

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

YVONNE KENNEDY, JAMES)	
BUSKEY & WILLIAM CLARK,)	
)	
Plaintiffs,)	
)	CIVIL ACTION NO.
v.)	2:05cv1100-MHT
)	(WO)
HONORABLE BOB RILEY, as)	
Governor of the State of)	
Alabama,)	
)	
Defendant.)	

Before Stanley Marcus, Circuit Judge, Myron H. Thompson, District Judge, and W. Harold Albritton, Senior District Judge.

ORDER

On August 18, 2006, this three-judge court held that two Alabama Supreme Court decisions, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005), must be precleared before they can be implemented. *Kennedy v. Riley*, 445 F. Supp. 2d 1333, 1337 (M.D. Ala. 2006). On January 8, 2007, after the State of Alabama had submitted the state-court decisions for preclearance, the United States Department of Justice refused to preclear them, and, on March 12, 2007, refused to reconsider its decision. This matter is now before us on the plaintiffs' renewed motion for further relief.

We conclude that, because *Stokes v. Noonan* and *Riley v. Kennedy* were not precleared, Governor Bob Riley's appointment of Juan Chastang to the Mobile County

Commission pursuant to these two decisions was unlawful under federal law. Chastang's appointment must therefore be vacated.

Accordingly, it is the ORDER, JUDGMENT and DECREE of the court that the plaintiffs' renewed motion for further relief (Doc. No. 44) is granted to the extent that the appointment of Juan Chastang to the Mobile County Commission is vacated.

Done, this the 1st day of May, 2007.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT
JUDGE

/s/ W. Harold Albritton
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
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Defendant.)	

Before Stanley Marcus, Circuit Judge, Myron H. Thompson, District Judge, and W. Harold Albritton, Senior District Judge.

OPINION

Myron H. Thompson, District Judge:

This three-judge court has been convened to consider the claim of plaintiffs Yvonne Kennedy , James Buskey , and William Clark that, under § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c , the State of Alabama was required, but failed, to preclear two decisions of the Alabama Supreme Court: *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005). For the reasons that follow, we hold that the state court decisions should have been precleared before they were implemented.

I.

A brief chronology of the events leading up to the challenge to these two state court decisions is helpful:

April through June 1985: Act No. 85-237, a local law providing, in certain circumstances, for a special election to fill vacancies on the Mobile County Commission, was enacted and, shortly thereafter, precleared by the United States Attorney General.¹ Prior to Act No. 85-237, such vacancies were filled by gubernatorial appointment.

June and July 1987: Pursuant to Act No. 85-237, a special election was held to fill a vacancy on the Mobile County Commission. Sam Jones won and assumed office.

September and October 1988: In *Stokes v. Noonan*, the Alabama Supreme Court held that, because Act No. 85-237 was a local statute and because it conflicted with and was subsumed by another state law of general application, it violated the Alabama Constitution. The governor then appointed Jones to the Mobile County Commission seat to which he was previously elected. The State did not submit *Stokes v. Noonan* for preclearance.

May through September 2004: The Alabama Legislature passed Act No. 2004-455 expressly to allow local laws to make exceptions to the general rule of filling vacancies by

¹ Act No. 85-237 states that:

“Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant....”

Act of Apr. 8, 1985, No. 85-237, 1985 Ala. Acts 137.

gubernatorial appointments.² The United States Attorney General precleared Act No. 2004-455.

September and October 2005: Jones was elected Mayor of Mobile and vacated his Mobile County Commission position.

November 2005: In *Riley v. Kennedy*, the Alabama Supreme Court rejected claims that Act No. 2004-455 revived Act No. 85-237 and that, as a result, Act. No. 85-237 now required that the vacancy on the Mobile County Commission be filled by special election rather than by gubernatorial appointment; the court held that Act No. 2004-455 applied only prospectively. Relying on *Riley v. Kennedy*, the governor appointed Juan Chastang to the vacated position on the Mobile County Commission. As with *Stokes v. Noonan*, the State did not submit *Riley v. Kennedy* for preclearance.

The plaintiffs then filed this lawsuit claiming that *Riley v. Kennedy* and the earlier decision in *Stokes v. Noonan* could not be implemented without first being precleared.

II.

