

Governor's
Appointment
Authority

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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MEMORANDUM

February 5, 1991

SUBJECT: Confirmation Power of Legislature When the Governor Has Failed or Refused to Transmit the Appointment to the Legislature (Work Order No. 17LS-0664)

TO: Representative Dave Donley

FROM: Gerald P. Luckhaupt *GLP*
Legislative Counsel

You have asked what the authority of the legislature is to hold confirmation proceedings for an appointee of the governor when the governor fails or refuses to transmit the name of the appointee, or notice of the appointment, to the legislature for confirmation. We hereby respond as follows.

Initially, in considering your question we must look to the constitution to determine the appointment power of the governor and the authority of the legislature to confirm or reject those appointments. Article III, sec. 25, of the Alaska Constitution provides:

The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

And art. III, sec. 26 provides:

When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized

by law, but the appointment shall be subject to the approval of the governor.

These provisions provide that the governor has the authority to appoint the "head of each principal department" of the state and the members of each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency." These appointees are all subject to the legislature's constitutional authority to confirm or reject them.^{1/}

In Bradner v. Hammond, 553 P.2d 1, 7 (1976), the Alaska Supreme Court described the authority of the legislature to confirm the appointees described in sections 25 and 26 as:

not a distinct legislative power, but rather a part of the executive power of appointment which has in turn been delegated in some specific instances by constitution to the legislative branch of government.

Therefore, the power of confirmation of the governor's appointees to the "head of each principal department" and to membership on each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency", though normally an executive branch function, has been exclusively delegated to the legislature by the Alaska Constitution.

To implement this confirmation power granted by the constitution the legislature has enacted AS 39.05.080. This section provides that the governor:

shall, within 30 days of the convening of the legislature in regular session, present to the legislature the names of the following persons: (A) persons appointed to a position or membership who have not previously been confirmed by the legislature or either house of it; (B) persons appointed subject to confirmation to fill an existing position or membership vacancy; (C) persons to be appointed subject to confirmation to fill a position or membership the term of which shall expire before July 2, following the session of the legislature. If an appointment is made after the deadline but while the legislature is in session, the appointing authority shall, within five calendar days after the appointment is made, present to the legislature for confirmation the

^{1/}Other appointments subject to legislative confirmation include certain military officers, art. III, §19; the non-attorney members of the judicial council, art. IV, §8; members of the Commission on Judicial Qualifications, art. IV, §10, and members of the University of Alaska Board of Regents, art. VII, §3.

name of the person appointed. The deadline may be extended by the legislature by the approval of a concurrent resolution. ...

But what if the governor fails or refuses to transmit the names of his appointments, or a particular appointment, to the legislature? Is the legislature without authority to confirm or reject the appointment if the governor does not commence the confirmation process by transmitting the name? The Alaska Supreme Court has never considered this issue but the courts of several other states have. The leading case on the subject of the legislature's authority to confirm or reject a gubernatorial appointment in the absence of a communication by the governor appears to be People v. Shawver, 30 Wyo. 366, 222 P.2d 11 (1924). Shawver was cited by the Alaska Supreme Court in Bradner for the proposition that confirmation is a portion of the executive's appointment power that has been delegated to the legislature by the constitution. Bradner, supra, at 7, n. 19. In Shawver, the Wyoming Supreme Court after reaching this conclusion addressed the next part of the issue presented by that case: Whether the Wyoming Senate (granted the power to confirm the appointees of the governor by the Wyoming Constitution) could act to confirm or reject an appointee when the governor did not transmit the appointee's name to the Senate and did not ask that the appointee be confirmed? The case involved the appointment of an individual to a state office by a governor who was then succeeded by another governor. The new governor failed to submit the appointment to the Senate for confirmation. The court said:

But why may not the Senate act upon an appointment of which it has knowledge, if the Governor should refuse or neglect to ask for such action especially where the appointee is known to have entered upon the duties of the office? A provision for an appointment by the Governor with the consent of or to be confirmed by the Senate directs not only what shall be done, but also in effect what shall not be done. The affirmative act of the two governmental agencies is required to confer title to an office under such a provision. A completed appointment cannot be made in any other way than as so provided. [Citations omitted] While the Governor's act in selecting the person to be considered for an office may be the principal and perhaps the more important one of the two, it is not alone sufficient. A construction of such provision denying the right of the Senate to act in any case unless directly requested to do so by the Governor or by a communication from his office would obviously give him the power to ignore the coordinate right of the Senate, and might mean the abolition of that right, and certainly would make it entirely dependent upon the Governor's pleasure.

Shawver, supra, at 23 - 24. The court then held that the Wyoming Senate properly confirmed an appointee, though the governor had not requested the confirmation.

The Kansas Supreme Court reached a similar conclusion in Barrett v. Duff, 114 Kan 220, 217 P. 918 (1923). That case involved the appointments to state offices by a governor during a recess of the legislature. The appointees entered upon the duties of their offices. A new governor took office and attempted to appoint others to the offices and removed the previous governor's appointees. By constitution, the Kansas Senate had the authority to confirm the appointees of the governor and the governor could not remove the state officers involved here except as provided by law, for cause. The court said:

The plaintiffs deny any force or validity to the action of the Senate in considering and confirming the appointments of defendants because of the failure of the executive to directly transmit the names of defendants. No good reason is advanced why the Senate would not consider such recess appointments without such direct word from the executive. Judicial notice or knowledge is the cognizance of certain facts which judges and jurors may properly take and act upon without proof because they already know them. Judicial notice means that the court will bring to its aid and consider, without proof of the facts, its own knowledge of those matters of public concern which are known to all well-informed persons. Legislative notice is far broader than judicial notice. 23 C.J. 58. The legislative department is equipped to deal with any condition, general or special, however manifested or brought to the knowledge of the law-making power. The mass of individual legislation found among the statutes of all the states demonstrates this legislative attribute. [Citation omitted].

The offices in controversy are all located in the capitol building, in which the Senate holds its deliberations. They are important departments of the state government. The Senate may, and often does, have official business with them. It receives reports from them. It considers the service which the departments are, by law, required to perform. It considers the extent of such service and its requirements. It considers and passes appropriations in order that they may lawfully and properly function. Under all the circumstances, the Senate cannot shut its eyes to the facts as to whether their respective offices are filled; whether they are functioning under the law, or whether there is a vacancy therein. . . . The Senate, which has official knowledge of all of the acts of another state department, may not close its eyes to an existing fact merely because the executive has failed to transmit a communication giving it the advice. The fact that the Senate is called upon to consent to or confirm appointments presupposes an investigation upon which to base its judgment as to whether or not it should confirm or reject the named appointee. It is a matter of common knowledge that the Senate of Kansas, likewise the Senate of the United States, may, and

frequently does, investigate the character, fitness, and ability of the appointee submitted for its consideration. The Senate must be permitted to investigate on its own initiative, and without communication from the Governor, the status of offices; otherwise the Governor could fill and refill them at his pleasure by simply failing to advise the Senate. . . . We conclude that the Senate did not go beyond its powers in making the investigation concerning the offices held by the defendants, and, having satisfied itself, that it could properly exercise its judgment thereon. While it is the usual and customary courtesy of the executive to transmit such facts to the Senate, we believe it the better view to hold that the Senate may, on its own initiative, if it so desires, ascertain the facts upon which to base its deliberative and final judgment in confirming or rejecting appointees of the Governor.

Barrett, supra, 925-926.

Virtually all other courts that have considered this issue have reached the same conclusion. See, e.g., Bell v. Sampson, 232 K. 376, 23 S.W.2d 575 (1930); McChesnev v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930); State v. Halladay, 219 N.W. 125 (S.D. 1928); State v. Brewster, 84 S.E.2d 231, 248 (W.Va. 1954); Commonwealth v. Stewart, 286 Pa. 511, 134 A. 392 (1926). Our research has disclosed only one court decision that has reached an opposite conclusion, Attorney General v. Warner, 299 Mich. 172, 300 N.W. 63 (1941). That court though, held that under the Michigan Constitution and that State's court decisions that the confirmation power of the legislature is a legislative power, not a delegation of the executive's appointment power. As such, its reasoning is contrary to the Alaska Supreme Court's decision in Bradner and is distinguishable on that ground.

Therefore, we conclude that the legislature may properly consider the confirmation or rejection of art. III, sec. 25 and 26 appointees of the governor, absent a communication from the governor of a particular appointment or appointments made during the interim and the session. While it is hoped that the governor will comply with the reasonable procedure for communication of appointments the legislature has provided in AS 39.05.080, if the governor fails or refuses the legislature may take notice of previous appointments and of the persons occupying the constitutional offices listed in sections 25 and 26. To hold otherwise would allow the governor to prevent the legislature from exercising its constitutional confirmation power at his whim, caprice, or neglect and would render the confirmation function a nullity. Shawver, supra. Such an absurd result was not intended by the framers of our constitution and would not, we believe, be embraced by our courts.

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MEMORANDUM

February 11, 1991

SUBJECT: Discussion of Munson v. Territory of Alaska (W.O. 17LS-0662)

TO: Representative Dave Donley

FROM: Jerry Luckhaupt *JER*
Legislative Counsel

You have requested a discussion of the case of Munson v. Territory of Alaska, 16 Alaska 580 (1956) and of its significance, if any, to the dismissal by Governor Hickel of the chairman of the Alaska Public Utilities Commission. As the facts have been presented to me, Peter Sokolov's term as a commissioner on the APUC expired on October 31, 1990. On November 8, 1990, Governor Cowper reappointed Mr. Sokolov to a new term ending October 31, 1996. Governor Hickel removed Mr. Sokolov from office in mid to late January, 1991, and appointed another to his seat.

The factual background of the Munson case was stated by the territorial district court as follows:

One Ira A. Rothwell was appointed to the Alaska Fisheries Board March 29, 1950, for a period of five years. On March 24, 1955, and while the Twenty-second Territorial Legislature was in regular session, the Honorable B. Frank Heintzleman, Governor of the Territory of Alaska, submitted a letter for his reappointment to the legislature, as follows:

"In accordance with the provisions of chapter 68, Session Laws of Alaska 1949, I submit herewith for confirmation by a majority of all the members of the Senate and House of Representatives in joint session assembled, the name of Mr. Ira Rothwell of Cordova, Alaska, for appointment to the Alaska Fisheries Board for the term ending March 31, 1960."

The legislature adjourned on March 25, 1955, sine die, without acting upon this request and no further action was taken in its extraordinary session, which followed the regular session. The governor took no

further action in regard to his appointment. Nevertheless, Mr. Rothwell continued to serve as a member of the board beyond the five years of the original appointment without taking another oath of office or receiving a new certificate.

By letter dated August 1, 1955, the Governor of Alaska appointed the plaintiff, Albert Munson on an interim status, to take the place of Mr. Rothwell. On August 5, 1955, the plaintiff executed the oath of office and received a certificate of his appointment.

The Alaska Fisheries Board, in preparation for a meeting which was called for November 7, 1955, through its then director, Clarence L. Anderson, sent notices of said meeting to all members of the Alaska Fisheries Board, including Ira A. Rothwell, but failed to send a notice to the plaintiff, Albert Munson.

Mr. Munson, nevertheless, flew to Juneau and attended all meetings of the board but was refused his seat by the other members of the board.

Munson, supra, at 582 - 83.

Munson then filed a declaratory judgment action asking that he be awarded his seat on the board and that Rothwell be removed from the seat that he claimed. The territorial court stated the issue in this manner:

There is but one issue to be determined in this case and that is, what effect did silence and inaction on the part of the legislature have on the attempted reappointment of Mr. Rothwell, that is, was such inaction tantamount to confirmation, rejection, or was it without legal effect whatsoever.

Munson, supra, at 584.

In answering this question the territorial court determined that the attempted reappointment of Rothwell, having occurred while the legislature was in session, was merely a "nomination" akin to the federal system whereby the president "nominates" persons to the senate for confirmation. In the federal system the "nominee" does not take office pending appointment. In that situation:

there is no 'appointment' within the meaning of vesting final title to the office until acted upon affirmatively by the legislative branch of government. Justice Marshall states that until the legislature acts, the president is free to choose whom he will.

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Munson, supra, at 585, discussing Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803).

The territorial court also observed that state courts have frequently held that:

[i]f the legislature is in session at the time of the appointment, though a vacancy in the office may exist, the authorities frequently hold the appointee has no right to the office until confirmation.

Munson, supra, at 587.

The territorial court then found that a failure of a legislature to confirm is tantamount to and thereby constitutes a rejection "and places an affirmative duty on the governor to make a new appointment." Id. The territorial court also found that § 4, ch. 64, SLA 1955 (now embodied with only minor changes as AS 39.05.080(d)), which provided that appointees pending confirmation are vested with the duties, powers, and obligations of their offices, only applied to interim appointments by the governor, that is, to appointments made by the governor when the legislature was not in session. The court found that section had no application to the situation where the governor makes an appointment while the legislature is in session. In that situation, as stated earlier, the appointment is merely a "nomination" which vests no title to, or any of the duties, powers, or obligations of the office.

Therefore, the territorial court found that Rothwell's attempted reappointment while the legislature was in session was merely a "nomination" which vested no title to membership on the Alaska Fisheries Board. When the legislature failed to confirm Rothwell's nomination and adjourned on March 25, 1955, by operation of law Rothwell's nomination was rejected. Rothwell continued to hold office under his original appointment until that term expired on March 31, 1955, and then became a holdover appointment, serving until his successor was appointed. Munson, supra, at 584. In this case August 1, 1955, when Munson was appointed by the governor.

The application of Munson to our present situation does not in any way support the action of Governor Hickel in removing Mr. Sokolov from his seat on the Public Utilities Commission. First, Mr. Sokolov was an interim appointee of Governor Cowper. Mr. Sokolov's term ended on October 31, 1990. He was reappointed by Governor Cowper on November 8, 1990, to a term ending October 31, 1996. The legislature was not in session, therefore under Munson's reasoning, Mr. Sokolov's appointment was an interim appointment vesting him with the title to, and the duties, powers, and obligations of his office. At that time Mr. Sokolov became not a "nominee", without title and the duties, powers, and obligations of his office, but an appointee, vested with the title and the duties, powers and obligations of his office by virtue of AS 39.05.080(d), subject only to the legislature's authority to confirm or

fail to confirm him or to the governor's authority to remove him as provided by law. Art. III, § 26, Alaska Constitution; AS 42.05.035.

The territorial court in Munson reaches this same conclusion after discussing a case that interpreted a statute "strikingly similar" to that at issue in Munson. After quoting from Bell v. Sampson, 232 Ky. 376, 23 S.W.2d 575 (1930), the territorial court said:

It is apparently the position of the Kentucky court that inaction is tantamount to rejection and places an affirmative duty upon the governor to make a new appointment. **This does not mean that the interim appointee can be arbitrarily removed from his position at the caprice of the governor.**

Munson, supra, at 587 (emphasis added).

By this statement the Munson court clearly accepted the reasoning that in the case of an interim appointee, that once title to an office has vested and the appointee has entered upon the duties of it, his appointment may not be withdrawn or removed merely at the governor's discretion, as in the case of a nominee, who has not received title to nor entered upon the duties of his office. The interim appointee may only be removed as provided by law or by failure of the legislature to confirm, not "at the caprice of the governor."

Bell v. Sampson, quoted from extensively by the territorial court in Munson, is also instructive on this point. In Bell, the Kentucky Supreme Court was confronted with a situation involving interim appointments to state boards requiring confirmation by the state senate. These interim appointees were vested with the title and duties of their office pending confirmation. A new governor took office and apparently failed to transmit the names of these appointments to the senate. The senate at its next regular session failed to confirm these appointees. The new governor then appointed others to these positions. The court held that the failure of the senate to confirm, even without executive communication, was tantamount to rejection of the appointments. The court found that the senate:

did not have to wait for the Governor to submit these appointments of Governor Fields, but could on its own initiative, without any executive communication from the Governor, institute and conduct investigation of recess appointments made by him and confirm or reject them.

Bell, supra, at 581.

Also cited in Munson is another Kentucky case decided the same day as Bell and involving a factual situation that is similar to that presented by Mr. Sokolov's appointment by Governor Cowper and removal by Governor Hickel, McChesnev v.

Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930). In McChesney, Governor Flem Sampson appointed McChesney to the state text-book commission during the interim between sessions of the legislature. McChesney entered upon the duties of the office. Prior to the state senate coming into session the governor removed McChesney and appointed another to the office. The governor contended that:

an appointment to the office in question is not complete without the consent of the Senate, and until the title to the office is thus vested, the Governor is free to designate, revoke, and reappoint at will. . . . We are thus brought to the final contention forcibly pressed that the appointments by the chief executive are mere nominations to be confirmed by the Senate, vesting no title to the office until both the Governor and the Senate concur, and that the governor may substitute new nominations at will until the Senate has finally acted.

McChesney, *supra*, at 585 - 86.

