of the petitioner upon the one hand and the duties of the defendant on the other."

And that,

"The petitioner can resign as secretary of state and continue to occupy the office of governor."

If a decision, as between the rights of the mother and father to damages under the liability law, is to be held conclusive and controlling between the widow and children, whose rights were in no way in question, and if we could properly determine the right of the secretary of state to resign and still hold the office of governor, and the right of the secretary of state to hold the office of governor after the election in 1920 in Olcott v. Hoff, when these questions were in no way presented by the pleadings; then it seems to me, that it would be going a long way to hold that we are not bound, by the unanimous decision of a previous supreme court, when it was passing properly and necessarily upon the very question as to whether such secretary of state, acting as governor, held for the full remain-