The thrust of the plaintiffs' argument is that , because Act No. 85-237 was precleared and enforced, *Stokes v. Noonan* (the decision invalidating it) and *Riley v. Kennedy* (the later decision refusing to revive, and therefore, to enforce it) should not have been implemented without first being precleared.

² Act No. 2004-455 amended the general law, Ala. Code § 11-3-6, to read as follows:

“Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed.”

A.

Section 5 of the Voting Rights Act requires certain States, such as Alabama, to obtain preclearance from the Attorney General of the United States or the United States District Court for the District of Columbia when they “or [their] political subdivision[s] . . . enact or seek to administer any . . . standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964.” 42 U.S.C. § 1973c. Generally, a change from an elected to an appointed office requires preclearance, *Allen v. State Bd. of Elections*, 393 U.S. 544, 569-70 (1969), and a § 5 change may be brought about by state court decisions. *Branch v. Smith*, 538 U.S. 254, 262 (2003).

“The State may preclear a voting change in one of two ways: it may obtain a declaratory judgment in the United States District Court for the District of Columbia, or it may submit the change to the Attorney General of the United States for approval. If the Attorney General approves the change, or fails to register an objection to the change within 60 days, the change is precleared.” *Boxx v. Bennett*, 50 F. Supp.2d 1219, 1223 (M.D. Ala. 1999) (three- judge court)

In reviewing the plaintiffs’ § 5 claim, we are tasked with the limited purpose of determining “(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5’s approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate.” *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983). Because it is undisputed that *Stokes v. Noonan* and *Riley v. Kennedy* were not precleared, the critical inquiries for this court are whether these decisions brought about a change covered by § 5, and, if so, the appropriate remedy.

In determining whether a change covered by § 5 occurred, we must first determine if there was, in fact, a change. Changes are measured by comparing the new

challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect. *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997) (citing 28 CFR § 51.54); *Gresham v. Harris*, 695 F. Supp. 1179, 1183 (N.D. Ga. 1988) (three-judge court), *aff'd sub nom. Poole v. Gresham*, 495 U.S. 954 (1990).

Here, the parties dispute what constitutes the baseline practice. The plaintiffs argue that the baseline is Act No. 85-237, which provided for the filling of the vacancy on the Mobile County Commission by special election; they maintain that *Stokes v. Noonan* and *Riley v. Kennedy* were changes because the former invalidated the Act and the latter still refused to enforce it. The State responds that the baseline could not be Act No. 85-237 because the Alabama Supreme Court declared it unconstitutional; the State posits that *Stokes v. Noonan* and *Riley v. Kennedy* did not reflect a change but were rather a mere reaffirmation of the correct scope of the governor's preexisting appointment power under Alabama general law.

We think the plaintiffs have the better argument. Because Act No. 85-237 was the most recent precleared practice put into force and effect with the election of Jones in 1987, it is the baseline against which we must determine if there was a change. To be sure, the Alabama Supreme Court declared Act No. 85-237 unconstitutional under state law; this was, however, after Act No. 85-237 had been put into effect. We are required to determine the baseline "without regard for [its] legality under state law." *Lockhart*, 460 U.S. at 133 (relying on *Perkins v. Matthews*, 400 U.S. 379, 394-395 (1971)).

We therefore hold that, because Act No. 85-237 is the baseline and because *Stokes v. Noonan* invalidated Act No. 85-237 and *Riley v. Kennedy* held that Act No. 85-237 was not rendered enforceable by Act No. 2004-455, the two decisions constituted changes that should have been

precleared before they were implemented. In reaching this holding, we emphasize that we are in no way disputing the rulings of the Supreme Court of Alabama, the reasoning underlying the rulings in these two cases, or that the governors acted in accordance with state law in making the appointments. Indeed, this court does not have jurisdiction to address such purely state-law questions. Whether Act No. 85-237 is, in fact, unconstitutional under state law and whether positions on the Mobile County Commission must be filled by special election or gubernatorial appointment are state-law questions we do not reach and should not be understood in any way as reaching; our holding today does not in any way undermine these two decisions under state law. We merely hold that federal law requires that they be precleared before they are implemented.

B.

The plaintiffs suggest that rather than enjoin enforcement of *Stokes v. Noonan* and *Riley v. Kennedy*, or otherwise even consider taking any action regarding the appointment of Juan Chastang to the Mobile County Commission, we should give the State 90 days to obtain the necessary preclearance. We agree.

An appropriate judgment will be entered.