The court rejected these arguments saying:

[I]n cases where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested. But under our system the appointee of the Governor takes the office, enters upon the performance of its duties, and is charged with responsibility. He holds then subject alone to the action of the Senate. His status is not that of a nominee awaiting confirmation, but that of an officer invested with the powers, privileges, and responsibilities of the position until the Senate acts. A recall of his designation would operate as a removal from office. It is argued that appointment to the office consists of two separate acts, one by the Governor and one by the Senate, and until both have acted there is no appointment such as to bring the incumbent within the protection of the law. Even so, the powers do not act concurrently, but consecutively, and action once taken and completed by the executive is not subject to reconsideration or recall. It is the general rule that an appointment to office is intrinsically executive. . . . In all jurisdictions where appointment to office is regarded as an executive function, as here, an appointment to office once made is incapable of revocation or cancellation by the appointing executive in the absence of a statutory or constitutional power. . . . What then constitutes an appointment in so far as the chief executive has to do with it? Appointment to an office by one possessing the appointing power is the designation of another person to discharge the duties of the office. . . . It is completed when the appointing authority has

performed the acts incumbent upon him to accomplish the purpose. . . . The fact that the title to the office, and the tenure of the officer, are yet subject to the action of the Senate, does not render incomplete the act of the chief executive in making the appointment. The appointment alone confers upon the appointee for the time being the right to take and hold the office, and constitutes the last act respecting the matter to be performed by the executive power.

McChesney, supra, at 587.

Under the reasoning of the territorial court in Munson and the cases cited by that court, Mr. Sokolov's appointment by Governor Cowper was not a mere "nomination" but an appointment vesting Mr. Sokolov with the title and the duties, powers, and obligations of his office on the Alaska Public Utilities Commission.

This conclusion is further buttressed by the fact that art. III, § 26 of the Constitution does not mention that the governor shall nominate board and commission members and later appoint them, but rather states that the members of boards and commissions "shall be appointed by the governor, subject to confirmation by a majority of the legislature." Nomination is nowhere mentioned. In fact, the original and revised drafts of art. III, § 26 of the Alaska Constitution, as prepared by the executive branch committee at the Alaska Constitutional Convention, recommended the following language be adopted:

Whenever a board or commission is at the head of a principal department or of a regulatory or quasi-judicial body, the members thereof shall be nominated and appointed by the governor, with the advice and consent of the senate. . . .

This "nomination" language and reasoning was specifically rejected by the framers of our Constitution in § 26 as it was finally enacted.

Any discussion of Munson deserves at least one final comment. The territorial court in Munson held that the forerunner of AS 39.05.080(d), which vests an appointee with the duties, powers, and obligations of the office appointed to, pending confirmation, only applies in the case of interim appointments - appointments when the legislature is not in session - and that all appointments made while the legislature is in session are mere nominations which vest no title to the office nor any of its duties, powers, and obligations. The language of AS 39.05.080 does not limit itself to such an interpretation, nor is such an interpretation necessary under § 26 of our Constitution as explained earlier. Nor has the practice of the executive branch supported this interpretation. Executive branch appointees, subject to confirmation by the legislature, have routinely been appointed by previous governors and the present governor while the legislature has been in session. These appointees have

Representative Dave Donley
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; taken office, begun exercising the duties, powers, and obligations of their respective offices and have received their salaries. These appointees have not acted nor been treated as mere "nominees", who are not entitled to their offices until confirmation, but are appointees serving in their respective offices, presumably pursuant to AS 39.05.080(d). I, therefore, conclude that the Munson court's interpretation of this provision and its application only to interim appointments was erroneous.

If you have further questions, please contact me at your convenience.

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DIVISION OF LEGAL SERVICES

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MEMORANDUM

February 6, 1991

SUBJECT: Governor's Appointment to APUC (Work Order No. 17-LS0366)

TO: Senator Pat Pourchot

FROM: Tamara Brandt Cook
Director *TBC*

Gerald P. Luckhaupt *GLP*
Legislative Counsel

You have asked the following questions: (1) May the governor switch the members of the Alaska Public Utilities Commission among the various seats, for example from a public seat to engineering seat; (2) If seats may be switched, does the term go with the member or stay with the seat; (3) Who or what determines when the term of an appointee begins and when the appointee goes on the payroll, and may the governor, prior to confirmation, instruct an appointee to take office? We hereby respond as follows.

The facts as we understand them are that Mr. Sokolov was reappointed to the engineering seat on the APUC for a six year term upon the expiration of his first term by Governor Cowper. Mr. Sokolov took office and exercised the duties of his office until his recent dismissal by Governor Hickel. Mr. Foster was appointed, and confirmed by the legislature, to a consumer seat for a six year term approximately four years ago. Governor Hickel has now moved Mr. Foster from his consumer seat to the engineering seat which was opened up by Mr. Sokolov's dismissal. Mr. Foster continues to serve the term he was originally appointed to (for the consumer seat) while Mr. Schoer, who was appointed to the consumer seat by Governor Hickel, is serving the six year term vacated by Mr. Sokolov.

Technically, the switching of a board member from one seat to another on a board would appear to constitute the removal and reappointment of the member, especially if the seats are earmarked for individuals with particular qualifications, such as the case where a member is moved from a public seat to an engineering seat. Accordingly, if the legislature has the authority to designate seats for individuals with

certain qualifications (the Attorney General has apparently accepted that such qualifications may be legal, see e.g., April 23, 1981, opinion from R. Pegues to Helen Beirne; August 13, 1979, opinion from R. Pegues to Governor Hammond; May 24, 1988, opinion from G. B. Schaible to Governor Cowper), the appointment of an individual to that seat, including the switching of seats, requires the removal of a member from one seat in accordance with law and the confirmation of that member in a new seat by the legislature. In the current situation, the legislature confirmed Mr. Foster's appointment to a consumer seat four years ago. His qualifications to hold the engineering seat have never been reviewed or passed upon by the legislature. To allow the switching of seats without confirmation by the legislature when appointees are required to have different qualifications for different seats would, arguably, prevent the legislature from exercising its constitutional duty to review the appointments of the governor to ensure that qualified people are being placed in control of important state government functions. Therefore, assuming the legislature has the authority to prescribe qualifications for appointments to particular seats of the APUC, we conclude that the switching of seats by the governor requires confirmation by the legislature.

However, if the legislature is found to lack the authority to interfere with the governor's appointment power by prescribing qualifications for particular seats on the APUC, a court could conclude that the governor has the power to switch seats. If the legislature lacks the authority to prescribe qualifications and if the member who is moved continues to serve for the duration of the term he was originally appointed to, and confirmed for, and does not commence a new or different term, no removal or reappointment has occurred. In that situation a court might conclude that the member's service to the state has not been interrupted - no break in service has occurred - so as to require a new appointment by the governor and confirmation by the legislature.

Regardless of whether a seat requires particular qualifications, if the board member commences a new term, that is, if he assumes the term that belongs to the new seat he is taking or the governor appoints him to some wholly new term (regardless of whether his old term has expired), the effect is that of a new appointment or a reappointment, requiring confirmation by the legislature. If the member whose seat is switched retains his original term, that is, if the duration of the period he serves in office is not altered, we do not believe that confirmation would necessarily be required. Note, however, that if the period is shortened by the switch, the member may have a cause of action against the state based upon his or her property interest in the original term. Likewise, if the period is increased a confirmation requirement may be triggered. We have been unable to discover any authority that clearly addresses the question of whether the term is appurtenant to the seat or to the person occupying the seat. Though, it seems reasonable to assume that a term should be found to be appurtenant to the particular seat and not the individual who happens to be occupying it at any particular point in time.

Regarding your questions as to when a term begins and when an appointee goes on the payroll and begins work, AS 39.05.080(4) provides:

(4) Pending confirmation or rejection of appointment by the legislature, persons appointed shall exercise the functions, and have the powers and be charged with the duties prescribed by law for the appointive positions or membership.

This language seems to provide that an appointment is effective when the person is appointed by the governor (subject of course to the legislature's authority to reject or fail to confirm the appointee). The Attorney General has so held in an opinion issued February 17, 1982 by Kenneth Vassar, attached. The Supreme Court has, also, held in a similar situation that an appointment is effective when made by the governor. Division of Elections v. Johnstone, 669 P.2d 537 (Alaska 1983). When the person goes on the payroll conceivably could be a different time than when the person is appointed. There are no statutes that set a date that an appointee is to begin receiving a paycheck, though, there are statutes that set out when the governor and lieutenant governor are to begin receiving their salaries. AS 39.20.020 and 39.20.040. These statutes provide that the governor and lieutenant governor begin receiving their salaries when they take the oath of office. At that time they have officially commenced upon the duties of their office. Using these provisions for guidance, we conclude that executive branch appointees should begin receiving their salaries when they take the oath of office and commence upon the duties of their office.

If you have further questions, please contact us at your convenience.

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91-022.lmb

MEMORANDUM

State of Alaska

TO: Lori Svensson
Administrative Officer
AK Seafood Marketing Institute.

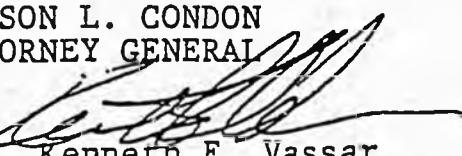
DATE: February 17, 1982

FILE NO: J66-377-82

TELEPHONE NO: 465-3600

DM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: Terms of office of officers of Alaska Seafood Marketing Inst.

By: 
Kenneth E. Vassar
Assistant Attorney General

You have asked whether the term of office of a member of the board of directors of the Alaska Seafood Marketing Institute who is also an officer of the institute may be construed to begin on the date of the first meeting of the board following the officer's appointment. It may not.

Under AS 16.51.020, the governor appoints members of the board of directors, and, under AS 16.51.030, the members of the board serve staggered three-year terms of office. Nothing in the statutes expressly states when a board member's term of office begins. In this situation, the general rule is that the term of office begins to run from the date of the appointment. 63 Am.Jur.2d, Public Officers and Employees, § 151. The power to determine when an appointee's term will begin is part of the appointing power which, under AS 16.51.020, is assigned to the governor. The suggested construction would make that power dependent upon the will of the board rather than that of the governor.

You have also asked whether the by-laws of the institute should be amended to address the situation in which the term of office of a board member who is an officer of the institute and who is not reappointed, expires leaving the institute with a vacancy in that office. Certainly, the by-laws could consider this contingency, and there are undoubtedly several methods of addressing the problem. However, the simplest method would seem to be for the staff of the institute to maintain a list of the board members who are officers and the expiration dates of their terms as board members. Then, a meeting of the board can be scheduled to follow shortly after the expiration date of a director's term so that any vacancy which arises can be filled without undue delay; or, at the last meeting before the expiration date, another director can be elected to take the office if the first director is not reappointed.

KEV/pjg

MEMORANDUM

State of Alaska

Department of Law

TO: Honorable Dave Donley, Chairman
House Judiciary Committee
House of Representative
Alaska State Legislature

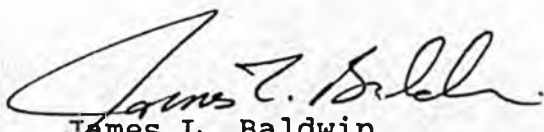
DATE: February 7, 1991

FILE NO:

TEL. NO: 465-3600

SUBJECT: Follow up on committee
testimony

FROM:


James L. Baldwin
Assistant Attorney General
Governmental Affairs Section

Thank you for the opportunity to testify during a hearing of the House Judiciary Committee held on February 4, 1991, regarding the various issues concerning the governor's appointment power. During questioning by the committee, I was asked to provide additional information to assist in further deliberations. Attached you will find:

1) a copy of our January 25, 1979 opinion concerning the necessity to confirm holdover principal department heads;

2) a copy of the settlement agreement in the matter of Michael Whitehead; and

3) a copy of a brief I filed in District 16 Republicans v. Cowper, No. 4FA-87-2009 Civil. In this brief, I discussed the validity of a statute authorizing confirmation of an appointment to an office for which confirmation is not expressly authorized by the State Constitution. I believe this brief is relevant because the constitution authorizes the establishment of an appointment procedure by statute for filling a mid-term legislative vacancy. This case was settled before a decision could be rendered by the Superior Court. However, the authorities cited remain relevant to the issue we were debating.

I hope that the documents provided will help you to understand our legal arguments discussed during the hearing. We will provide the remainder of the information you requested in the time specified.

JLB:jr

Attachments

cc: Ron Lorensen, AAG, Legislation

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR

File: 663-79-0462

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

January 25, 1979

The Honorable Jay S. Hammond
Governor
Pouch A
Juneau, Alaska 99811

Re: Confirmation of heads of principal departments

Dear Governor Hammond:

You have asked whether either custom or law require you to submit the names of the heads of principal departments to the legislature for confirmation when they carry over in office following a gubernatorial election.

The short answer is that neither custom nor law impose any such requirement.

The law on the subject has been stated succinctly as follows:

When the term of office is not fixed by law, the officer holds office at the will of the appointing power, and strictly speaking has no term of office.

67 C.J.S. Officers § 66(b). Under the Alaska Constitution, the Governor is the "appointing power." Bradner v. Hammond, 553 P.2d 1 (Alaska 1976). Article, section 25, of the Alaska Constitution provides as follows:

The head of each principal department . . . shall be appointed by the governor, subject to confirmation by . . . the legislature . . . and shall serve at the pleasure of the governor. . . .

ATTACHMENT 1

Accordingly, under the general rule, the heads of the principal departments, once appointed and confirmed, serve indefinitely until they leave office. Unlike the Governor, whose term is fixed by the constitution, their terms are indefinite. The occurrence of a gubernatorial election has no effect, in itself, on their terms. They continue to serve even upon the election of a new governor until they are discharged by the governor or resign. There is no vacant office to which the incumbent may be "appointed" or "reappointed," and therefore no appointment or reappointment for the legislature to confirm.

The custom nationally as in Alaska is consistent with this interpretation. A past President of the United States has been known to have submitted for confirmation the names of persons holding over as cabinet officers. One can search the diaries of Harold Ickes, the Secretary of the Interior from 1933 through 1946, in vain for any record of his reconfirmation in 1937, 1941, or 1945. There was none. Since the first election of Franklin D. Roosevelt in 1932, there have been seven instances of presidential reelections involving cabinet officers who held over and three instances of vice-presidential succession involving cabinet officers who held over. So far as is known, the name of none was submitted for confirmation.

In Alaska, prior to 1978 there has been only one instance of a gubernatorial reelection, Governor Egan's reelection in 1962. In 1963, Governor Egan submitted the names of the heads of six principal departments to the legislature for confirmation. All but one had succeeded to office since the adjournment of the 1962 legislature. The one exception was an appointment to head a new department established by law by the 1962 legislature. The Governor did not submit the names of the heads of seven departments who had carried over in office, e.g., Floyd Guertin, who had served as Commissioner of Administration since Statehood, and Phil Holdsworth, who had served as Commissioner of Resources for the same period. 1963 Supp. to H. and S. Jour. April 9, 1963.

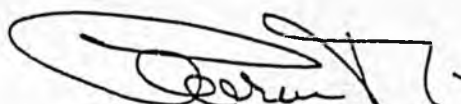
When Lieutenant Governor Miller succeeded to the office of Governor, he did not submit the names of the heads of all the principal departments for confirmation but rather only those who had been appointed to office since their predecessors had been confirmed, i.e., a new Attorney General, new Commissioners of Administration, Highways, and new Public Works. 1969 S. Jour. 491 (Mar. 27, 1969). Hence, the custom in Alaska is the same as at the national level.

Accordingly, neither by law nor by custom need you submit for legislative confirmation the names of the heads

The Honorable Jay S. Hammond
January 25, 1979
Page 4

of principal departments whose appointments have already been confirmed and who have carried over in office. There are no vacancies in those offices to which an appointment or reappointment can be made, and no appointment or reappointment which the legislature can affirm.

Sincerely,


Avrum M. Gross
Attorney General



AMG:chw:RWP

RELEASE AND SETTLEMENT AGREEMENT

Michael M. Whitehead was appointed to a position on the Alaska Commercial Fisheries Entry Commission by Governor Hammond on October 16, 1982, for a term expiring July 1, 1985. In a letter to Mr. Whitehead dated February 28, 1983, Governor Sheffield advised Mr. Whitehead that he had decided to appoint another person to fill the term to which Mr. Whitehead had previously been appointed by Governor Hammond. In that letter Governor Sheffield thanked Mr. Whitehead for his service to the public interest, and stated that he had been enormously helpful to the state during his tenure as Commissioner. On or about March 1, 1983 the Governor's office caused to be circulated to all members of his office, the Lieutenant Governor and all members of his cabinet a memorandum stating that the Governor had chosen to appoint another person to Mr. Whitehead's position on the Commission.

Mr. Whitehead disputed the Governor's power to remove him from office. Specifically, Mr. Whitehead contended that the Governor was required by AS 39.05.080 to submit his name to the Legislature within 30 days of its convening. He further contended that, by virtue of AS 16.43.030(a), he could be removed from office only for "cause." The Governor has acknowledged that no "cause" exists for Mr. Whitehead's removal; indeed, as already stated, Mr. Whitehead's performance of his duties as Commissioner has been outstanding. The fundamental basis for Mr. Whitehead's claim is that, had the Governor removed him from office as planned, he would have suffered serious emotional and mental injury and despite the Governor's commendation of his performance in office, he would nevertheless have suffered reputational harm.

The Governor, on the other hand, maintains that, despite Mr. Whitehead's outstanding job performance, he has the power under law to withdraw Mr. Whitehead's interim recess appointment to the Commission by failing to transmit Mr. Whitehead's name to the Legislature for confirmation. In fact, on or about March 23, 1983 the Governor appointed Mr. Richard Listowski to Mr. Whitehead's position and sent Mr. Listowski's name to the Legislature for confirmation, and on June 8, 1983 the Legislature in joint session confirmed Mr. Listowski's appointment.

