HARGRAVES *v.* SOLOMON.

Opinion delivered October 15, 1928.

1. CONSTITUTIONAL LAW—DIRECTORY AND MANDATORY PROVISIONS.—The general rule is that constitutional provisions are to be construed as mandatory unless by their express terms or by necessary implication a different intention is manifest.
2. CONSTITUTIONAL LAW—MANNER OF EXERCISING POWER CONFERRED.—Where a power is expressly given by the Constitution and the manner or means by which it is to be exercised is prescribed, such manner or means is exclusive.
3. CONSTITUTIONAL LAW—WISDOM OR EXPEDIENCY OF PROVISIONS.—The courts are not concerned with the wisdom or expediency of constitutional provisions, but should carry out the provisions of the Constitution, as indicated by its plain language.
4. MUNICIPAL CORPORATIONS—ISSUANCE OF BONDS—REGULATION.—The provision of Const. Amdt. No. 13 (Acts 1927, p. 1210) that bonds issued by a city for the purposes mentioned therein shall mature annually after three years from date of issue and that no bonds shall be issued for a longer period than 35 years, is mandatory, and not merely directory.

5. MUNICIPAL CORPORATIONS—ISSUANCE OF BONDS—CONCLUSIVENESS AGAINST ATTACK.—The provision of Constitution, Amdt. 13, that the result of a city election on the question of issuing bonds shall be proclaimed by the mayor, and the result as proclaimed shall be conclusive unless attacked in the court within 30 days after such proclamation, does not apply to an attack on the bond issue on grounds other than those relating to the result of the election.

6. MUNICIPAL CORPORATIONS—VALIDITY OF BOND ISSUE.—Where some of the bonds issued by a city were invalid under Const., Amdt. 13 (Acts 1927, p. 1210), because they matured before three years from the date of their issue, the whole bond issue was void.

7. MUNICIPAL CORPORATIONS—EFFECT OF INVALIDITY OF BOND ISSUE.—Though a bond issue was adjudged invalid under Amdt. 13 to the Constitution (Acts 1927, p. 1210), because some of the bonds matured within three years from the date of their issue, this did not exhaust the power of the city council to commence a new proceeding for the same purpose.

Appeal from Phillips Chancery Court; *A. L. Hutchins,* Chancellor; affirmed.

STATEMENT OF FACTS.

Lafe Solomon, an owner of real property in the city of Helena, brought this suit in equity against D. T. Hargraves, mayor of Helena, to enjoin him from executing and delivering to any one $150,000 in municipal bonds for the purpose of building a city hospital.

According to the allegations of the complaint, on the third day of February, 1927, the common council of the city of Helena passed an ordinance calling an election to be held in said city on the fifth day of May, 1927, for the purpose of determining whether the city should issue $150,000 in bonds for the purpose of building a city hospital. Said ordinance provided that said bonds shall mature serially in each of the years 1920 to 1949, inclusive, and should be dated July 1, 1927, and the first maturity should be January 1, 1930. Pursuant to said ordinance, notice of the election was duly published, and the election was held on the tenth day of May, 1927. The mayor duly published his proclamation that a majority had voted at the election in favor of the bond issue. The complaint further alleges that the bonds were sold to a

bond company, and that the mayor is preparing to deliver said bonds to the purchaser. The bond issue is alleged to be void on the ground that the first maturity is less than three years from the date of issue, and is therefore violative of the provisions of Amendment No. 13 to the Constitution of our State.

The defendant filed a demurrer to the complaint, which was overruled by the court, and, having elected to stand upon his demurrer, the defendant was perpetually enjoined from the execution and delivery of said hospital bonds. The case is here on appeal.

E. M. Pipkin, Jr., and *Rose, Hemingway, Cantrell & Loughborough*, for appellant.

Polk & Orr, for appellee.

HART, C. J., (after stating the facts). The record shows that some of the bonds proposed to be issued will mature less than three years from the date of issue. Counsel for the defendant seek to reverse the decree on the ground that the provision in the Thirteenth Amendment to our Constitution, providing that such bonds shall be serial, maturing annually after three years from the date of issue, is directory, and that the court erred in holding the provision to be mandatory.

The correctness of the holding of the chancery court depends upon the construction to be placed upon that part of Amendment No. 13 which reads as follows:

"Cities of the first and second class may issue, by and with the consent of a majority of the qualified electors of said municipality voting on the question at an election held for the purpose, bonds in sums and for the purposes approved by such majority at such election, for hospitals. Said bonds shall be serial, maturing annually after three years from date of issue, and shall be paid off as they mature, and no bonds issued under the authority of this amendment shall be issued for a longer period than thirty-five years.