Done this the 18th day of August, 2006.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT
JUDGE

/s/ W. Harold Albritton
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
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Defendant.)	

Before Stanley Marcus, Circuit Judge, Myron H. Thompson, District Judge, and W. Harold Albritton, Senior District Judge.

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court that:

(1) Judgment is entered in favor of plaintiffs Yvonne Kennedy, James Buskey, and William Clark and against defendant Bob Riley.

(2) The State of Alabama has 90 days from the date of this order to obtain preclearance in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c; if the State fails to comply with this requirement within the time allowed, the court will revisit the issue of remedy. Defendant Riley is to keep the court informed of

what action, if any, the State decides to take and the result of that action.

It is further ORDERED that costs are taxed against defendant Riley, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Done this the 18th day of August, 2006.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT
JUDGE

/s/ W. Harold Albritton
SENIOR UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

YVONNE KENNEDY, JAMES)	
BUSKEY & WILLIAM CLARK,)	
)	
Plaintiffs,)	
)	
vs.)	CIVIL ACTION
)	NO. 2:05 CV 1100-T
HONORABLE BOB RILEY,)	
as Governor of the State of)	
Alabama)	
)	
Defendant.)	

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

Bob Riley, in his official capacity as Governor of the State of Alabama, the defendant in this action, hereby appeals to the Supreme Court of the United States from the final Order of the three-judge court vacating his appointment of Juan Chastang to fill a vacancy in the Mobile County Commission, entered in this action on May 1, 2007 (doc. 48), and from prior orders, judgments and decrees of the three-judge court upon which the May 1, 2007 Order necessarily relies, specifically including the Judgment entered on August 18, 2006 (doc. 23) and the Opinion of the same date (doc. 22).

This appeal is taken pursuant to 42 U.S.C. § 1973c, as amended by Pub.L. No. 109-246, § 5, July 27, 2006, 120 Stat. 577, 580, and 28 U.S.C. § 1253.

Respectfully submitted,

TROY KING (KIN047)
ATTORNEY GENERAL

BY:

s/ John J. Park, Jr.

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Governor of the State of Alabama

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of May, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Governor of the State of Alabama

42 U.S.C. § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until

the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred

candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term “purpose” in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

Supreme Court of Alabama.

Willie H. STOKES

v.

Lionel W. "Red" NOONAN, in his capacity as Judge
of the Probate Court of Mobile County, et al.

86-1082.

Sept. 30, 1988.

BEATTY, Justice.

The plaintiff, Willie H. Stokes, appeals from a judgment in favor of defendant Lionel W. "Red" Noonan, et al., holding that Act No. 85-237, Acts of Alabama 1985, is valid and constitutional.

Stokes, as a registered voter, taxpayer, and real property owner of Mobile County, filed suit in April 1987 contesting the constitutionality of Act No. 85-237, which provides for the filling of vacancies on the Mobile County Commission by a special election when at least 12 months remain on any commissioner's unexpired term:

"Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term."

Stokes contends that the subject of local Act No. 85-237 is

subsumed by a general law, § 11-3-6, Code of 1975, and therefore, under Art. IV, § 105, Constitution 1901, and this Court's decision in *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala.1978), is unconstitutional.

Section 105, in pertinent part, states: "No special, private, or local law ... shall be enacted in any case which is provided by a general law." Section 11-3-6, Code of 1975, is contained in the chapter pertaining to county commissions and refers to vacancies:

"In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed."

Stokes also contends that Act No. 85-237 violates Art. IV, § 104(29), Constitution of 1901, which states, in pertinent part: "The legislature shall not pass a special, private, or local law in any of the following cases:

"....

"(29) Providing for the conduct of elections or designating places of voting, or changing the boundaries of wards, precincts, or districts, except in the event of organization of new counties, or the changing of the lines of old counties...."

We need not address the plaintiff's attacks under § 104(29) because we are convinced that Act No. 85-237 clearly offends § 105 of the Constitution of 1901.

In *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala.1978), this Court explained at length the difference between a local law and a general law, and, applying the literal language of the Constitution of 1901, held that the presence of a general law upon a given subject was *primary*,

meaning “that a local law cannot be passed upon that subject.” This Court added at 813:

“By constitutional definition a general law is one which applies to the whole state and to each county in the state with the same force as though it had been a valid local law from inception. Its passage is none the less based upon local considerations simply because it has a statewide application, and already having that effect, the constitutional framers have prohibited the enactment of a local act when the subject is already subsumed by the general statute.”