But for this settlement agreement, the Governor would have taken steps to remove Mr. Whitehead from the Commission, forcing a judicial determination of the dispute. In order to avoid the expense and uncertainty of litigation and in consideration of the promises contained herein, the Governor and Mr. Whitehead agree to settle this dispute on the following terms:

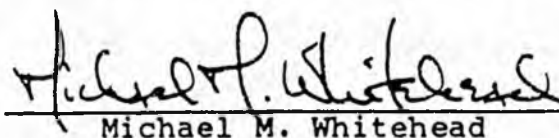
1. The State of Alaska will pay to Mr. Whitehead the sum of Seventy Five Thousand and 00/100 Dollars (\$75,000.00), receipt of which is hereby acknowledged.

2. Mr. Whitehead's employment on the Alaska Commercial Fisheries Entry Commission ends as of the close of business on Thursday, June 16, 1983, and he will receive all salary and benefits that will normally accrue as a result of his employment.

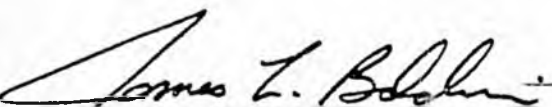
3. Mr. Whitehead hereby waives any claim he has to a position on the Alaska Commercial Fisheries Entry Commission.

4. Mr. Whitehead and the State of Alaska hereby release and forever discharge each other of and from any and all claims, including claims arising from the allegedly tortious conduct described in this agreement, whether known or unknown, foreseen or unforeseen, which they have now or which may hereafter accrue on account of the events set forth in this agreement.

DATED at Juneau, Alaska this 16th day of June, 1983.


Michael M. Whitehead

ATTORNEY GENERAL
STATE OF ALASKA

By: 
James L. Baldwin
Assistant Attorney General

ATTORNEY GENERAL, STATE OF ALASKA
STATE CAPITOL
P.O. BOX K, JUNEAU, ALASKA 99811
PHONE 465-3800

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

FAIRBANKS REPUBLICAN PARTY
DISTRICTS 19, 20, and 21,

Plaintiffs,

and

MITCH ABOOD, et al.,

Plaintiffs in Intervention,

vs.

STEVE COWPER, Governor of the
State of Alaska,

Defendant.

No. 4FA-87-2009 CIV

STEVE COWPER, Governor of the
State of Alaska,

Plaintiff,

vs.

JAN FAIKS, et al.,

Defendants.

No. 1JU-87-1849 CIV
CONSOLIDATED

MEMORANDUM IN SUPPORT OF
GOVERNOR'S MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

The governor filed an action to determine the validity of a purported rejection of an appointment he made to fill a legislative vacancy for the seat which represents senate district K-A. A similar action was brought in Fairbanks by persons seeking to have the governor make a subsequent appointment. The

Mm. for Jgmt on the Pleadings

- 1 -

ATTACHMENT 3

1 court requested briefing and argument on the issue of whether
2 the senate must be in session when the appointment is confirmed
3 or rejected. The governor has styled this memorandum as being
4 in support of a motion for judgment on the pleadings.

5 The vacancy was created by the death of Senator Don
6 Bennett on August 30, 1987. Senator Bennett was a member of the
7 Republican Party. His most recent term began in January 1984.
8 Plaintiffs are local districts of the Republican Party situated
9 in senate district K-A (in this memorandum we will refer to
10 plaintiffs as "the districts"). The districts proposed to the
11 governor that he appoint Dick Randolph to fill the vacancy. The
12 governor, after a period of deliberation, appointed Beverly
13 Bennett on September 23, 1987 to fill the vacancy created by the
14 death of her husband. Exh. 1.

15 Plaintiffs in intervention are members of the state
16 senate and members of the state Republican Party (in this memo-
17 randum, plaintiffs in intervention will be referred to as "the
18 Republican senators"). The republican senators are duly elected
19 members of the state senate. A vacancy in the seat representing
20 senate district K-A must be filled by appointment by the gover-
21 nor because Senator Bennett had less than two years and five
22 months remaining in his term of office. AS 15.40.370, 15.40.-
23 380. Under the state election code (AS 15), the appointment is
24 subject to confirmation by "a majority of the members of the
25 legislature who are members of the same political party which
26 nominated the predecessor in office and of the same house as was

1 the predecessor in office." AS 15.40.330(a).

2 On October 7, 1987, during the interim between legis-
3 lative sessions and while the state senate was adjourned, the
4 governor received a letter on official senate letterhead which
5 purported to be a "report." The report advised the governor
6 that 11 republican senators met and purportedly voted to reject
7 the governor's appointee. Exh. 2. The report also discloses
8 that one of the senators participated "via teleconference." The
9 governor immediately filed an action seeking a declaratory judg-
10 ment as to whether the purported rejection was effective. The
11 governor also questioned the validity of the delegation of con-
12 firmation power to a group of legislators. Governor's Compl.,
13 dated Oct. 7, 1987, Count 2.

14 As a preliminary matter, the court should be aware of
15 the connection between the districts and the republican sena-
16 tors. The districts publicly offered only one name for appoint-
17 ment to fill the vacancy. In turn, the republican senators de-
18 clared that they would confirm only persons recommended by the
19 districts. Acquiescence in these demands would place the true
20 appointment power in the hands of the districts. The governor
21 requested the attorney general to advise him concerning the
22 proper role of the districts in the process for selecting an
23 appointee. An informal attorney general opinion was issued on
24 September 21, 1987. 1987 Inf. Op. Att'y Gen. (Sept. 21; 663-88-
25 0107), Exh. 3. The attorney general advised that the districts
26 had no legal claim to a formal role in the appointment process.

1
2 II. THE PROPER ROLE OF THE DISTRICT COMMITTEES

3 The Alaska Constitution directs the legislature to
4 enact a procedure to fill mid-term vacancies in the legislature.
5 Alaska Const. art. II, § 4. This section was implemented in
6 1960 by the enactment of AS 15.40.320 -- 15.40.470. The elec-
7 tion code does not contain a requirement that the governor
8 select the successor from a list of nominees provided by the
9 local committee of the political party of the predecessor in
10 office. It is not unusual for the governor to consult with
11 local district committees before making an appointment to fill a
12 vacancy. It make good sense to do so. However, when the gover-
13 nor and the nominee are not of the same political party, dis-
14 agreements occasionally erupt over who should be appointed.
15 Governors have, out of courtesy, solicited advice from local
16 political organizations during the appointment process. But,
17 when push comes to shove, it is the governor who is vested with
18 the appointment power by state law and the constitution. He may
19 seek counsel from whomever he wishes.

20 A review of historical precedent involving the rejec-
21 tion of appointments to fill legislative vacancies confirms the
22 governor's power to act without consultation. The precedent was
23 established soon after statehood during the first term of the
24 Egan administration. Governor Bill Egan and senators were en-
25 gaged in a struggle over an appointment to fill a vacancy left
26 by the death of Senator Elton Engstrom, Sr. During the course

1 of that controversy, Governor Egan appointed and the senate mem-
2 bers of the Republican Party successively rejected four persons
3 before a successor was confirmed. The senators demanded that
4 Governor Egan appoint from a list of candidates provided by the
5 local republican committee. Governor Egan responded to the de-
6 mand as follows:

7 Please permit me to point out that there is no
8 reference to political committees of either major
9 political party in the law which covers filling
10 of vacancies in the State Legislature. If the
legislature had intended that political commit-
tees would be responsible for such appointments,
the Legislature would have so provided.

11 1963 Senate J. 73. Since 1963, the legislature has been in-
12 formed of Governor Egan's interpretation and chose not to amend
13 the election code to create a role for a district committee of a
14 major political party.

15
16 III. THE CONFIRMATION POWER CANNOT BE DELEGATED AWAY

17 The issue identified by the court for initial consid-
18 eration concerns whether the republican senators must act for-
19 mally as a subdivision of the senate or informally as a politi-
20 cal caucus. A caucus is a private, partisan political organiza-
21 tion. It is not an official interim or standing committee of
22 the legislature. Consistent with this premise, the Alaska
23 Supreme Court has observed that a political caucus is not a leg-
24 islative body or committee and because of that status is not
25 subject to the Open Meetings Act (AS 44.62.310). Malone v.
26 Meekins, 650 P.2d 351, 359 (Alaska 1982). The governor submits

1 that the legislature cannot delegate confirmation powers to in-
2 dividual legislators, especially if they purport to act in the
3 form of a private political caucus.

4 The power to appoint persons to fill a vacant legisla-
5 tive office is accorded by law to the governor and is an execu-
6 tive power. By reserving a right to confirm appointees, the
7 legislature is attempting to authorize a part of the senate to
8 share executive powers. Bradner v. Hammond, 553 P.2d 1, 7
9 (Alaska 1976) ("... [C]onfirmation is a specific attribute of
10 the appointive power of the executive."). The legislature may
11 only share the executive power of appointment when the state
12 constitution specifically permits it. Id.

13 Because the appointive office is legislative rather
14 than executive, the senate, as a separate house of the legisla-
15 ture, has an express constitutional remedy to assure the ap-
16 pointment of qualified persons to serve there. Article II, sec-
17 tion 12 of the Alaska Constitution provides: "Each [house of
18 the legislature] is the judge of the election and qualifications
19 of its members...." Respected authority on legislative proce-
20 dure states: "The exclusive power to judge of the qualifica-
21 tions and elections of its members is fixed in each house and
22 cannot by its own consent or by legislative action be vested in
23 any other tribunal or office." Mason's Manual of Legislative
24 Procedure, § 560(5) (1979 rev'd ed.) (hereafter Mason's). The
25 confirmation power added by AS 15.40 has the effect of giving
26 the exclusive power to judge qualifications to a group of legis-

1 lators determined by political affiliation rather than by mem-
2 bership in a house of the legislature as contemplated in the
3 constitutional scheme devised by the framers.

4 Under the election code, a minority of one house of
5 the legislature can frustrate the governor's will and circumvent
6 the express remedy for determining the qualifications of persons
7 selected to serve there. The Alaska Constitution provides:
8 "The legislative power of the state is vested in a legislature
9 consisting of a senate with a membership of twenty and house of
10 representatives with a membership of forty." The senate Repub-
11 licans are acting as if the senate is comprised of a membership
12 of eleven. They are also acting as if the senate can convene
13 and transact legislative business without the aid of the gover-
14 nor or the house of representatives. Additionally, the gover-
15 nor's duty to execute the election code is impaired in an inap-
16 propriate manner by requiring him to share the appointment power
17 with a partisan group of legislators. Legislators are members
18 of the law-making branch of state government. If they are al-
19 lowed to participate in the making of an appointment, they would
20 be executing the law as well.

21 The governor is not arguing that all delegations of
22 legislative power are invalid. Only a delegation which confers
23 the exclusive right to determine qualifications of a person ap-
24 pointed to legislative office. For example, the court is given
25 jurisdiction to determine election contests involving the quali-
26 fications of a legislator-elect. AS 15.20.540 -- 15.20.560.

1 However, that power is limited to determining if a candidate is
2 qualified "as required by law." AS 15.20.540(2). This power
3 was determined to be "not atypical" and to reflect a traditional
4 role for the judiciary to assume. Boucher v. Bomhoff, 495 P.2d
5 77 (Alaska 1972); accord Mason's, § 560(7) (1979 rev.). The
6 election code expressly states that the grant of power to the
7 courts to hear election contests is "not intended to limit or
8 interfere with the power of the legislature to judge the elec-
9 tion or qualifications of its members. AS 15.20.560. If the
10 rejection by the republican senators is effective, the senate
11 will never be able to judge the qualifications of Mrs. Bennett.
12 Unlike the grant of jurisdiction to the superior court to hear
13 election contests, the confirmation power is delegated to a
14 group of legislators without standards to direct the exercise of
15 the legislative power.

16 It is expected that plaintiffs will argue that the
17 constitutional directive set out in article II, section 4 of the
18 Alaska Constitution authorizes the delegation of confirmation
19 power to a legislative political caucus. Article II, section 4
20 provides: "A vacancy in the legislature shall be filled for the
21 unexpired term as provided by law. If no provision is made, the
22 governor shall fill the vacancy by appointment." However, in
23 State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), the
24 Alaska Supreme Court observed:

25 The legislature is bound to act in accordance
26 with the constraints provided in article II of
the constitution. The fact that it can delegate

1 legislative power to others who are not bound by
2 article II does not mean that it can delegate the
3 same power to itself and, in the process, escape
4 from the constraints under which it must operate.

5 606 P.2d at 777. The court went on to make the following gener-
6 al statement: "It is therefore worth observing that most au-
7 thorities have rejected the validity of the laws conferring ei-
8 ther affirmative or negatory legislative powers on individual
9 legislators or committees." 606 P.2d at 778 (citing and discuss-
10 ing State ex rel. Judge v. Legislative Finance Committee, 543
11 P.2d 1317 (Mont. 1975) (legislature could not delegate power to
12 approve budget amendments to an interim legislative committee)
13 and People v. Tremaine, 168 N.E. 817 (N.Y. 1929) (legislature
14 may not grant certain legislative committee chairmen the power
15 to disapprove of the allocation of lump sum appropriations to an
16 executive agency)).

17 The superior court sitting in Juneau has ruled on the
18 delegation question. In 1978, Judge Thomas Stewart decided that
19 an interim committee of the legislature could not approve of
20 transfers between appropriations during the interim between leg-
21 islative sessions. Kelley v. Hammond, C.A. No. 77-4 CIV (Alaska
22 Super., 1st Dist., Juneau, Decision on Mn. for Pt. Sum. Jgmt.,
23 Apr. 12, 1978), Exh. 4. Judge Stewart reasoned that the budget
24 and audit committee was attempting to act as a mini-legislature
25 by exercising legislative powers during the interim. The case
26 was not appealed and the legislature amended AS 37.07.030(e) to
provide that transfers between appropriations may only be au-

Mn. for Jgmt on the Pleadings

- 9 -

1 thorized in an appropriations Act.

2 The foregoing analysis shows that the legislature can-
3 not vest the legislative duty of confirmation in a discrete
4 group of legislators. To sanction the delegation would allow
5 the legislature to operate without the procedural safeguards
6 established in article II of the Alaska Constitution. The gov-
7 ernor will show in the next subdivision of this memorandum that
8 the legislature may act only when it is assembled in session and
9 by recorded vote.

10
11 IV. CONFIRMATION IS A LEGISLATIVE DUTY REQUIRING FORMAL
12 ACTION

13 Under the governor's theory of this case, the court is
14 asked to render a declaratory judgment concerning the formality
15 with which the legislature must exercise legislative powers.
16 The court is requested to determine if duties assigned by law to
17 a house of the legislature, or a part of it, must be exercised
18 by a formal vote during a session of the senate. Plaintiffs
19 would have the court validate a procedure where an appointee to
20 high government office is divested of any right to that office
21 by unofficial action by individual senators acting in their of-
22 ficial capacities separately from the senate. The election code
23 requires the confirming body to be members of the legislature
24 and the state senate. AS 15.40.330(a). These institutions of
25 the legislative branch of state government exist as corporate
26 bodies and not through individuals elected to serve in those
bodies.

1 It is only when the houses of the legislature are law-
2 fully assembled that they constitute the legislature of the
3 state. Mason's, § 780(13) (citing Ex Parte Hague, 147 A. 220
4 (N.J. 1929). Mason also observes: "The decision of a delibera-
5 tive body can be made only by the taking of a vote at a meeting.
6 The fact that members have individually expressed opinions on a
7 question is not a decision of the body and is of no effect."
8 Mason's, § 520(1). At-best, the report of the caucus meeting
9 held in Anchorage to consider the qualifications of Mrs. Bennett
10 should be accorded no more force than a report of a standing
11 committee of the senate. Those powers are to study and analyze
12 the subject matter referred to the caucus and to report back to
13 the parent body. The report by the caucus should be considered
14 advisory only. The binding decision is made by the senate or a
15 part of it after it reconvenes.

16 The election code pertaining to legislative vacancies
17 specifies an appointment procedure that includes confirmation as
18 the final step. AS 15.40.330(a). During the appointment strug-
19 gle of 1963, Governor Egan demanded that if the senate Republi-
20 cans desired to reject his appointment, a vote must be taken on
21 the question of confirmation in open session with the vote re-
22 corded in the journal. 1963 Senate J. 74. The senators attempt-
23 ed to record the rejection by reading a report from the caucus
24 into the Senate Journal. The demand for direct action during
25 regular session was based on an interpretation of the election
26 code advanced in an opinion of the attorney general. 1963 Inf.

1 Op. Att'y Gen. (Feb. 12; Gross), Exh. 5. The senate acceded to
2 the governor's demand by correcting the journal and taking ac-
3 tion in open session to vote on the question of confirmation.
4 1963 Senate J. 85.

5 The attorney general opined that the term "confirma-
6 tion" should be construed to mean a formal process undertaken by
7 the appropriate house of the legislature culminating in a vote
8 on the question. Since 1963, the legislature has been informed
9 of a formal interpretation of AS 15.40 by the attorney general.
10 During that period, the legislature has undertaken major revi-
11 sions to the election code. See ch. 100, SLA 1980. However,
12 the provisions under review in this action were not changed to
13 alter the effect of the attorney general's construction of AS
14 15.40. The interpretation was announced within three years
15 after the appointment provisions were enacted and has remained
16 in effect for 24 years.

17 The longstanding interpretation announced by the at-
18 torney general is entitled to great weight. State, Dept. of
19 Revenue v. Alaska Pulp America, Inc., 674 P.2d 268 (Alaska
20 1983). However, this is not to say that the attorney general is
21 infallible, nor that opinions of the attorney general are always
22 controlling. The court is the final authority on important
23 questions of statutory construction. Trustees for Alaska v.
24 Watt, 524 F. Supp. 1303 (D.C. Alaska 1981); aff'd 690 F.2d 1279
25 (9th Cir. 1982). The court should adopt the attorney general's
26 interpretation because it is consistent with the provisions of

1 the election code and legal authority concerning the manner in
2 which the legislature must transact legislative business.