"Said election shall be held at such times as the city council may designate by ordinance, which ordinance shall specifically state the purpose for which the bonds

are to be issued, and, if for more than one purpose, provision shall be made in said ordinance for balloting on each separate purpose; which ordinance shall state the sum total of the issue, the dates of maturity thereof, and shall fix the date of election so that it shall not occur earlier than thirty days after the passage of said ordinance. Said election shall be held and conducted and the vote thereof canvassed and the result thereof declared under the law and in the manner now or hereafter provided for muncipal elections, so far as the same may be applicable, except as herein otherwise provided. Notice of said election shall be given by the mayor by advertisement weekly for at least four times, in some newspaper published in said municipality and having a *bona fide* circulation therein, the last publication to be not less than 10 days prior to the date of said election. Qualified voters of said municipality only shall have a right to vote at said election. The result of said election shall be proclaimed by the mayor, and the result as proclaimed shall be conclusive, unless attacked in the courts within thirty days after the date of such proclamation.

"This amendment shall be in force upon its adoption and shall not require legislative action to put it into force and effect."

The Constitution of a State and the amendments thereto are the organic law, and are usually construed to be mandatory. The general rule is well established that constitutional provisions are to be construed as mandatory unless by their express terms or by necessary implication a different intention is manifest. Cooley on Constitutional Limitations, 8 ed., vol. 1, pp. 159-164, inclusive; 6 R. C. L. 55; and 12 C. J. 140.

This general rule has been approved by our own court. *State* v. *Johnson*, 26 Ark. 281, and *Merwin* v. *Fussell*, 93 Ark. 336, 124 S. W. 1021.

The reason for the rule is especially appropriate in cases of this sort. Where a power is expressly given by the Constitution and the manner or means by which it is

to be exercised is prescribed, such means or manner is exclusive of all others.

In the application of the rule in *State* v. *Johnson,* 26 Ark. 281, it was said that, when a constitutional provision designates the time when a fundamental act shall be done and is silent as to any other time for performing it, it cannot be done at any other time. Under the same principle, where a power is given a municipality to issue bonds under certain conditions and the date of the maturity of the bonds is fixed in the same provision of the Constitution, this would be a restriction upon the power of the municipality to fix another or different date for their maturity.

We are not concerned with the wisdom or expediency of the provision of the Constitution under consideration. Our duty is to carry out the provisions of the Constitution as indicated by its plain language. We have quoted in full what the framers of the Constitution expressed as to the manner and means of allowing a municipality to issue bonds; and we find nothing in the language used which would indicate that it was intended that the provision for the maturity of the bond issue was to be declared directory. If such was the intention of the framers, the provision under consideration might just as well have been left out. It will be noted that the language of the provision is direct and positive, and there appears to be no reason for holding that it was to be considered directory merely. In direct and positive terms the clause of the constitutional amendment under consideration provides that the bonds shall mature annually after three years from the date of issue, and that no bonds shall be issued for a longer period than thirty-five years. They evidently decided upon having the first date of maturity three years after the date of issue in order to give the property owners time to accumulate a fund for paying the bond issue as it should annually mature. Whatever the reason might have been, however, it is our duty to construe the provision as mandatory, inasmuch as there

is nothing in the language used to indicate that it was intended to be directory merely.

Again, it is insisted that the plaintiff was barred of his right to attack the ordinance because the amendment provides that the result of the election, as proclaimed by the mayor, shall be conclusive, unless attacked in the courts within thirty days after the date of said proclamation. The attack in the case at bar was made more than thirty days after the date of said proclamation. We do not agree with counsel in this contention. We have copied the provision in question above, and it is apparent from the language used that the framers of the amendment to the Constitution only had in mind that the result of the election as proclaimed by the mayor should not be attacked after thirty days from the date of such proclamation.

It is next insisted that, even if we should hold that the bonds maturing before three years from the date of their issue were void, this would not invalidate the issue as to the remainder. We do not agree with counsel in this contention. The issue of bonds was an entirety; and, as we have already seen, there is no power to issue them unless the mandatory provisions of the amendment to the Constitution conferring the power have been complied with. Having violated the provisions of the Constitution in question in issuing the bonds, the invalidity of some of them necessarily affects the whole issue.

What we have said in this opinion should not be construed to prevent the common council of the city of Helena from passing an ordinance to hold another election for the purpose of issuing bonds for a city hospital, if said council should deem such course to be wise and expedient. The fact that the first issue has been declared illegal in no sense exhausts the power of the city council to commence a new proceeding in accordance with the provisions of the amendment to the Constitution in question.

It follows that the decree of the chancery court was correct, and it will therefore be affirmed.