Section 11-3-6 is a statewide statute governing the general subject of filling vacancies on county commissions. Its language is substantially the same as its complementary section that appeared in Ala.Code 1940 as Title 12, § 6. See also Ala.Code 1940, Title 12, § 6 (Recomp.1958).

Act No. 85-237 was approved April 8, 1985. By its terms, it is made applicable only to Mobile County. Hence, when it became law it applied to a political subdivision of the state less than the whole, and thus, it was a local law on the same subject as the previously enacted general law, § 11-3-6; see Constitution of 1901, § 110; *Peddycoart*, 354 So.2d at 814; and, accordingly, it is unconstitutional under § 105. We cannot, therefore, agree with the defendant that the Mobile County Commission, because of statutory history, has always been, and therefore is still, governed by local law. To approve such a proposition here would run directly counter to the language of our constitution. Surely, it cannot be held that the legislature is proscribed from enacting general laws on subjects already covered by local laws, even if by application such local laws are repealed, when the intent of the legislature is clear-and it is in this case. See *Buskey v. Mobile County Board of Registrars*, 501 So. 2d 447 (Ala.1986).

In *Baldwin County v. Jenkins*, 494 So. 2d 584 (Ala.1986), a similar question dealing with the constitutionality of a local act was resolved. In that case, this Court was confronted with two statutes dealing with the election and terms of the office of county commissioners. This Court held that the general statute, Code of 1975, § 11-3-1, as amended, having contained the language, “unless otherwise provided by local law,” manifested a legislative intent that the subject it dealt with not be subsumed within it:

“A situation completely opposite and contrary to the one presented here was contemplated and prohibited by the constitutional framers, which is to say that the legislature, by enacting a general law *containing no such provision or exception for contrary local laws*, thereby intended that general law to be *primary* and the subject subsumed entirely by the general law. In that situation, § 105 does operate to prohibit the enactment of contrary local laws. Such is not the case with respect to § 11-3-1 and Act No. 84-639. Because the language of the statute provides for the existence of and prevailing effect of contrary local laws, it must be that the legislature did not intend the subject to be ‘subsumed’ exclusively within § 11-3-1. That being the case, the co-existence of the general law (§ 11-3-1) and the *contrary* local law (Act No. 84-639) deferred to in the general law, cannot be said to be repugnant to § 105 because ‘the constitutional framers have [only] prohibited the enactment of a local act when the subject [as intended by the legislature] is already subsumed by the general statute.’ *Peddycoart*, [354 So.2d at 813].”

494 So. 2d at 587. (Emphasis in *Jenkins*.)

No such intent is demonstrated by the language of § 11-3-6 regarding filling of vacancies, and that language must be

given effect according to its terms. Thus, it is our duty to declare Act No. 85-237 unconstitutional as violating § 105. It follows that the judgment appealed from must be, and it is hereby, reversed, and a judgment rendered declaring that Act unconstitutional.

REVERSED AND JUDGMENT RENDERED.

TORBERT, C.J., and JONES, SHORES and HOUSTON, JJ., concur.

MADDOX, J., concurs specially.

ALMON, J., concurs in the result.

ADAMS and STEAGALL, JJ., dissent.

MADDOX, Justice (concurring specially).

I concur completely with the opinion holding that Act No. 86-237 is unconstitutional under § 105, under this Court's decision in *Peddycoart*, cited in the majority opinion.

I do not believe it is necessary to distinguish *Baldwin County v. Jenkins*, 494 So.2d 584 (Ala.1986), which I thought was incorrectly decided, for the reasons I expressed in a dissent in that case; therefore, I concur specially.

STEAGALL, Justice (dissenting).

I respectfully dissent as to the majority opinion's reversal of the trial court's decision that Act No. 85-237 is valid and constitutional.

The Mobile County Commission was created on August 7, 1957, when the Alabama Legislature passed Act No. 181, Acts of Alabama 1957, a local act. The Act created the Mobile County Commission out of the existing board of revenue and road commissioners and provided for the election of its members, those members' terms of office, qualifications for that office, and various other requirements

dealing with that body, including the filling of vacancies when they occurred. That Act states specifically:

“Vacancies on the commission shall be filled by appointment by the Governor, but the office of president of the commission shall be filled by the members thereof. Any person appointed to fill a vacancy shall serve the unexpired term, and until his successor is elected and qualified.”