3 Even if the governor were to concede for the purpose
4 of argument that a part of the senate could be authorized to
5 confirm, the Republican senators may only exercise their dele-
6 gated powers when the senate is assembled in lawful session.
7 The election code does not contain an express authorization for
8 the senators to meet during the interim. Rather, the code im-
9 plies that confirmation will take place during the session. The
10 governor contends that formality is necessary to ensure deliber-
11 ation before action is taken, to ensure that the requisite ma-
12 jority of the house votes to confirm or reject, and to provide a
13 public record of the vote of each legislator. It must be remem-
14 bered that the qualifications of a prominent citizen of the
15 state to hold office is ultimately at issue here.

16 Under the election code, the governor must appoint a
17 successor if the term is less than two years and five months, or
18 if a special election cannot be held before the legislature re-
19 convenes. An appointment can be defeased in two ways. First,
20 by rejection through the confirmation process, if the predeces-
21 sor in office was "a member of a political party." AS 15.40.-
22 330(a). Second, by election of a person other than the appointee
23 to fill the vacancy. AS 15.40.380. The election code provides
24 for the "date of office" of an appointee. AS 15.40.340. Sec-
25 tion 340 states that the date of office of an appointment not
26 subject to confirmation is, in this case, the date the legisla-

1 ture reconvenes. However, if the appointment is subject to con-
2 firmation, the clear implication is that the "date of office" is
3 later; i.e., a date, after the reconvening of the legislature,
4 on which the appointment is confirmed.

5 The term "confirmation" has a commonly understood
6 meaning when used to describe a legislative procedure. The term
7 connotes a formal process that is performed by a vote taken on
8 the record during a session of the confirming body. The state
9 constitution provides that executive appointments are confirmed
10 during joint session. Alaska Const. art. III, §§ 25 and 26.
11 The legislature implemented the confirmation power by establish-
12 ing a procedure for the consideration of all executive appoint-
13 ments made by the governor. This procedure requires a formal
14 vote by all members. AS 39.05.080(4); see also Rule 46, Uniform
15 Rules of the Alaska State Legislature. The provisions imple-
16 menting the procedures for confirmation of appointments to exec-
17 utive office are in pari materia with AS 15.40 and should be
18 used to interpret the meaning of the provision under review
19 here. There is no basis for a more liberal interpretation of
20 the term "confirmation."

21 Because the legislature does not meet during the in-
22 terim, there is no institutional need to provide for an earlier
23 confirmation. Even the election code provides that an appoint-
24 ee's office does not begin until confirmation. AS 15.40.340.
25 If the legislature perceives a need to confirm an appointee dur-
26 ing the interim, a special session could be called to take up

1 the question. See Alaska Const. art. II, § 9. Apparently, the
2 leadership of the house of representatives had no interest in
3 calling such a session. Exh. 6. The senate Republican caucus
4 also requested the governor to call a special session to resolve
5 this dispute. However, the governor declined to exercise his
6 discretionary power to do so under article III, section 17 of
7 the Alaska Constitution. Exh. 7.

8
9 V. CONCLUSION

10 The governor contends that AS 15.40.330(a) is invalid
11 because that statute purports to delegate the power to determine
12 the qualifications of an appointed senator to a few legislators
13 serving in the senate. This function may only be performed by
14 the entire senate. The statute purports to require the governor
15 to share his appointment power with individual legislators.
16 Once a power of appointment is assigned by statute to the gover-
17 nor, the legislature cannot attempt to also exercise that power.
18 The Republican senators carry the grant of the confirmation
19 power too far when they attempt to exercise it during the inter-
20 im. To be valid at all, confirmation must be decided when the
21 senate is assembled in session. The vote of each senator per-
22 mitted to vote must be recorded in the senate journal.

23 For the reasons set out in this memorandum, the gov-

24 ////

25 ////

26 ////

ATTORNEY GENERAL, STATE OF ALASKA
STATE CAPITOL
P.O. BOX K, JUNEAU, ALASKA 99811
PHONE 465-3600

ernor is entitled to judgment on all counts set out in his
complaint.

DATED: November 25, 1987

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: James L. Baldwin
Assistant Attorney General

Mm. for Jgmt on the Pleadings

- 16 -

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

*P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029*

*Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101*

MEMORANDUM

February 19, 1991

SUBJECT: Legislative Designation of Qualifications for Members of Boards and Commissions (Work Order No. 17LS-0661)

TO: Representative Dave Donley

FROM: Jerry Luckhaupt
Legislative Counsel

You have requested an opinion concerning the legislature's authority to designate qualifications for membership on boards and commissions created by the legislature. I hereby respond as follows.

Art. III, § 26 of the Alaska Constitution provides:

When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

This section provides that the governor shall appoint the members of boards and commissions that are "at the head of a principal department or a regulatory or quasi-judicial agency." Art. III, § 26 provides a general qualification that all appointees to these boards and commissions shall be United States citizens. Other than this general requirement the section does not provide any direction concerning the designation of qualifications for membership on particular boards or particular seats on boards.

In Bradner v. Hammond, 553 P.2d 1 (Alaska 1976), the Alaska Supreme Court recognized that implicit in the Alaska Constitution is the doctrine of separation of powers. That doctrine, that one branch of government may not exercise the powers committed to another branch, is designed to avoid the "tyrannical aggrandizement of

power by a single branch of government. . ." Bradner, supra, at 5. The Bradner decision also recognized that our constitution envisioned a strong executive and "that the appointment of executive officers is an executive function. . ." Bradner, supra, at 6.

"The legislative power of the State [though] is vested in a legislature. . ." Art. II, § 1, Alaska Constitution. "Legislative power" is the power of the legislature "to make laws and such power is reposed exclusively in such body though it may delegate rule making and regulatory powers to departments in the executive branch." Black's Law Dictionary.

As part of its law making power the legislature may determine that the best way for a particular law to be implemented or enforced is by the establishment of a board or commission to administer the law. In fact, such appears to be expected by art. II, § 26 of our constitution. In creating the board or commission it seems only reasonable that the legislature may establish qualifications for the members of the board or commission who are going to be implementing the particular law enacted by the legislature. The legislature may want persons with experience in the field or area to be regulated, or with some other qualifications or training, to administer the law. By enacting qualifications for members of boards or commissions, the legislature is not selecting a particular person to be on the board or commission (which power is provided solely to the governor) but only specifying that certain qualifications are necessary for any person selected by the governor to serve on the particular board or commission. The governor may still select the individual he wants to be on the board or commission, provided the person has the qualifications the legislature has specified as being necessary. As such, it appears that the governor's appointment power is not invaded or restricted by the legislature's enactment of reasonable qualifications for membership on boards and commissions.

This view is consistent with the general rule of law concerning the prescription of qualifications for public office by the legislature.

Subject to constitutional restrictions, the legislature has the right to prescribe the qualifications of officers to be elected or appointed to state offices created by it. . .

81 A, C.J.S., States, § 83, at p. 460.

And:

Subject to such limitations as may be imposed by the constitution, the power to fix the qualifications of public officers or employees may be exercised by the legislature. The qualifications for, or conditions of, public employment may not be arbitrary, but must be reasonable and

based on substantial grounds which are natural and inherent in the subject matter of the legislation.

67 C.J.S., Officers, § 16, at p. 256 - 57.

Various state courts have reached this same conclusion and have upheld legislative designations of qualifications for public offices, such as, memberships on a board or commission. See, e.g., State v. Matassarini, 114 Kan. 244, 217 P. 930 (1923); State v. Eischen, 76 N.W.2d 385 (Minn. 1956); Humane Society of the United States v. New Jersey Fish and Game Council, 70 N.J. 565, 362 A.2d 20 (1976); Landes v. North Hempstead, 20 N.Y.2d 417, 284 N.Y.S.2d 441 (1967); Hurd v. Freeland, 442 P.2d 344 (Okla. 1966); State v. Wells, 112 N.W.2d 601 (S.D. 1961); State v. Millsap, 605 S.W.2d 366 (Tex. App. 1980).

This view is also consistent with the statements of the framers of our constitution at the constitutional convention. It was apparently their belief that qualifications for membership should be stated in the statutes authorizing the particular board or commission. In discussing residency requirements and qualifications of board members, Delegate V. Rivers stated:

The board or the commission would be established by law, and we presume they might have some requirements in the law, but that leaves it open to the legislature to make the decision on it.

Alaska Constitutional Convention Proceedings (ACCP), at p. 2038. And, "I for one would prefer to see the statute provided [sic] rather than the constitution provide for board member qualifications." ACCP, at p.2039.

Further, at least three Alaska Attorney General opinions or letters of advice have concluded that the legislature may prescribe reasonable qualifications for gubernatorial appointments to boards or commissions. Opinion from R. Pegues to H. Beirne, 04/23/81; Opinion from R. Pegues to Governor Hammond, 08/13/79; Opinion from G. Schaible to Governor Cowper, 05/24/88. Copies of these opinions are attached.

An examination of these authorities reveals at least two areas of caution. First, a legislative attempt to require the governor to appoint an individual selected by some other group could be found by a court to be violative of the governor's appointment power under art. III, § 26. See, e.g., the Attorney General's opinion from R. Pegues to H. Beirne attached hereto. At least two states that have considered this issue, based of course on their own constitutional provisions, have ruled that delegating the selection of individuals to some other group and requiring the governor is to make his appointments from the names submitted by those groups is proper. Humane Society of the United States v. New Jersey Fish and Game Council, *supra* (New Jersey's constitution is similar to ours and was a model used by our framers); State

Representative Dave Donley
February 19, 1991
Page 4

v. Eischen, supra. Second, since our constitution already provides a residency requirement in art. III, § 26 (that being that all members of boards and commissions must be United States citizens), it is possible that a court could find that the imposition of a state residency requirement would be improper. See the Attorney General's opinion from R. Pegues to Governor Hammond attached hereto.

It therefore appears that the legislature may prescribe reasonable qualifications for art. III, § 26, boards and commissions, that are reasonably related to the position or to the aim of the legislation and which do not interfere with the governor's appointment power or with qualifications set out in the constitution.

If you have further questions, please contact me at your convenience.

GPL:mi/pl
91-032.mai

Enclosure

DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT

February 4, 1991

Representative Ben Grussendorf
Speaker of the House of Representatives
P.O. Box V
Juneau, Alaska 99811

Dear Mr. Speaker:

On February 4, 1991, the Judiciary Committee held a hearing to review the Governor's power to remove members of various boards and commissions, including the Alaska Public Utilities Commission. After hearing from Legislative Counsel [and a representative of the Attorney General], the Judiciary Committee has concluded that the Governor does not have the legal authority to unilaterally remove Commissioner Peter Sokolov from his position on the APUC. An APUC commissioner may only be removed from office "by and with the consent of a majority of the legislature." AS 42.05.035.

Because Commissioner Sokolov's appointment to the APUC has not yet been confirmed by the Legislature, it is the recommendation of the Judiciary Committee that we proceed with the confirmation process for this appointment. In addition, because the APUC does not now have a vacancy as defined by AS 42.05.030, the Judiciary Committee recommends that the Legislature return to the Governor any additional APUC appointments that are submitted for confirmation at this time.

Very truly yours,

Dave Donley, Chair

DD:lho

Alaska State Legislature



House of Representatives House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

February 6, 1991

James L. Baldwin
Department of Law
P.O. Box K
Juneau, AK 99811

Dear Mr. Baldwin:

Thank you very much for your participation in the House Judiciary Committee hearing on February 4, 1991.

The following is a summary of the information that you committed on behalf of the Department of Law to provide to the committee:

The legal authority for the Attorney General's position that transmittal to the legislature of the name of an individual who has been appointed to a Section 26 board, under AS 39.05.080, is a discretionary act on the part of the governor.

The legal authority for the position that, until the name of such an appointee has been formally transmitted by the governor to the legislature, the legislature is powerless to exercise its confirmation powers with respect to that appointee.

The legal authority for the position that the removal provision for APUC Commissioners, AS 42.05.035, is invalid.

An historical summary of appointments to the law, engineering, finance, accounting or business administration, and consumer chairs on the APUC, as prescribed by AS 42.05.040.

The informal Attorney General's opinion stating that an executive appointee, once confirmed by the legislature, need not be resubmitted to the legislature after being reappointed to either the same or a different position. .

The results of your research on the question of what constitutes a "regulatory" board under Article III, Section 26, of the Alaska Constitution.

Copies of the cases that reached an opposite holding to that of McChesney v. Sampson, 232 Ky 395, 23 S.W.2d 584 (1930).

A copy of the settlement agreement between the state and Michael Whitehead after he was removed from the Commercial Fisheries Entry Commission.

Because the committee would like to receive the above-requested information by February 15, 1991, your prompt attention to this request will be greatly appreciated.

Sincerely,

A handwritten signature in cursive script that reads "Dave Donley". The signature is written in dark ink and is positioned above the typed name and title.

Dave Donley, Chair
House Judiciary Committee

DD/hk

January 31, 1991

SENT VIA TELECOPIER

Don Tanner, Director
Boards and Commissions
Office of the Governor
State of Alaska
P.O. Box A
Juneau, Alaska 99811-0101

Dear Mr. Tanner:

This is in response to your January 29, 1991 letter, in which you informed me that Governor Hickel is attempting to withdraw my reappointment to the Alaska Public Utilities Commission, and to replace me on the Commission effective January 23, 1991.

I was lawfully appointed to the Commission, and may not be summarily removed. Furthermore, the Alaska State Legislature has the right and the responsibility to decide whether or not to confirm my appointment. I believe that my appointment has already been submitted to the Legislature for confirmation, and I request that no action be taken to prevent the Legislature from carrying out its responsibilities. If my name has not been submitted, then I request that it be submitted, as the law requires.

While I believe that the action taken by the Governor's Office is illegal, I also do not believe that it is in the public interest to become involved in a personal confrontation with the Governor's Office. I will therefore physically vacate the premises where my office is located, as you request. I also will comply with any reasonable request for my continued assistance in seeing that the duties and responsibilities of the Commission are carried out. At the same time, I reserve all of my rights under law, including the right to be reinstated to my position on the Commission. I will immediately resume the performance of my duties on the Commission upon notification of my reinstatement.

Sincerely yours,

Peter Sokolov

1 IN THE HOUSE

2 HOUSE JOINT RESOLUTION NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 Proposing an amendment to the Constitu-
6 tion of the State of Alaska relating to
7 legislative confirmation of the board
8 members of public corporations of the
9 state.

0 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

1 * Section 1. Article III, sec. 26, Constitution of the State of Alaska,
2 is amended to read:

3 SECTION 26. BOARDS AND COMMISSIONS. When a board or commission
4 is at the head of a principal department, [OR] a regulatory or quasi-
5 judicial agency, or a public corporation established by law, its
6 members shall be appointed by the governor, subject to confirmation by
7 a majority of the members of the legislature in joint session, and may
8 be removed as provided by law. They shall be citizens of the United
9 States. The board or commission may appoint a principal executive
0 officer when authorized by law, but the appointment shall be subject
1 to the approval of the governor.

2 * Sec. 2. The amendment proposed by this resolution shall be placed
3 before the voters of the state at the next general election in conformity
4 with art. XIII, sec. 1, Constitution of the State of Alaska, and the elec-
5 tion laws of the state.
6
7
8
9

SENATE JOINT RESOLUTION NO. 4**IN THE LEGISLATURE OF THE STATE OF ALASKA****SEVENTEENTH LEGISLATURE - FIRST SESSION****BY SENATORS KERTTULA, Sturgulewski****Introduced: 1/21/91****Referred: Judiciary and Finance****A RESOLUTION**

1 Proposing an amendment to the Constitution of the State of Alaska requiring legislative
2 confirmation for members of the governing boards of the Alaska Permanent Fund
3 Corporation and the Alaska Railroad Corporation.

4 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 * Section 1. Article III, sec. 26, Constitution of the State of Alaska, is amended to read:

6 SECTION 26. BOARDS AND COMMISSIONS. When a board or commission is at the
7 head of a principal department or a regulatory or quasi-judicial agency, or is the governing
8 entity of the Alaska Permanent Fund Corporation or the Alaska Railroad Corporation, its
9 members shall be appointed by the governor, subject to confirmation by a majority of the
10 members of the legislature in joint session, and may be removed as provided by law. They shall
11 be citizens of the United States. The board or commission may appoint a principal executive
12 officer when authorized by law, but the appointment shall be subject to the approval of the
13 governor.

14 * Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state
15 at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and
16 the election laws of the state.

Alaska State Legislature



House of Representatives House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

January 28, 1991

The Honorable Charles E. Cole
Attorney General
P.O. Box K
Juneau, Alaska 99811

Re: Constitutionality of AS 44.39.030

Dear Attorney General Cole:

In reviewing recent press accounts of the controversy involving the appointment of the Commissioner of Fish and Game, I was interested to read you have concluded that AS 44.39.030 (which requires the commissioner to be appointed from names submitted to the Governor by the Boards of Fish and Game) is an unconstitutional infringement on the power of the executive. Because I am very interested in the contours of the relationship between the executive and legislative branches of government, I would appreciate receiving a copy of any written opinion in which you or a member of your staff conclude the statute is unconstitutional. If a written opinion on this subject does not exist, please advise me of the legal basis for your conclusion that the statute is unconstitutional.

Thank you in advance for your prompt attention to this request.