Act No. 181, § 2(b), Acts of Alabama 1957, at 234.

The local act being question here, Act No. 85-237, Acts of Alabama 1985, states, in regard to vacancies on the Mobile County Commission:

“Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.”

Act No. 85-237, Acts of Alabama 1985, at 137.

This Court has on several occasions upheld trial courts’ rulings that a local act amending a local act is not unconstitutional. In *Freeman v. Purvis*, 400 So.2d 389 (Ala.1981), the Court upheld a trial court ruling which found that:

“Act 80-797 passed in the 1980 regular session of the Legislature of Alabama, is a Local Act which amends a local act and is not unconstitutional.”

400 So.2d at 390. The Court then stated: “Accordingly, the trial court was correct when it held that Act No. 797 was a local law which amended Act No. 710, a pre-existing local law.” 400 So.2d at 392.

Local Act 85-237 is amendatory in nature, affecting the already-existing local legislation, which created the Mobile County Commission and provided for the filling of vacancies.

In *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala.1978), we stated, regarding legislation passed before and after that decision:

“Henceforth when at its enactment legislation is local in its application it will be a local act and subject to all of the constitutional qualifications applicable to it. With regard to legislation heretofore enacted, the validity of which is challenged, this Court will apply the rules which it has heretofore applied in similar cases.”

354 So.2d at 814.

The effect of this passage was to say that the new standard established in *Peddycoart* as to the constitutionality of local legislation would be applied only prospectively. *Ex parte Bracewell*, 407 So.2d 845 (Ala.1979), *reversed on other grounds*, 457 U.S. 1114, 102 S. Ct. 2920, 73 L.Ed.2d 1325 (1982). Where, as here, we are looking at legislation enacted prior to *Peddycoart* but amended afterwards, this Court is required to apply the law as it stood before *Peddycoart*. That law can be found in the case of *Johnson v. State ex rel. City of Birmingham*, 245 Ala. 499, 17 So.2d 662 (1944):

“Sec. 105 of the Constitution is not construed to inhibit local legislation on a subject not prohibited by the Constitution, merely because the local law is

different, and works a partial repeal of a general law.”

245 Ala. at 503, 17 So.2d at 664, citing *Talley v. Webster*, 225 Ala. 384, 143 So. 555 (1932). This Court, in *Talley v. Webster*, in determining whether a statute violated Section 105 of the Constitution, stated: “We need not review the numerous cases construing this section. Suffice it to say it does not inhibit the passage of local laws on subjects, not prohibited by Section 104, merely because such local law is different, and works a partial repeal of the general law of the state in the territory affected.” 225 Ala. at 385, 143 So. at 555.

In the case of *Norris v. Seibels*, 353 So.2d 1165 (Ala.1977), this Court reversed a judgment of the Alabama Court of Civil Appeals and held that a showing of specific legislative intent was necessary to effect any such repeal: “This general statute cannot be repealed by implication found in the local statute unless the legislative intent to effect such a repeal is clearly manifested.” 353 So. 2d at 1167. This Court held that the language used in the questioned local statute contained no express repeal of the general statute. However, such is not the case here. Section 3 of Act 85-237, Acts of Alabama 1985, demonstrates a specific legislative intent by expressly repealing “[a]ll laws or parts of laws which are in conflict with this act.”

Because I believe that Act 85-237, a local act, is amendatory in nature and therefore that the law to be applied is that existing prior to our decision in *Peddycoart*, supra, I believe the trial court’s judgment should be affirmed.

ADAMS, J., concurs.

Supreme Court of Alabama.
Bob RILEY, as Governor of Alabama
v.
Yvonne KENNEDY et al.
1050087.

Nov. 9, 2005.
Rehearing Denied Nov. 15, 2005.

STUART, Justice.

Bob Riley, in his official capacity as Governor of Alabama, appeals a judgment of the Montgomery Circuit Court holding that a vacancy on the Mobile County Commission should be filled by a special election. We reverse and remand.

Facts

In an election held on September 13, 2005, Sam Jones, the county commissioner for district 1, Mobile County Commission, was elected to the office of mayor of the City of Mobile. On September 19, 2005, Yvonne Kennedy, James Buskey, and William Clark, registered voters in Mobile County and residents of district 1 (hereinafter referred to collectively as “Kennedy”), filed a pleading in the Montgomery Circuit Court containing the following: a complaint seeking a declaration as to whether Alabama law requires the vacancy in the district 1 seat on the County Commission to be filled by a special election; a petition for a writ of mandamus directing Don Davis, probate judge of Mobile County to conduct such a special election to fill the district 1 seat; and a request for an injunction prohibiting Governor Riley and the other defendants¹ from acting to the

¹ In addition to naming Governor Riley as a defendant, the complaint also named Don Davis, in his official capacity as probate judge of Mobile County; the Mobile County Commission; and Stephen Nodine and Mike

contrary.

According to the complaint, Governor Riley, through his legal advisers, had made public statements indicating that he would fill by appointment the vacancy created when Jones resigned his seat on the County Commission to assume the office of mayor. Kennedy averred that Governor Riley could not make such an appointment, because, she argued, Act No. 85-237, Ala. Acts 1985, requires that “a special election be held to fill the vacancy, and, if a special election is not held, [Kennedy] and other similarly situated registered voters of the County of Mobile will be disenfranchised and denied the opportunity to vote for a candidate of their choice to fill the vacancy mentioned.”

Governor Riley answered the complaint, asserting that he is authorized by general law to fill the vacancy and that Act No. 85-237, Ala. Acts 1985, relied on by Kennedy, was declared unconstitutional by this Court in *Stokes v. Noonan*, 534 So.2d 237 (Ala.1988). Act No. 85-237, he argues, is therefore void, and it was not revived, as Kennedy argues, by the legislature’s subsequent enactment of Act No. 2004-455, Ala. Acts 2004, amending § 11-3-6, Ala. Code 1975.

On September 29, 2005, after hearing argument by counsel, the Montgomery Circuit Court, apparently giving a field of operation to Act No. 85-237, Ala. Acts 1985, held that the vacancy on the Mobile County Commission must be filled by a special election rather than by appointment by the Governor. On October 3, 2005, Sam Jones, the commissioner for district 1, resigned to assume the office of mayor of the City of Mobile. On October 11, 2005, Governor Riley appealed.

Standard of Review

Dean, in their official capacities as members of the Mobile County Commission. Governor Riley is the only defendant who appealed.

“This court reviews de novo a trial court’s interpretation of a statute, because only a question of law is presented.’ *Scott Bridge Co. v. Wright*, 883 So.2d 1221, 1223 (Ala.2003). Where, as here, the facts of a case are essentially undisputed, this Court must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review. *Carter v. City of Haleyville*, 669 So.2d 812, 815 (Ala.1995).”

Continental Nat’l Indem. Co. v. Fields, 926 So.2d 1033, 1034-35 (Ala.2005).

Discussion

Governor Riley contends that Act No. 2004-455, Ala. Acts 2004, amending § 11-3-6, Ala. Code 1975, did not revive Act No. 85-237, Ala. Acts 1985, which this Court had held unconstitutional, see *Stokes v. Noonan*, and that, therefore, the trial court erred in declaring that the vacancy on the Mobile County Commission created by Jones’s resignation should be filled by a special election.²

In *Stokes*, this Court addressed the constitutionality of Act No. 85-237, which provided that vacancies on the Mobile County Commission would be filled by a special election when at least 12 months remained on the unexpired term of any commissioner. The registered voter challenging Act No. 85-237 in *Stokes* argued that Act No. 85-237, a local act, was subsumed by a general law, § 11-3-6, Ala. Code 1975, and, consequently, was unconstitutional under Art. IV, § 105, Alabama Constitution 1901.

Act No. 85-237 provided:

² We review this issue only as presented by these facts and by the parties’ arguments regarding these facts; we do not address any other possible impediments that may exist to the constitutionality or enforceability of Act No. 85-237.

“Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.”