Very truly yours,

A handwritten signature in cursive script that reads "Dave Donley".

Dave Donley, Chair

DD:lho

Appointment of Fink pal irks lawmakers

By DAVE PATRICK

TIMES CAPITAL BUREAU

Some legislators are charging the governor with overstepping his authority when he replaced Peter Sokolov on the Alaska Public Utilities Commission with a close friend of Anchorage's mayor.

Gov. Walter J. Hickel named Don Schroer to one of two consumer seats on the 5-member commission. Schroer is Mayor Tom Fink's insurance business partner, campaign treasurer and duck hunting buddy. The appointment requires confirmation by the Legislature.

The commission regulates utilities and oversees rate-setting. It would hold approval power over Fink's bid to sell the city-owned Anchorage Telephone Utility.

Schroer's appointment was made without a formal announcement and while Sokolov was out of state on vacation. Sokolov was at the end of his 6-year term when he was re-appointed Oct. 31 by former Gov. Steve Cowper, six days before the Nov. 6 election.

Hickel won the election and took office Dec. 3. The Legislature, which convened Jan. 21,

had not taken action on Sokolov's appointment. Hickel's boards and commissions director Don Tanner and the governor's deputy press secretary Ed Wicher did not return phone calls Friday on Schroer's appointment.

Rep. David Finkelstein, D-Anchorage, said he holds nothing against Schroer, but questions the nature of the appointment.

"The independence of agencies like this are in jeopardy," he said. Finkelstein chairs the House Labor and Commerce Committee, which would review APUC appointments.

"The whole idea is to have them not be on the side of the administration or the Legislature and have them be independent," Finkelstein said.

Schroer said Friday he heard Sokolov was to resign, although he could not remember who told him about a resignation.

Sokolov is expected to return from vacation Monday. APUC spokesman Ray Wipperman said Sokolov did not previously intend to resign.

Schroer, a former insurance industry lobbyist, said he did not expect trouble in the Legislature over his confirmation. He said it

appears Hickel can remove Sokolov by making a new appointment.

"I understand until the Legislature acts on an appointment the governor can withdraw that," Schroer said. "Admittedly it's a different governor now."

Schroer cites six years on the state Real Estate Commission and his current seat on the Anchorage Water and Wastewater Advisory Commission as qualifications for the APUC job. Utilities commissioners are paid more than \$69,000 per year.

Lawyers for the Legislature issued an opinion in December that said an APUC commissioner can be removed only for cause, or if lawmakers fail to confirm the appointment.

"It appears his appointment is binding upon the subsequent administration," wrote attorney Jerry Luckhaupt of the Legislative Affairs Agency Division of Legal Services.

Rep. Kay Brown, D-Anchorage, requested the opinion and said Hickel is overstepping his authority.

"I am concerned about the question of the separation of powers between the governor and the Legislature," Brown

said. "I don't think the governor has the power to replace Commissioner Sokolov."

Hickel shifted Commissioner Mark Foster from a consumer chair to Sokolov's engineering seat to make room for Schroer. Foster is a civil engineer. Schroer does not have to be an engineer to sit on a consumer seat.

APUC Commissioner Susan Knowles said the move was unprecedented and may also require legislative review.

"Mark was confirmed as one of the consumer commissioners in early 1990," Knowles said. "How that move sits with the Legislature, I don't know," said Knowles, wife of gubernatorial candidate Tony Knowles.

Democratic Rep. Pat Parnell, a former Anchorage assemblyman, said he had no concerns about Schroer's relationship with Fink and how it may affect the ongoing debate over the proposed sale of the city's telephone utility.

"I imagine if the people were to approve that sale in a vote, the APUC would perform a perfunctory exercise in approving or disapproving it," Parnell said.

January 31, 1991

SENT VIA TELECOPIER

Don Tanner, Director
Boards and Commissions
Office of the Governor
State of Alaska
P.O. Box A
Juneau, Alaska 99811-0101

Dear Mr. Tanner:

This is in response to your January 29, 1991 letter, in which you informed me that Governor Hickel is attempting to withdraw my reappointment to the Alaska Public Utilities Commission, and to replace me on the Commission effective January 23, 1991.

I was lawfully appointed to the Commission, and may not be summarily removed. Furthermore, the Alaska State Legislature has the right and the responsibility to decide whether or not to confirm my appointment. I believe that my appointment has already been submitted to the Legislature for confirmation, and I request that no action be taken to prevent the Legislature from carrying out its responsibilities. If my name has not been submitted, then I request that it be submitted, as the law requires.

While I believe that the action taken by the Governor's Office is illegal, I also do not believe that it is in the public interest to become involved in a personal confrontation with the Governor's Office. I will therefore physically vacate the premises where my office is located, as you request. I also will comply with any reasonable request for my continued assistance in seeing that the duties and responsibilities of the Commission are carried out. At the same time, I reserve all of my rights under law, including the right to be reinstated to my position on the Commission. I will immediately resume the performance of my duties on the Commission upon notification of my reinstatement.

Sincerely yours,

Peter Sokolov

**THE FOLLOWING DOCUMENT(S)
MAY NOT FILM LEGIBLY BECAUSE OF
THE POOR QUALITY OF THE ORIGINAL**

Albert MUNSON, Plaintiff, v. TERRITORY OF ALASKA; J. Gerald Williams, Attorney General for the Territory of Alaska; Hugh J. Wade, Treasurer of the Territory of Alaska; John A. McKinney, Director of Finance of the Territory of Alaska; Clarence L. Anderson, Director, Alaska Department of Fisheries; Nels Nelson, Member, Alaska Fisheries Board; Howard Wakefield, Member, Alaska Fisheries Board; Robert Eallenberg, Member, Alaska Fisheries Board; Kenneth D. Bell, Member, Alaska Fisheries Board; Ira A. Rothwell, Defendants.

Civ. No. A-11769.

District Court, Alaska. Third Division, Anchorage.

Dec. 28, 1956.

Action for a declaratory judgment determining right to office of plaintiff on the Alaska Fisheries Board. The District Court for the District of Alaska, McCarrey, J., held that plaintiff was entitled to a declaration that he was a duly appointed and qualified member of the Board.

Judgment for plaintiff.

1. Fish ☞11

Where plaintiff, an appointee to the Alaska Fisheries Board, did not exhaust his administrative remedies for payment of his expenses while in attendance at the meetings of the Board of Fisheries, right to recover therefore would be summarily denied. 28 U.S.C.A. § 2201.

2. Statutes ☞256

Where bill to provide procedural uniformity and appointments to certain territorial officers was passed by the Legislature on March 19, 1955 and was returned to the Legislature on March 29, 1955 without the Governor's signature, bill became a law at midnight on March 27, 1955. A.C.L.A.1949, § 4-3-3; Laws 1955, c. 64 and § 7; Laws 1949, c. 68.

Y OF ALASKA; J.
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3. Fish §11

Where party was appointed to the Alaska Fisheries Board for a period of five years and though his term was to expire on March 31, 1955 he continued to hold office until a successor was appointed and duly qualified and under the statute the Governor had power to make an interim appointment which would be subject to confirmation by the Legislature at its next session. A.C.L.A.1949, § 4-3-3; Laws 1955, c. 64 and § 7; Laws 1949, c. 68.

4. Statutes §188

A court must confine its interpretation of an act to the intent as expressed therein.

5. Fish §11

Where a party was appointed to Fisheries Board March 29, 1950 for five years and on March 24, 1955 and while Legislature was in regular session, Governor reappointed party and Legislature adjourned on March 25, 1955 sine die without acting on Governor's request and no further action was taken silence and inaction of Legislature did not amount to a confirmation of appointment, and where Governor on August 1, 1955 appointed plaintiff on an interim status to take place of incumbent, plaintiff was entitled to the office. A.C.L.A.1949, §§ 4-3-3; Laws 1955, c. 64 and § 7; Laws 1949, c. 68; U.S.C.A.Const. art. 2, § 2, cl. 2; Laws 1955, c. 64, §§ 1, 4(c) (d, e).

Jack F. Scavenius, Anchorage, Alaska, for plaintiff.

J. Gerald Williams, Atty. Gen., for defendants.

Kay & Buckalew, Anchorage, Alaska, for defendant Rothwell.

McCARREY, District Judge.

This case was tried before the court under the Declaratory Judgment Act which has been extended to the Territory of Alaska. 28 U.S.C.A. § 2201.

One Ira A. Rothwell was appointed to the Alaska Fisheries Board March 29, 1950, for a period of five years. On March 24, 1955, and while the Twenty-second Territorial Legislature was in regular session, the Honorable B. Frank Heintzleman, Governor of the Territory of Alaska, submitted a letter for his reappointment to the legislature, as follows:

"In accordance with the provisions of chapter 68, Session Laws of Alaska 1949, I submit herewith for confirmation by a majority of all the members of the Senate and House of Representatives in joint session assembled, the name of Mr. Ira Rothwell of Cordova, Alaska, for appointment to the Alaska Fisheries Board for the term ending March 31, 1960."

The legislature adjourned on March 25, 1955, sine die, without acting upon this request and no further action was taken in its extraordinary session, which followed the regular session. The governor took no further action in regard to his appointment. Nevertheless, Mr. Rothwell continued to serve as a member of the board beyond the five years of the original appointment without taking another oath of office or receiving a new certificate.

By letter dated August 1, 1955, the Governor of Alaska appointed the plaintiff, Albert Munson, on an interim status, to take the place of Mr. Rothwell. On August 5, 1955, the plaintiff executed the oath of office and received a certificate of his appointment.

The Alaska Fisheries Board, in preparation for a meeting which was called for November 7, 1955, through its then director, Clarence L. Anderson, sent notices of said meeting to all members of the Alaska Fisheries Board, including Ira A. Rothwell, but failed to send a notice to the plaintiff, Albert Munson.

Mr. Munson, nevertheless, flew to Juneau and attended all meetings of the board but was refused his seat by the

other members of the board. Thereafter he submitted vouchers to the Director of Finance, as provided by law, § 12-3-1, A.C.L.A.1949 and S.L.A.1955, c. 82, who disapproved the same. Mr. Rothwell submitted his vouchers and they were paid by the Director of Finance.

The plaintiff prayed for

" * * * a judgment decreeing, determining and declaring that this plaintiff is a duly-appointed and qualified member of the Alaska Fisheries Board and that said plaintiff is entitled to pay any remuneration for his attendance at the meetings of said board and for his attendance at such future meetings as the board may hold.

"Plaintiff further prays * * * a judgment decreeing, determining and declaring that defendant Ira A. Rothwell is not a duly-appointed and qualified member of the Alaska Fisheries Board and is not entitled to any remuneration or payment for any meetings of said board which he may attend. * * *"

[1] As heretofore announced from the bench, I am of the opinion that the plaintiff did not exhaust his administrative remedies for the payment of his expenses while in attendance at the meetings of the Board of Fisheries, thus such relief is hereby summarily denied.

Pursuant to the provisions of S.L.A.1949, c. 68, sec. 3(a), the " * * * confirmation by a majority of all of the members of the Senate and House of Representatives in joint session assembled * * *" was necessary to the plaintiff's appointment.

[2] On March 19, 1955, an act was passed entitled House Bill No. 156, characterized as follows:

"An act to provide procedural uniformity in the appointments of certain Territorial Administrative and Executive officers, and certain members

of Territorial boards, commissions, authorities, councils, and committees; prescribing an additional qualification for appointments; repealing prior inconsistent Acts; and declaring an emergency."

This bill was returned to the legislature on March 29, 1955, without the Governor's signature. Accordingly, this act became law at midnight on March 22, 1955. Section 4-3-3, A.C.L.A.1949 and sec. 7 of the act. This statute was in effect at the time the Governor submitted the name of Ira Rothwell to the legislature. This act, S.L.A.1955, c. 64, will hereinafter be referred to as the 1955 act.

[3] Under the provisions of the act of 1949 supra, though Mr. Rothwell's term was to expire on March 31, 1955, he continued to hold office until his successor was " * * * appointed and duly qualified". The Governor had power under this act to make an interim appointment which would be subject to the confirmation by the legislature at its next session.

There is but one issue to be determined in this case and that is, what effect did silence and inaction on the part of the legislature have on the attempted reappointment by the Governor of Mr. Rothwell, that is, was such inaction tantamount to confirmation, rejection, or was it without any legal effect whatsoever.

[4] The question of case law on this subject has been briefed and argued at considerable length by the parties. It is the position of the defendant that the cases cited concerning the right to public office upon appointment and difference in wording between the statutes involved in those confirmation are not applicable in this case because of the cases and the 1955 act. A cursory comparison readily confirms this position. It is doubtful that one could find another statute with so much ambiguity and inconsistency as this one. The specific purpose of the legislators in enacting this particular act rests in the realm of conjecture, but this court must confine its opinion to their intent as expressed in the act.

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Statutes requiring the action of two authorities in the completion of appointment are certainly nothing new. Article 2, sec. 2, clause 2 of the Constitution, provides that the consent of the Senate is necessary for appointment to certain federal offices. Justice Marshall, speaking for the Supreme Court in *Marbury v. Madison*, 1803, 1 Cranch 137, 2 L.Ed. 60, 5 U.S. 137, interpreted this power of appointment to consist of three acts—first, the nomination by the executive; second, the appointment by the executive by concurrence of the Senate; third, the ministerial act of certifying the appointee. He states 5 U.S. at page 156:

"The last act to be done by the president is the signing of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed."

This would seem to establish a rule that there is no "appointment" within the meaning of vesting final title to the office until acted upon affirmatively by the legislative branch of the government. Justice Marshall states that until the legislature acts, the president is free to choose whom he will.

By the terms of the 1955 act, sec. 4(c), the legislature is required to act on the appointment within three days from the date the governor submits the name of the prospective appointee. Interpreting a similar statute in 1946, the Connecticut Supreme Court in *State ex rel. McCarthy v. Watson*, 132 Conn. 518, 45 A.2d 716, 724, 164 A.L.R. 1238, faced a similar situation. Quo warranto proceedings were brought by an office holder to try title to his office. His term had expired but by provisions similar to those contained in S.L.A.1949, c. 68, he continued to hold office until a successor was appointed and had qualified. The defendant had been chosen by the governor of the state to

succeed the plaintiff. The defendant's name had been submitted to the legislature prior to the expiration of the plaintiff's term in office. Contrary to the express provisions of the applicable act which provided that the legislature must act on the name submitted by the governor, the legislature voted not to consider the appointment. After the legislature adjourned the governor appointed the defendant to the position held by the plaintiff. The defendant argued as the defendant does in this case that the inaction of the legislature amounted to tacit confirmation. The Connecticut court said "** * ** in acting upon an appointment, it [the legislature] is not exercising a prerogative granted it in its own interest or that of its members; *there can be no waiver of that duty so that inaction would be the equivalent of a tacit approval of an appointment*". (Emphasis supplied.) The defendant's appointment was judicially determined invalid.

In *Bell v. Sampson*, 1930, 232 Ky. 376, 23 S.W.2d 575, 581, the Kentucky court interpreted a statute strikingly similar to the 1949 Fisheries Act. In that case the plaintiffs had been "appointed" by the governor to the state textbook commission in the interim between sessions of the legislature. The legislature met in 1928 and failed to act on the proposed appointments. A new governor had taken office in the meantime and at the adjournment of the legislature "appointed" a new set of members to the commission. The plaintiffs sought injunctive relief to restrain these appointees and the governor from acting upon the appointments. The court found in favor of the defendants. The court ruled that laws requiring bilateral appointments are mandatory and in the interest of the public, that to allow inaction to substitute for confirmation would void the beneficial effects of this type of legislation.

"** * ** as no vote was ever taken in the Senate upon the appointments of Governor Fields [the plaintiffs], its nonaction as to such appointments cannot be ** * ** a confirmation of them."

Further,

"It would hardly be contended that if the Senate had, by vote taken, rejected the appointments of the Governor, then the right of the Governor to make other appointments could be questioned. And as the nonaction of the Senate is just such a rejection as an actual vote of rejection would have been, it follows that the power of the Governor to make other appointments is as comprehensive as it would have been after an actual vote of rejection." 23 S.W.2d at page 583, cited p. 4, plaintiff's brief.

It is apparently the position of the Kentucky court that inaction is tantamount to rejection and places an affirmative duty upon the governor to make a new appointment. This does not mean that the interim appointee can be arbitrarily removed from his position at the caprice of the governor.

If the legislature is in session at the time of the appointment, though a vacancy in the office may exist, the authorities frequently hold the appointee has no right to the office until confirmation. *McBride v. Osborn*, 1942, 59 Ariz. 321, 127 P.2d 134; *State ex rel. Gibbs v. Rogers*, 1940, 141 Fla. 237, 193 So. 435; *Sims v. Tucker*, 1941, 191 Ga. 676, 13 S.E.2d 773; *Hockman v. Tucker County Court*, 1953, 138 W.Va. 132, 75 S.E.2d 82.

"* * * appointment is not complete until confirmed by the members of the legislature as in the Act provided."

Lockwood v. Jordan, 1951, 72 Ariz. 77, 231 P.2d 428, 434.

The net effect of the governor's appointment when the legislature is in session is merely "nomination". *McBride v. Osborn*, supra; *McChesney v. Sampson*, 1930, 232 Ky. 395, 23 S.W.2d 584, 587; *McCall v. Cull*, 1938, 51 Ariz. 327, 75 P.2d 696.

Section 1 of the 1955 act declares it to be the intention of the legislature to achieve " * * * *the elimination, insofar as possible, of recess or interim appointments except in the event of death, resignation, inability to act or other removal from office and the exercise, insofar as possible, of such appointee powers only at such times as the Legislature is in session duly assembled.*" (Emphasis supplied.) This expressed intention is certainly repugnant to tacit confirmation.

Section 4(c) contains language imposing a direct mandate upon the legislature to act upon the "nominations" of the governor.

"Whenever appointments are presented to the Legislature for confirmation, *the Legislature shall, in joint session assembled, act thereon within three days following receipt of the names so presented, by confirming or declining to confirm by a majority vote of all of the members thereof the appointments so made and presented;*" (Emphasis supplied.)

The meaning of the phrase "by confirming or declining to confirm by a majority vote" is not easily determined. Literal interpretation would seem to demand that the legislature, acting on a motion for confirmation, should first vote on the question whether to confirm, and should the motion fail, again vote on the question of declining to confirm. Defendants argue that this is the proper construction. I am unable to attribute such an unreasonable intent to the territorial legislature. The question of confirmation is determined at the first vote; it would be ludicrous to require a second vote. By this reasoning, defendants' argument that the statute demands affirmative rejection falls.

Section 4(d) of the 1955 act provides in part:

"*If the name of any person has been submitted and has not been confirmed, the appointing authority shall not, upon re-submission of appointments as required by this Act, submit again the*

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This language would certainly tend to negate any argument of tacit confirmation. The legislature indicated that if they fail to confirm the "nominee" he is ineligible to hold the position. It is difficult to see how they could be more explicit in indicating their own interpretation of the importance of confirmation.

Section 4(e) throws more ambiguity into the picture.

"Pending confirmation or rejection of appointment by the Legislature, persons so appointed shall exercise all of the functions, have all of the powers and be charged with all of the duties by law prescribed for such appointive 'positions or memberships'." (Emphasis supplied.)

Literal interpretation of this subsection again would be risible. If applied to any but interim appointments, the appointee would in effect be holding the same office as the incumbent, assuming, of course, that the new appointee is a different person. Again I am unable to attribute this intent to the legislature. The apparent purpose of sec. 4(e) is to vest authority in necessary interim appointees and therefore could not be applied in this case because the legislature was in session at the time the reappointment of Rothwell was submitted.

The reason for dual consideration of prospective office holders is the benefit of the considered opinion of the legislators to avoid the possibility of incompetency and injury to the public which may otherwise be perpetrated. The basis is not one merely of giving the public a "veto power", lost by inaction, but is rather an affirmative duty of the legislature.

Inarticulated confirmation by the failure of the legislature to act is something foreign to the whole concept of division of powers embodied in the Constitution. There

are, of course, situations when unilateral appointments are unavoidable. The territorial legislature in the 1955 act declares its intent to avoid these appointments whenever possible. It cannot be said that such an intent is compatible with the concept of tacit confirmation sought to be enforced upon us. In view of this consideration, the only alternative left to this court is to rule that the failure of the legislature to act on Mr. Rothwell's "appointment" is, in effect, rejection. To rule otherwise would place this court out of the general line of authority and against the specific declared intent of the legislature.

[5] I therefore hold that the plaintiff is entitled to a judgment decreeing and declaring him to be the duly appointed and qualified member of the Alaska Fisheries Board as was heretofore announced orally in open court.



CITY OF FAIRBANKS, Plaintiff, v. George
GILBERTSON, Defendant.

No. 9210.

District Court, Alaska. Fourth Division, Fairbanks.

Jan. 4, 1957.

Action by city to recover for utility services rendered by plaintiff to defendant, wherein defendant filed counterclaim for loss of hotel and contents destroyed by fire. On plaintiff's motion to dismiss counterclaim, the District Court, Hodge, J., held that furnishing electric power for operation of pumps which supplied water to fight fire was a governmental function of city, and that hence city was not liable in damages for destruction of hotel and contents by fire on theory that after fire had been brought under control and confined to a small portion of building by fire

6. States $\S$ 46—Statutory requirement that Senate shall take action on Governor's appointment at first session thereafter is mandatory (Ky. St. $\S$ 3750).

Under Ky. St. $\S$ 3750, requirement that Senate shall take action on appointment to office by Governor at first session after appointment is mandatory.

7. Schools and school districts $\S$ 47—Failure of Senate to act on Governor's appointment to text-book commission at first session thereafter did not amount to confirmation of appointment (Ky. St. $\S$ 3750).

Under Ky. St. $\S$ 3750, providing that appointee to office by Governor shall hold office subject to advice and consent of Senate, required to take action on appointment at first session held thereafter, failure by Senate to act on appointment by Governor to state text-book commission created by Acts 1926, c. 77, $\S$ 1, did not amount to confirmation of appointment.

8. States $\S$ 46—Senate is charged with notice of contents of Executive Journal containing appointments by Governor, and may confirm or reject appointments without communication from Governor (Acts 1926, c. 77, $\S$ 1; Const. $\S$ 91).

Where appointments by Governor to state text-book commission created by Acts 1926, c. 77, $\S$ 1, were duly entered on Executive Journals, as required by Const. $\S$ 91, Senate was charged with notice of its contents and could on own initiative, without any executive communication from Governor, conduct investigation of recess appointments made by Governor and confirm or reject them.

9. Schools and school districts $\S$ 47—Appointments to text-book commission, not confirmed by Senate at first session thereafter, expired with adjournment of Senate, creating vacancy which Governor could fill (Acts 1926, c. 77, $\S$ 1; Ky. St. $\S$ 3750).

Under Ky. St. $\S$ 3750, requiring Senate to confirm appointments by Governor at first session thereafter, appointments by Governor to state text-book commission created by Acts 1926, c. 77, $\S$ 1, not confirmed by Senate at first session thereafter, expired with adjournment of Senate, and though appointees may hold over until successors are appointed and qualified, under terms of statute, vacancy was created which Governor could fill.

10. Schools and school districts $\S$ 47—Nonaction by Senate could not be considered confirmation of appointments to text-book commission, where Senate took no vote (Acts 1926, c. 77, $\S$ 1; Ky. St. $\S$ 3750).

Where no vote was taken by the Senate on question of confirmation of appointments to state text-book commission, under Acts 1926, c. 77, $\S$ 1, nonaction by Senate could not be considered confirmation required by Ky. St. $\S$ 3750, under rule that voters absenting themselves or abstaining from voting are considered as acquiescing in result declared by majority of those actually voting, which rule is applicable only when election is held and every one entitled to vote had opportunity to vote.

11. Schools and school districts $\S$ 47—Governor held not prevented from removing appointees to state text-book commission, after Senate's failure to confirm, because not having power of removal between appointment and confirmation (Acts 1926, c. 77, $\S$ 1; Ky. St. $\S$ 3750).

Where Senate failed to confirm appointments of Governor to state text-book commission created by Acts 1926, c. 77, $\S$ 1, at first session after appointment, as required by Ky. St. $\S$ 3750, fact that Governor does not have arbitrary power of removal between time of appointment and confirmation by Senate under Ky. St. $\S$ 3750, did not prevent Governor from making appointment between adjournment of Senate after appointment and expiration of term.

12. States $\S$ 46—Governor's power to make other appointments, after vacancy created by Senate's failure to act on appointments, is as comprehensive as though Senate actually rejected appointments (Acts 1926, c. 77, $\S$ 1; Ky. St. $\S$ 3750).

Where Senate failed to act on appointments by Governor to state text-book commission created by Acts 1926, c. 77, $\S$ 1, as required by Ky. St. $\S$ 3750, power of Governor to make other appointments for vacancies created by nonaction of Senate was as comprehensive as it would have been after actual vote of rejection by Senate.

13. Schools and school districts $\S$ 47—Two-year appointment to state text-book commission commenced on date specified in act, though act did not go into effect until three months thereafter (Acts 1926, c. 77, $\S$ 1).

Under Acts 1926, c. 77, $\S$ 1, providing for appointments of members of state text-book commission in April, 1926, for terms of four and two years, fact that Governor could not appoint members in April, because act did not take effect until June, did not show intention to make term expire two and four years from time of appointment, but two-year appointment first made could not extend beyond April, 1928.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Suit for injunction by W. C. Bell and others against Hon. Flem D. Sampson and others, in which defendants filed a counterclaim. A temporary injunction was granted in part against both parties. On motion by both parties to dissolve injunction in part and grant injunction in part, motion of plaintiffs was overruled and motion of defendants was sustained, and final judgment was entered in accordance therewith, and plaintiffs appeal. Affirmed.

See also 23 S.W.(2d) 584, 588.

John Marshall, Jr., and Woodward, Hamilton & Hobson, all of Louisville, for appellants.

Arthur B. Bensinger and Herman G. Handmaker, both of Louisville, B. J. Bethurum, of Somerset, and J. C. Bird, of Frankfort, for appellees.

DIETZMAN, J. By chapter 77 of the Acts of 1926, a state text-book commission was created. Section 1 of that act provides:

"There is hereby created a State Text Book Commission which shall consist of twelve members, two of whom shall be ex officio members, namely, the Governor of the Commonwealth, and the State Superintendent of Public Instruction, and ten of whom shall be appointed by the Governor at such time or times and in the manner hereinafter provided.

"All members first appointed under this act shall be appointed during the month of April, 1926. Five of the members so appointed shall serve for two years, and five for four years from and after their appointment, and until their successors are appointed and qualified, the terms of the respective members to be designated in their appointment. Upon the expiration of the term for which each of said members is appointed, his successor shall be appointed for a period of four years. Thereafter, the terms of each and all appointive members shall in like manner be for a period of four years and the appointments shall be so made that the terms of five members expire every two years, thus providing for a continuous commission having thereon at each adoption of books a majority of experienced members. All vacancies on said commission shall be filled for the unexpired term in the same manner as original membership is determined."

We are informed that, as originally prepared, this act carried an emergency clause. However, as passed, it did not contain such a clause, and hence did not become effective until in June of that year. On April 23, 1927, the Honorable W. J. Fields, then Governor of Kentucky, appointed as members of this state text-book commission Frank L. McVey, R. A. Edwards, Wm. Pearce, H. T. Peters, L. H. Powell, P. H. Hopkins, B. W. Hartley, H. C. Burnett, R. W. Kincaid, and Mrs. Pearl Hindman Harris, for a term of four years each from that date. All of these appointees, with the exception of Dr. McVey, who is not involved in this litigation, and Wm. Pearce and Mrs. Harris, who declined to join in the bringing of this suit, are parties plaintiff. On December 12, 1927, Governor Fields, having been informed that five of his appointments should have and could only have been made for a term of two years, revoked the appointment of R. A. Edwards, H. W. Peters, P. H. Hopkins, H. C. Burnett, and P. H. Harris for the four-year terms, and reappointed them for a term of two years each from April 23, 1927. These appointments of the Governor were duly entered on the Executive Journal, by the secretary of state, pursuant to section 91 of the Constitution, which, among other things, provides as to the duties of the secretary of state:

"The secretary of state shall keep a fair register of and attest all the official acts of the governor, and shall, when required, lay the same and all papers, minutes and vouchers relative thereto before either house of the general assembly."

The 1928 session of the General Assembly passed without any action on its part concerning these appointments of Governor Fields. On September 12, 1928, the Honorable Flem D. Sampson, then and now the Governor of this commonwealth, revoked these appointments of Governor Fields, and in lieu thereof appointed Dr. Frank L. McVey and the defendants, Samuel Walker, L. B. Stephen, K. R. Cummins, and Miss Delphia Evans, as members of this state text-book commission, for a term of four years each from April, 1928, and John H. Pickett, Henry O. Gray, Frank V. McChesney, Robt. J. Nickel and W. R. McCoy as such members for a term of two years each from April, 1928. Thereupon the plaintiffs brought this suit to enjoin the defendants from undertaking to act as the state text-book commission and from in any wise interfering with the plaintiffs while acting as such commission. The defendants counterclaimed, asking like relief against the plaintiffs. As Dr. McVey, an appointee of Governor Fields, had been reappointed by Governor Sampson, no relief was asked by either side as to him. On motion by both sides for a temporary injunction, the chancellor being of the opinion that the terms of office of the two-year appointees of Governor Fields had expired in April, 1928, and that therefore there was a vacancy as to them which Governor Sampson had a right to fill, refused to enjoin the four-year appointees of Governor Sampson; but, being also of the opinion that the four-year appointments of Governor Fields had not yet expired, he did enjoin the two-year appointees of Governor Sampson. Per contra, he enjoined the two-year appointees of Governor Fields and declined to enjoin his four-year appointees.

Thereupon, pursuant to section 298 of the Civil Code of Practice the defendants moved one of the judges of this court to dissolve the injunction granted against the two-year appointees of Governor Sampson and to grant the injunction refused against the four-year appointees of Governor Fields. The plaintiffs made a like motion as to the two-year appointees of Governor Fields and the four-year appointees of Governor Sampson. In an order concurred in by the whole court, the motion of the plaintiffs was overruled, while that of the defendants was sustained. On the return of the case to the lower court, a final judgment was entered in accordance with the order last mentioned, and from this judgment, the defendants have appealed.

We are confronted at the outset with the question whether or not appointments to the

state text-book commission as provided for by the act creating that body, are subject to confirmation by the Senate. Although we have no general constitutional provision providing for confirmation by the Senate of executive appointments we do have a statute which, in part, reads:

"Unless otherwise provided, all persons appointed to an office by the governor, whether to fill a vacancy, or as an original appointment, shall hold office, subject to the advice and consent of the senate, which body shall take appropriate action upon such appointments at its first session held thereafter." Ky. St. § 3750.

In the case of *Sewell v. Bennett*, 187 Ky. 626, 220 S. W. 517, 520, we had before us the question of the application of this section of the Statutes to the appointments of members of the Workmen's Compensation Board. The Workmen's Compensation Act was passed by the 1916 session of the Legislature. So far as the appointments to the Compensation Board were concerned, it became effective by its terms in April of that year. Chapter 33, Acts of 1916, § 81. The act provided for the appointment of three members to the Compensation Board, and the question was whether such appointments had to be confirmed by the Senate pursuant to section 3750 of the Statutes or not. In holding that they did, we said:

"It was manifestly the purpose of the Legislature in adopting the sections in this chapter to make provision for omissions and deficiencies in special acts, of which there are great numbers, creating offices and officers, and that the Legislature had the power except in so far as it was restrained by the Constitution, to enact these general provisions relating to offices and officers, will not be controverted, nor will it be disputed that these general provisions, in so far as applicable and not in conflict with the provisions of the legislative acts creating offices and officers, are to be read in connection with and as a part of such acts. * * *

"With this understanding of its purpose and effect, I come now to consider whether section 3750 should be read into and considered as a part of the sections of the Workmen's Compensation Act relating to members of the board; and it will be at once seen that this is the principal question in the case, because, if section 3750 has no application to members of the board, then neither Gov. Morrow nor the Senate, acting separately or in concert, had the power to remove either Allington or Sewell during the terms for which they were appointed except for cause. On the other hand, if this section is to be read into and as a part of the related sections of the Compensation Act, *Bennett* and *Levi* are entitled to the offices.

"It will readily be seen, and indeed is not questioned, that there is no apparent conflict

on the face of the Statute between section 4920 of the Compensation Act and section 3750. Section 4920 merely provides that the board shall be 'appointed by the Governor,' while section 3750 simply stipulates that, unless it is 'otherwise provided' all persons appointed to an office by the Governor shall hold it subject to the advice and consent of the Senate. This section does not in any manner interfere with the power of the Governor to appoint. It merely provides that, when he does appoint, his appointment shall be subject to the approval of the Senate. It only adds to or supplements the provisions of the Compensation Act by declaring that the appointments made by the Governor must be submitted by him to the Senate for its approval or rejection. * * *

"Section 3750, in simple and unmistakable language declares that: 'Unless otherwise provided, all persons appointed to an office by the Governor, whether to fill a vacancy, or as an original appointment, shall hold the office subject to the advice and consent of the Senate.'

"Now what do the words 'Unless otherwise provided' mean in connection with the point under consideration? These words are in common and general use, have no technical meaning, and should be given that construction that will carry out their purpose according to their commonly understood usage. The word 'otherwise' is, of course, the controlling word in this group of words, and, as defined by Webster, 'otherwise' means 'in a different manner; in another way; or in other ways, contrarily; another way or manner;' and it is according to these definitions that the word 'otherwise' is commonly used and understood.

"It is further plain that the words 'unless otherwise provided' have reference to something that follows the appointment by the Governor, and unless the act creating the office makes some provision whereby the appointment shall be subject to the advice and consent of some other person or body, or provides that the appointment shall not be subject to the advice and consent of any other person or body, it cannot be said that the act has 'otherwise' provided that the appointment shall not be made subject to the advice and consent of the Senate.

"Clearly the mere failure of the act to make any provision whatever concerning the approval or rejection of the appointment after it has been made is not either in spirit or in substance a provision that the appointment shall not be subject to the advice and consent of the Senate. In order to defeat the meaning and purpose of this last sentence in section 3750, the act creating the office must in terms or in substance make some provision contrary to the meaning and effect of the sentence, and this the Legislature could easily have done if it had wanted to by providing

that the appointment should not be subject to the advice and consent of the Senate, or that the appointment should be approved in some other manner or way.

"It is further insisted that the words, 'Unless otherwise provided, all persons appointed to an office by the Governor, whether to fill a vacancy, or as an original appointment, shall hold office, subject to the advice and consent of the Senate, which body shall take appropriate action upon such appointments at its first session held thereafter,' were intended to apply only to officers who were appointed by the Governor by and with the advice and consent of the Senate.