534 So.2d at 238. We held that Act No. 85-237, applicable only to Mobile County, constituted a local law on the same subject as the previously enacted general law. We then considered § 11-3-6, Ala.Code 1975, which appears in Chapter 3, Title 11, of the Alabama Code pertaining to county commissions. It provided at the time we decided *Stokes*: “In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed.” 534 So.2d at 238. We recognized that § 11-3-6 is clearly a general law, a statewide statute addressing the filling of vacancies on county commissions throughout the State, and that the legislature did not in the language of § 11-3-6, Ala.Code 1975, manifest an intent to except the local law from the general law. Therefore, we held that Act No. 85-237 was contrary to § 11-3-6, Ala. Code 1975, and, consequently, that it violated Art. IV, § 105, Alabama Constitution 1901, which provides, in pertinent part: “No special, private, or local law ... shall be enacted in any case which is provided for by a general law.” We reasoned that because the legislature did not in § 11-3-6, Ala. Code 1975, manifest an intent to except the local law from the general law, the contrary local law, in that case Act No. 85-237, must defer to the general law, §

11-3-6, Ala. Code 1975, and, consequently, we held, Act No. 85-237 violated Art. IV, § 105, Alabama Constitution 1901.

On May 14, 2004, Governor Riley approved Act No. 2004-455 and it became effective. Act No. 2004-455 amends § 11-3-6, Ala. Code 1975, to read as follows: “Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed.”

Kennedy argues that Act No. 2004-455, which amended § 11-3-6, Ala. Code 1975, manifests an intent by the legislature to cure the impediment to the enforceability this Court found as to Act No. 85-237 and to now give effect to that Act and that, consequently, a special election is the proper procedure by which to fill the vacancy created on the Mobile County Commission by Jones’s resignation. We cannot agree with that conclusion because the language of Act No. 2004-455 does not clearly so indicate.

This Court has consistently held that

“statutes are to be prospective only, unless clearly indicated by the legislature. Retrospective legislation is not favored by the courts, and statutes will not be construed as retrospective unless the language used in the enactment of the statute is so clear that there is no other possible construction. *Sutherland Stat. Const.*, § 41.04 (4th ed 1984).’

“*Dennis v. Pendley*, 518 So. 2d 688, 690 (Ala.1987).”

Gotcher v. Teague, 583 So. 2d 267, 268 (Ala.1991). Moreover, although curative statutes are “of necessity” retroactive, *Horton v. Carter*, 253 Ala. 325, 328, 45 So. 2d 10, 12 (1950), even they are subject to the same rule of

statutory construction, i.e., they will not be construed as retroactive unless the intent of the legislature that the statute have such retroactive effect is clearly expressed. The act under consideration in *Horton* expressly provided: “This Act shall be deemed retroactive in its effect upon its passage and approval by the Governor or upon its otherwise becoming a law.” 253 Ala. at 328, 45 So. 2d at 12. On numerous other occasions the legislature has demonstrated its ability to provide expressly for retroactive effect when enacting curative legislation. See, e.g., § 34-8-28(h), Ala. Code 1975 (“The provisions of this amendatory section are remedial and curative and shall be retroactive to January 1, 1998.”); § 11-50-16(c), Ala. Code 1975 (“The provisions of this section shall be curative and retroactive”); § 11-43-80(d), Ala. Code 1975 (“The provisions of this section shall be curative and retroactive”); and Act No. 2001-891, § 5, Ala. Acts 2001 (“It is the intent of the Legislature that this act be construed as retroactive and curative.”).

Here, the plain language in Act No. 2004-455, amending § 11-3-6, Ala. Code 1975, provides for prospective application only, and that language must be given effect according to its terms. Nothing in the language in Act No. 2004-455 demonstrates an intent by the legislature that the amendment of § 11-3-6 apply retroactively. The argument that Act No. 2004-455 applies prospectively only is further supported by the preamble of the Act, which provides that the purpose of the Act is “[t]o amend Section 11-3-6 of the Code of Alabama 1975, relating to county commissions, *to authorize the Legislature by local law to provide for the manner of filling vacancies in the office of the county commission.*” (Emphasis added.) The language “to authorize the Legislature ... to provide” the means by which vacancies on the county commission are to be filled further indicates an intention by the legislature that the Act is to be prospectively applied. Therefore, we hold that Act No. 2004-455 applies

prospectively only; consequently, Governor Riley is authorized to fill the vacancy on the Mobile County Commission by appointment.

Conclusion

Based on the foregoing, we conclude that the trial court erred in holding that the vacancy on the Mobile County Commission should be filled by a special election. Its judgment so holding is, therefore, reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

NABERS, C.J., and SEE, LYONS, HARWOOD, SMITH, BOLIN, and PARKER, JJ., concur.

WOODALL, J., concurs in the result.