"In other words, the argument is that, when the act creating an office and officer provides that the officer shall be appointed by the Governor by and with the advice and consent of the Senate, but makes no provision for filling vacancies by and with the advice and consent of the Senate, the quoted words should be read into and as a part of the act, and accordingly vacancy appointments in such an act must be submitted to the Senate as the original appointments are required to be. This argument, of course, assumes that original appointments to the Compensation Board are not subject to the advice and consent of the Senate, and if this were so neither would vacancy appointments be subject to the advice and consent of the Senate. But having, as heretofore stated, reached the conclusion that original appointments under this act must be submitted to the Senate for its advice and consent, it necessarily follows, if the last sentence in section 3750 is to be given any effect, that vacancy appointments must also be submitted to the Senate.

"This last sentence is well written and its meaning expressed in simple and easily understood words. It refers as plainly as language can make it to 'all persons appointed to an office by the Governor, whether to fill a vacancy, or as an original appointment,' and declares that all persons so appointed 'shall hold office, subject to the advice and consent of the Senate, which body shall take appropriate action upon such appointment at its first session held thereafter.' There is no limitation or restriction in this sentence. It is as broad as it could be phrased, and covers every vacancy and every original appointment, unless 'otherwise provided' in the act, creating the office and officer."

Applying the holding and the reasoning of the Sewell Case to the instant one, we find that the act creating the state text-book commission does not in terms exempt the appointments to that commission from the necessity of confirmation by the Senate. This much is conceded. But it is insisted that the act "in substance" does effect such exemption, and that under the Sewell Case, if this be true, confirmation by the Senate is

unnecessary. Although, as the Sewell Case pointed out, the mere failure of an act to make any provision whatever concerning the approval or rejection of an appointment after it has been made is neither in spirit nor in substance a provision that the appointment shall not be subject to the advice and consent of the Senate, it is argued that we have here more than such "mere failure," in that the section creating the text-book commission itself states that its purpose is to provide for a continuous commission having at each adoption of books a majority of experienced members, which could hardly be accomplished if appointments required to be made almost two years in advance of the meeting of the Senate should be rejected by it when it did meet, and, further, in that the first adoption of text-books, taking place in January, 1929, would be past, and one-half of the work of the 1928 appointees completed, before their appointments could be confirmed. In other words, the test urged by the appellants is the assumed intention of the Legislature, arrived at by the supposed practical working of the act. That the Sewell Case never meant such a test, when it used the language that an act creating an office must in terms or in substance exempt the appointment to such office from the provision of section 3750 of the Statutes in order to obviate the necessity of a confirmation by the Senate, is clear to us. The Sewell Case meant by the use of the term "in substance" just what it said earlier in the opinion:

"Unless the act creating the office makes some provision whereby the appointment shall be subject to the advice and consent of some other person or body, or provides that the appointment shall not be subject to the advice and consent of any other person or body, it cannot be said that the act has 'otherwise' provided that the appointment shall not be made subject to the advice and consent of the Senate."

And again, after using the expression "in substance" now seized upon:

"In order to defeat the meaning and purpose of this last sentence in section 3750, the act creating the office must in terms or in substance make some provision contrary to the meaning and effect of the sentence, and this the Legislature could easily have done if it had wanted to by providing that the appointment should not be subject to the advice and consent of the Senate, or that the appointment should be approved in some other manner or way." (Italics ours.)

[1] To adopt the test advanced by the appellants would defeat the operation of section 3750 of the Statutes in most instances. The fact that the appointments to the state text-book commission are to be made after the adjournment of the Legislature is not at all indicative of the legislative intent concerning the requirement of confirmation by

the Senate. Almost, if not all, of the offices to be filled by the Governor's appointment have their terms beginning after the adjournment of the Senate. That was true of the Compensation Board. The appointments to that board were to be made in April following the adjournment of the Senate, just as these to the text-book commission were to be made in April also following the adjournment of the Senate. The appointments to neither the Compensation Board nor the text-book commission could be confirmed until almost two years after they had been made, unless, perchance, a special session of the Senate were called in the meantime. Further, the vast majorities of vacancies in office filled by appointment by the Governor occur when the Senate is not in session, and yet the Sewell Case holds that appointments to fill such vacancies are subject to confirmation by the Senate. To hold that the fact that the filling of an office is to take place during the recess of the Senate is indicative of a legislative intent to exempt such appointment from the necessity of confirmation by the Senate, would, in the light of what we have said about the beginning of the terms of most of our offices, amount to a practical repeal of section 3750 of the Statutes. We do not think the Legislature ever contemplated such a result.

[2] Nor does the fact that section 1 of the act stated that its purpose was to provide for a continuous body composed of a majority of experienced members lead to a different conclusion. Such, in reality, is the purpose of the Legislature with regard to most of the boards it creates, with the terms of office of the members expiring at different times. Such a provision, as in the case of the Compensation Board, indicates a purpose of having on such board a majority acquainted with the duties and responsibilities of the office. Yet this was not considered in the Sewell Case as affecting the necessity of confirmation by the Senate. The provision in the act under discussion for a continuous body of experienced members was only a reason advanced by the Legislature for the making of the terms of the members to expire at different times. The reason would have been just as clearly understood had it not been expressed. Further, the very operation of the act defeats in a measure this expressed purpose or hope, for in those years when a new Governor and new superintendent of public instruction come into office, they, together with the five members to be appointed the following April, will compose a majority of the board to select in October following the term-books, a state of case affording an opportunity for a majority of the commission to be composed of inexperienced members. We might also take into account the possibilities of death, resignation, or removal for cause.

[3, 4] We are therefore brought to the conclusion that the test urged by the appellants is not the true one to use, and that to exempt from the operation of section 3750 of the Statutes an appointment by the Governor to an office created by a statute, such statute must do so in terms or in substance by providing for approval in some other manner or way than by the Senate. As the act under discussion did not do this, it follows that the appointments therein provided are subject to confirmation by the Senate.

[5, 6] What effect did the failure of the Senate at its 1923 session to act on the appointments of Governor Fields have upon such appointments? Referring again to section 3750 of the Statutes, we find the provision that, unless otherwise provided, persons appointed to office by the Governor shall hold their offices subject to the advice and consent of the Senate, which body shall take appropriate action upon their appointments at its first session held thereafter. It was plainly the purpose of the Legislature to provide by this section that, unless otherwise provided, the title to office of one appointed to such office by the Governor finally vests in the appointee when his appointment has been confirmed by the Senate. The statute makes it the duty of the Senate to take action upon all such appointments at its first session held thereafter. As the Legislature was unwilling, unless it otherwise provided, to vest the appointments to office in the Governor except with the advice and consent of the Senate, it follows that the requirement that the Senate shall take action at its first session after the appointments is mandatory; otherwise the legislative purpose would be defeated. Wisely or not, it was unwilling to vest such appointments finally to the unfettered discretion and judgment of the Governor. His appointees were to hold office subject to the advice and consent of the Senate. And this body was to take action at its first session held after the appointments. Unless it did so act at such session, inasmuch as our Senate convenes in regular session only biennially, the terms of office of the appointees of the Governor would, in most instances, be practically over before the Senate could take appropriate action. Thus the Governor would be free from the supervisory control over his appointments which the statute designed there should be. Keeping in mind the object sought to be accomplished and the fact that the authority conferred upon the Senate was one concerning the public interest and that to ignore the provision of the statute would be to defeat its purpose, we are convinced that the provision for action at the first session held after appointments is mandatory. Cf. *McCreary v. Speer*, 150 Ky. 783, 162 S. W. 99; *Wait v. Southern Oil & Tar Co.*, 200 Ky. 682, 273 S. W. 473; 25 R. C. L. 770. This being true, what effect does its

nonaction have? It certainly cannot be construed as a confirmation. In *Morgan v. Champlon*, 150 Ky. 396, 150 S. W. 517, 518, the office of county road engineer was involved. The statute provided for his appointment by the county judge "by and with the consent of the fiscal court." The county judge made the appointment. The orders of the fiscal court showed that the county judge reported his action to that court, and that two of the members of the court voted to ratify the appointment; the other four members not voting. The record did not show that they had been given an opportunity to vote. Invoking the general rule that, where a vote is being taken, those who are present and refuse to vote are taken as voting affirmatively, the appointee of the county judge endeavored to establish his title to the office. In denying his contention, we said:

"The distinction between consent as some active propulsion or expression of the mind, and mere acquiescence as a nonactive immobile condition, is drawn in the case of *Plummer v. Commonwealth*, 1 Bush, 76. Consent was said to be an 'agreement of the mind to what is proposed or stated by another,' and that the mere standing by without volition, the mere acquiescence, was not a consent in the way of participation. In the case of *Aull v. Columbia, etc., R. Co.*, 42 S. C. 431, 20 S. E. 302, it was held that consent implies some positive action as distinguished from a permission manifested by mere passivity. In *Cocke v. Gooch*, 5 Helsk. (Tenn.) 204, it was said that consent 'cannot be substituted for by a passive acquiescence.' In *True v. Commonwealth*, 90 Ky. 651, 14 S. W. 684, 12 Ky. Law Rep. 594, an instruction against an accomplice in a murder was held bad because the consent demanded by the instruction was that of offering no resistance to the crime without the slightest contribution to it by the accomplice's own will. In *State v. Cross*, 12 Iowa, 66, 79 Am. Dec. 519, it was held that a submissive mind did not necessarily involve a consenting mind. In *Philomath College v. Wyatt*, 37 Or. 390, 31 P. 206, 37 P. 1022, 26 L. R. A. 68, it was held that in respect to suffrage consent meant the active concurrence of the voters, and not a passive acquiescence. In *Crabb's Synonyms*, the philologist, in differentiating to consent, to permit, and to allow, says that a consent is 'an express sanction to the conduct of others.'

"In Kentucky the rule is that, when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by a majority of those actually voting. *Montgomery County Fiscal Court v. Trimble*, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738, 20 Ky. Law Rep. 827. But in that case, as in the *Ruy Case* [140 Ky.

500, 131 S. W. 1039], the record disclosed that an election was held and every one entitled to vote had his opportunity to vote to say yes or to say no. Silence, passivity or acquiescence, therefore, in accord with the foregoing cases, cannot, in the case at bar, be said to be an affirmative consent, in the absence of any demonstrated opportunity to vote denying consent."

[7] In the instant case, as no vote was ever taken in the Senate upon the appointments of Governor Fields, its nonaction as to such appointments cannot be, in the light of the *Morgan Case*, a confirmation of them.

[8] The Senate had the right at all times, had it so desired, to take up for action these appointments of Governor Fields. They had been duly entered upon the Executive Journal as section 91 of the Constitution, to which we have referred, requires. This journal was subject at all times to inspection by the Senate. It had under the Constitution the right to call for it. It was charged with notice of its contents. The Senate did not have to wait for the Governor to submit it these appointments of Governor Fields, but could on its own initiative, without any executive communication from the Governor, institute and conduct investigation of recess appointments made by him and confirm or reject them. It was so held in the cases of *Barrett v. Duff*, 114 Kan. 220, 217 P. 918, 925, and *People v. Shawver*, 30 Wyo. 366, 222 P. 11, 23. In the latter case is a valuable discussion pointing out the difference between the power of the Wyoming Senate and the United States Senate in this regard, turning on the fact that, under the Federal Constitution, the President nominates appointees to office, whereas under the Wyoming law, the Governor appoints to office. On this point, the Wyoming court said:

"Notwithstanding the very infrequent use in our statutes of the word 'nominate' when directing an appointment by the Governor, with the consent of or to be confirmed by the Senate, a reference to the published legislative journals coming under our observation has disclosed the fact that the several Governors for at least 20 years have been in the habit of using a form of communication stating that the Governor nominates for the described office and term, and requesting the consent or confirmation of the Senate. That custom has no doubt resulted from using as a model the phraseology of presidential communications to the Senate of the United States submitting official nominations to that body. The use of the word in the case of federal appointments is proper to comply with the provision of the Constitution of the United States providing that the President shall 'nominate' and by and with the advice and consent of the Senate shall appoint. Said executive custom in this state, however, is not sufficiently potent, in our opinion, to require or justify the court, in determining the right of the Sen-

ate to exercise its confirming or rejecting power in the absence of executive communication, to consider the meaning or effect of the word 'nominate' or a provision that the Governor shall nominate, where a nomination is not required for the particular office in question. Nor, except in the very few instances in our statutes providing that the Governor shall nominate, do they contain anything restricting the authority of the Senate in the exercise of its said power to cases where its action has been directly invited by a communication from the Governor, unless such restriction is to be implied from the fact that its power is to advise and consent to or confirm or to refuse to consent or confirm. And that we think presents a very important question and one upon which the authorities directly in point are few. They support, however, the contention that the Senate may act upon an appointment where such action is provided for by law, although the appointment has not been communicated to it by the executive or through his office.

"The orderly and contemplated method is of course an executive communication placing the matter before the Senate for its consideration, and that is the method usually employed here and elsewhere. We suppose also that upon a reasonable anticipation of a necessity therefor the Senate might request by resolution the submission to it of recess appointments which when so submitted it would be authorized to consider under its said power. But why may not the Senate act upon an appointment of which it has knowledge, if the Governor should refuse or neglect to ask for such action especially where the appointee is known to have entered upon the duties of the office? A provision for an appointment by the Governor with the consent of or to be confirmed by the Senate directs not only what shall be done, but also in effect what shall not be done. The affirmative act of the two governmental agencies is required to confer title to an office under such a provision. A completed appointment cannot be made in any other way than as so provided. *People v. O'Toole*, 164 Ill. 344, 45 N. E. 683; *Clark v. State*, 177 Ala. 188, 59 So. 259. While the Governor's act in selecting the person to be considered for an office may be the principal and perhaps the more important one of the two, it is not alone sufficient. A construction of such provision denying the right of the Senate to act in any case unless directly requested to do so by the Governor or by a communication from his office would obviously give him the power to ignore the co-ordinate right of the Senate, and might mean the abolition of that right, and certainly would make it entirely dependent upon the Governor's pleasure. The probability of that effect would be more marked, perhaps, where a recess appointment for a fixed term is held to be effective until rejected by the Senate, but

under the rule adopted in this state, and to which we adhere, that confirmation when required is necessary to complete an appointment, the same result would not be impossible."

On the same point, the Kansas court said:

"No good reason is advanced why the Senate would not consider such recess appointments without such direct word from the executive. * * * The offices in controversy are all located in the capitol building, in which the Senate holds its deliberations. They are important departments of the state government. The Senate may, and often does, have official business with them. It receives reports from them. It considers the service which the departments are, by law, required to perform. It considers the extent of such service and its requirements. It considers and passes appropriations in order that they may lawfully and properly function. Under all the circumstances, the senate cannot shut its eyes to the facts as to whether the respective offices are filled; whether they are functioning under the law, or whether there is a vacancy there. * * * The Senate, which has official knowledge of all of the acts of another state department, may not close its eyes to an existing fact merely because the executive has failed to transmit a communication giving it the advice. * * * The Senate must be permitted to investigate on its own initiative, and without communication from the Governor, the status of offices; otherwise the Governor could fill and refill them at his pleasure by simply failing to advise the Senate. * * * The investigation by the Senate brought before it the records of the secretary of state showing the appointments of the defendants. We conclude that the Senate did not go beyond its powers in making the investigation concerning the offices held by the defendants, and, having satisfied itself, that it could properly exercise its judgment thereon."

Section 3750 of the Statutes refers to appointments made by the Governor, and not nominations. Hence the Wyoming and Kansas cases are in point, and we think their reasoning on this question sound.

[9] As the title to the office of the appointees referred to in section 3750 of the Statutes is finally vested in such appointees when their appointments are confirmed by the Senate, and as the Senate must confirm, if it is going to confirm at all, at its first session held after the appointments are made by the Governor, and as it is charged with notice of the appointments entered on the Executive Journal and may take them up for action without waiting for an executive communication concerning them, and as a nonaction by the Senate is not confirmation, it must follow, to give any effect to the statute at all and to carry out its manifest purpose, that, if the appoint-

ments be not confirmed at the first session of the Senate following their making, they expire with the adjournment of the Senate, and while it may be true that, under the statutes which create their offices, the appointees may hold over until their successors are appointed and qualified, there is a vacancy which the Governor may fill.

[10] Appellants argue, however, that conceding that the appointments here in question were of the character required to be confirmed by the Senate and that the Senate could have considered these appointments without any direct communication from the Governor concerning them, the nonaction on the part of the Senate should be considered a confirmation rather than a rejection, since under the facts the case falls within the rule of *Montgomery County Fiscal Court v. Trimble*, supra, rather than that of *Morgan v. Champion*, supra, because the Senate had an opportunity to vote and failed to do so. The rule of *Trimble Case* is, as pointed out in the *Morgan Case*, applicable only when "an election" is held and every one entitled to vote "has" his opportunity to vote and say "yes" or to say "no." No vote on the question of the confirmation of these appointments was ever taken by the Senate, and so the rule of the *Trimble Case* is inapplicable, and the case of *Morgan v. Champion* controls.

What we have said being true, the appointments of Governor Fields both for the two-year and four-year terms expired with the adjournment of the 1928 Senate, and Governor Sampson had the authority to appoint to the vacancies thus created.

[11, 12] Two other points are made by the appellants against the conclusions here reached. They contend: First, that the reason for denying the Governor arbitrary power of removal between the time of appointment and confirmation, as it is conceded section 3750 does (see also *McChesney v. Sampson* [Ky.] 23 S.W.(2d) 584), applies with equal force to such removal between the adjournment of the Senate after the appointment is made and the expiration of the term. Secondly, they urge that the power of the executive office was exhausted when Governor Fields appointed members of the state textbook commission, and such power could be revived only by action of the Senate in rejecting the parties named. Neither of said contentions militate against the conclusions

herein reached. It would hardly be contended that if the Senate had, by vote taken, rejected the appointments of the Governor, then the right of the Governor to make other appointments could be questioned. And as the nonaction of the Senate is just such a rejection as an actual vote of rejection would have been, it follows that the power of the Governor to make other appointments is as comprehensive as it would have been after an actual vote of rejection.

So much as we have said applies to both the four-year and the two-year appointees of Governor Fields. As to the latter, there is yet another reason why their offices were vacant at the time Governor Sampson filled them.

[13] Although it is true that, due to the fact that chapter 77 of the Acts of 1928 did not become effective until June of that year, for which reason it was impossible for the Governor to appoint its members in April, as section 1 of the act provided, it does not follow that therefore the Legislature intended that the term of office of the Governor's appointees should expire two and four years from the time of his appointments. In arriving at what the Legislature intended about when these terms of office should expire, it is a potent consideration to remember that, despite the elimination of the emergency clause, the Legislature refused to change the date when it said the terms of office of the members of the commission were to begin, and provided that such terms should expire two and four years from such appointment. This statement is not rested on conjecture, for we find on page 2780 of the House Journal of the 1928 Session a rejection of an amendment to this bill striking out the words "April, 1926," where it appears in section 1 of the act, and substituting the words "January, 1923." We conclude therefore that, although the legislative purpose that these appointments should be made in April, 1926, could not be carried out, since the act was not then in effect, its just as evident purpose that the terms of office thus created should expire in April of the even years following may and should be, for which reason the two-year appointments of Governor Fields could not extend beyond April, 1928. The judgment of the lower court being in accord with these views, it is affirmed.

Whole court sitting.

tation, legislative interpretation, or bonus-board interpretation, and my hope is the Legislature about to assemble will forbear to make penurious use of the power which the majority opinion concedes to it.

JOHNSTON, O. J., concurs in the foregoing dissent.

MARSHALL, J., dissents from third paragraph of syllabus and corresponding part of opinion. I am very sorry that I cannot agree with the court in all its conclusions.

The law adopted by the people provides for the issue of bonds "in a sum not exceeding twenty-five million dollars," to provide funds to pay the debt of one dollar a day which the state acknowledges it owes and which it promises to pay. No other bonds are authorized, and the Legislature is not given power by that law to authorize any other issue of bonds. Twenty-five million dollars is named in the law as the limit to which bonds may be issued. That amount only was appropriated by the people for the payment of the debt.

Section 1 cannot be considered separate and apart from the rest of the law. The whole law must be examined to ascertain the meaning of any part of it. When so examined, section 2 should be considered as a restriction on the acknowledgment of indebtedness contained in section 1. Twenty-five million dollars was the total amount that was voted by the people. The statute reads, "in a sum not exceeding twenty-five million dollars." This limits the amount of bonds that may be issued under that law. If this construction of the law be not correct, why name any amount as a limit to the bonds that may be issued under it? Why does not the law say that bonds shall be issued in such sum as may be necessary to pay the one dollar a day? The sum named is a restriction on the total amount of bonds that may be issued under the law, not merely a restriction on the amount that the issuing officers may put out.

BARRETT v. DUFF, GOODRICH v. CRAWFORD, RICE v. GREENLEAF.
(Nos. 24930, 24950, 24955.)

(Supreme Court of Kansas. July 7, 1923.)

(Syllabus by the Court.)

1. States $\S$ 41—Executive power of Governor continuing, and not broken by succession.

The executive power of the Governor is a continuing power, never ending, and not broken by succession.

2. States $\S$ 51—Appointee of Governor during recess of Legislature holds for full term, subject only to nonconcurrence or rejection of Senate.

Where the appointment to an office is vested in the Governor, with the advice and consent of the Senate, and the term of the incumbent expires during a recess of the Legislature, and the Governor appoints a successor to the office, *id.*, that the appointment vests in the appointee a right to hold for his full term, subject only to be defeated by nonconcurrence or rejection of the Senate.

3. States $\S$ 46 — After appointment neither Governor nor successor has further control over appointee until rejected by Senate.

Where the power of the Governor has been exercised by the appointment to an office, and the appointee has qualified and been vested with the powers and prerogatives of the office, neither the Governor nor his successor has any further control over the appointment unless and until the appointee has been rejected by the Senate.

4. Officers $\S$ 7—Where term of office fixed by statute, power of removal does not exist in executive except by statute.

Where the term of an office is fixed by statute, the power of removal does not exist in the executive except so far as provided by statute.

5. Officers $\S$ 7—Executive power to appoint does not include power of removal unless tenure not statutory.

The executive power to appoint to office does not include the power to remove unless the tenure of office has not been declared by law.

6. States $\S$ 46—Neither Governor making appointment with statutory tenure nor successor can revoke it.

When the appointee to an office, the tenure of which is declared by law, is commissioned by the Governor and vested with the power and prerogatives of the office, neither that Governor nor his successor can revoke the appointment.

7. Statutes $\S$ 206—One part should be construed with other parts of same statute to prevent treatment of any one clause as superfluous.

Rule followed that one part of a statute should be construed by other parts of the same statute, so that, if possible, no clause or part thereof shall be treated as superfluous, and especially when the two are parts of the same section. *State v. Mitchell*, 50 Kan. 289, 23 Pac. 104, 20 L. R. A. 308; *McCreedy v. City of Ft. Scott* (Kan. Sup. No. 24905) 216 Pac. 287.

8. States $\S$ 46—Statutory appointment by Governor during recess of Legislature may be confirmed or rejected by Senate.

Where statutes provide for appointment by the Governor, by and with the advice and consent of the Senate, and there is an absence of any constitutional or statutory provision limiting its power, the Senate may, on its own initiative, without advice from the Governor,

institute and conduct investigations of recess appointments made by the Governor, and may confirm or reject them.

Dawson and Harvey, JJ., concurring in part and dissenting in part.

Original proceeding in quo warranto by John E. Barrett against Hugh Duff, by L. E. Goodrich against John H. Crawford, and by M. H. Rice against Jesse W. Greenleaf. Judgments for defendants.

Frank Doster, J. E. Addington and Silas Porter, all of Topeka, and S. B. Amidon and S. A. Buckland, both of Wichita, for plaintiffs.

Chester I. Long, A. M. Cowan, and W. E. Stanley, all of Wichita, J. A. Troutman, of Topeka, and Warren F. Wattles, of Wichita, for defendants.

HOPKINS, J. These are original proceedings in quo warranto to determine the titles to the offices of state inspector of oils, judge of the court of industrial relations, and member of the Public Utilities Commission. The facts briefly stated are as follows:

Harvey H. Motter was appointed state oil inspector by Gov. Henry J. Allen for a term of four years, beginning March 31, 1921. His appointment was confirmed by the Senate March 16, 1921. October 13, 1921, he resigned, effective November 1, 1921, and on October 13, 1921, the defendant Hugh Duff was appointed and commissioned by the Governor to succeed Mr. Motter for the unexpired term ending March 31, 1925. November 1, 1921, Mr. Duff qualified and entered upon his official duties. He has performed such duties at all times since that date. On January 27, 1922, John H. Crawford was by Gov. Allen appointed and commissioned as a judge of the court of industrial relations for the term beginning February 1, 1922, and ending February 1, 1925. He duly entered upon the duties of such office, and has performed the same since that time. On March 20, 1922, Jesse W. Greenleaf was by Gov. Allen appointed and commissioned as a member of the Public Utilities Commission for the three-year term from March 13, 1922, to March 13, 1925. He duly entered upon the duties of such office, and has so continued.

On January 9, 1923, the Legislature convened, and on January 16 following, in regular session of the Senate, a motion was adopted that the Senate consider recess appointments. The appointments of Messrs. Duff, Crawford, and Greenleaf were referred to a Senate committee. On February 21, 1923, Gov. Jonathan M. Davis transmitted the name of the plaintiff John E. Barrett to the Senate as state inspector of oils for the unexpired term for which Mr. Duff had previously been appointed. On March 6, 1923, Gov. Davis transmitted to the Senate the name of the plaintiff Lee Goodrich as a member of the court of industrial relations

for the unexpired term for which Mr. Crawford had previously been appointed. On March 16, 1923, Gov. Davis transmitted to the Senate the name of the plaintiff M. H. Rice as a member of the Public Utilities Commission for the unexpired term for which Mr. Greenleaf had previously been appointed. On February 22, 1923, Gov. Davis advised Mr. Duff by letter that he had revoked and canceled his appointment as state inspector of oils. On March 6, 1923, the Governor conveyed like information to Messrs. Crawford and Greenleaf. On March 7, the Senate, in executive session, confirmed the appointments, respectively, of Messrs. Duff, Crawford, and Greenleaf to the offices, and for the terms for which they had been appointed.

March 1, 1923, Gov. Davis issued a paper in form and with intent to commission Mr. Barrett state oil inspector. He issued like papers to Goodrich and Rice March 24, 1923. The cases have been submitted together, and will be so considered. They involve consideration of several questions. The plaintiffs contend that under the laws providing for appointments with the advice and consent of the Senate the required acts and necessary order of their sequence are: (a) Nomination by the executive, communicated directly to the Senate; (b) consent by the Senate; (c) appointment by the executive to be evidenced only by a commission to the appointee; that, unless, and until appointments have been made in such order and sequence, those holding the respective offices may be removed at the pleasure of the Governor.

The defendants contend that plaintiffs' construction of the statutes under consideration is erroneous, due to a failure to distinguish between the procedure provided by the Constitution of the United States and that provided by the statute of Kansas; that there is no provision of the Constitution of Kansas and no statute relating to the offices in controversy which requires, or contemplates, a so-called nomination; that "tenure of office" means the term of office, and refers to the office itself, and not to the person who happens to hold it; that a portion of the term cannot be different from the whole term of which it is a part; that the Governor, having exercised his power of appointment, and vested the defendants with the prerogatives of office, cannot revoke or withdraw the appointments, and that he has no authority, without cause, to summarily remove the defendants from office.

[1] 1. We may first consider whether the action of Gov. Allen in naming and commissioning defendants Duff, Crawford, and Greenleaf to their respective offices was, in each case, merely a nomination, or an appointment. The supreme executive power of the state is vested in the Governor. Const. art. 1, § 3. This executive power is continu-

ous—never ending. It knows neither names nor persons. It began with the first Governor, has continued ever since, and will continue unbroken so long as the Constitution exists. It follows that, in respect to the offices in question, Gov. Davis had the same power and no greater power of removal than that which would have been possessed by Gov. Allen had he remained in office. It is strongly urged by the plaintiffs that the three appointments by Gov. Allen were not effective until they were communicated by the Governor directly to the Senate and the Senate had consented thereto; that the appointments were, in effect, nominations only, which could be withdrawn, and, inasmuch as they were not communicated to the Senate by the Governor the Senate had no power to consider them; that it was therefore within the power of Gov. Davis to remove the defendants; that his notification of removal created vacancies in the respective offices, and that the plaintiffs, by virtue of his commissions, are entitled thereto.

An examination of article 2, § 2, of the Constitution of the United States, together with certain provisions of the Kansas Constitution and the sections of the statute having to do with the appointment of the respective offices in controversy, is necessary to an understanding of the issues.

Article 2, § 2, of the Constitution of the United States is as follows:

"He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. * * * The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

The Kansas Constitution has these provisions:

Article 15, § 1: "All officers whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law."

Article 2, § 19: " * * * It [the Legislature] shall have the power to provide for the election or appointment of all officers, and the filling of all vacancies not otherwise provided for in this Constitution."

Article 15, § 2: "Tenure of any office not herein provided for may be declared by law; when not so declared such office shall be held during the pleasure of the authority making the appointment, but the Legislature shall not create any office the tenure of which shall be longer than four years."

The Kansas statute relating to appointment of oil inspector, being section 2, c. 200,

of the Laws of 1913 (section 5011, General Statutes of 1915), is as follows:

"The Governor shall, on or before the 1st day of April, 1913, and every four years thereafter, appoint a suitable person who is a resident of this state, and not interested in manufacturing, dealing, or vending any of the illuminating or heating oils specified in section 1 of this act, as state inspector of oils, whose term when confirmed by the Senate, shall be for four years from April 1, 1913, and until his successor is appointed and qualified, unless sooner removed by the Governor; and he may be removed at any time for cause."

The statute relating to the appointment of judge of the court of industrial relations, being section 1, of chapter 29 of the Laws of 1920, is as follows:

"There is hereby created a tribunal to be known as the court of industrial relations, which shall be composed of three judges who shall be appointed by the Governor, by and with the advice and consent of the Senate. Of such three judges first appointed, one shall be appointed for a term of one year, one for a term of two years, and one for a term of three years, said terms to begin simultaneously upon qualification of the persons appointed therefor. Upon the expiration of the term of the three judges first appointed as aforesaid, each succeeding judge shall be appointed and shall hold his office for a term of three years and until his successor shall have been qualified. In case of a vacancy in the office of judge of said court of industrial relations the Governor shall appoint his successor to fill the vacancy for the unexpired term. * * *"

The statute relating to the appointment of a Public Utilities Commission, being section 1, c. 260, of the Laws of 1921, is as follows:

"A Public Utilities Commission is hereby constituted and created, which shall be composed of three commissioners, who shall be appointed by the Governor, by and with the advice and consent of the Senate. Of such three persons first appointed, one shall be appointed and designated to serve for a term of one year, one for a term of two years, and one for a term of three years, said terms to begin upon the qualification of the persons appointed thereto. Upon the expiration of the terms of the three commissioners first to be appointed, as aforesaid, each commissioner shall be appointed and shall hold his office for a term of three years and until his successor shall have been appointed and qualified. In case of a vacancy in the office of any commissioner, the Governor shall appoint his successor to fill the vacancy for the unexpired term. * * *"

It is apparent that appointments are made in two entirely different ways. Under the Constitution of the United States the President sends his nominations to the Senate. If the Senate consents the President then appoints. Except in article 7, referring to trustees of benevolent institutions. Kansas has no constitutional provision comparable to article 2, § 2, of the Constitution of the United States. There is no constitutional provision

in Kansas, and no statute which applies to the offices in controversy, which first requires a nomination by the Governor. Under the Kansas Constitution and statutes the appointments to the offices in controversy are made by the Governor before the Senate Acts.

The federal statute provides for granting commissions to fill vacancies occurring during a recess of the Senate, expiring at the end of the next session. The statutes here involved provide for appointments to fill vacancies for unexpired terms, and provide that appointees shall hold until successors are qualified. If an appointment to fill a vacancy occurring during a recess of the Senate were a mere nomination, which vested no title to the office until the Senate acted, an incumbent whose term expired during a Senate recess could hold over under the statutory provision for holding until a successor was confirmed and qualified.

Both parties support their contentions by substantial authority. The plaintiffs cite various cases based on and which construe and interpret statutes where nominations preceding senatorial action are required. These are similar to the requirements of the federal Constitution. They rely on *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, a case in which Chief Justice Marshall wrote one of the most important decisions in the judicial history of this country. He was dealing, however, with the provisions of the Constitution of the United States which requires a nomination before senatorial action, as distinguished from the Kansas statutes, under which completed appointments, so far as the Governor is concerned, are submitted to the Senate for its approval or rejection. It might well be said that the logic and reasoning of Chief Justice Marshall supports the contention of the defendants in the instant case. The principal question there decided was that the executive, having once completed the last act which he had authority to perform, could not thereafter revoke that act. In the instant case it may be said that, the Governor having the power and authority to appoint the defendants, and having so appointed and commissioned them, and they having become vested with the powers and prerogatives of the respective offices, the Governor was powerless to remove them or to create vacancies in the offices which they held except by a lawful proceeding and for cause. Plaintiffs also cite a number of authorities to sustain the doctrine that an outgoing executive cannot forestall his successor in his prerogative to make his own appointments. These cases have no application to the controversy here, for the reason that the terms began, and a large portion of them was actually served, during the administration of the Governor making the appointments.

Plaintiffs place great reliance on the case

of the State v. Breidenthal, 55 Kan. 303, 40 Pac. 651, which was an action to determine the title to the office of Bank Commissioner. The Legislature of 1891 passed an act for the organization of banks, and providing that the Governor should appoint, by and with the advice and consent of the Senate, a bank commissioner whose term of office should be four years. The act made no provision for the filling of vacancies. On March 21, 1891, Charles F. Johnson was appointed by the Governor, but, the Senate not being in session, the appointment was not confirmed. He qualified, took possession of the office, and performed the duties until February, 1893, when John W. Breidenthal was appointed by the Governor for a four-year term, and his appointment confirmed by the Senate. Four years from the time that Charles F. Johnson was appointed, the Senate not being in session, the Governor appointed C. S. Jobes to the office of bank commissioner. There was no claim that Breidenthal had resigned, been removed, had forfeited or surrendered his office, and the court held, by a majority opinion, that Breidenthal's term did not expire until 1897, and, as between him and Jobes, judgment was rendered in favor of Breidenthal. The analogy sought to be applied by plaintiffs in these cases to the Breidenthal Case is that the original appointment of Johnson, not having been confirmed by the Senate, was provisional, or a temporary appointment, and subject at any time to revocation by the Governor. The decision in the Breidenthal Case was by a divided court, which at that time was composed of three justices. While the judgment rendered was in favor of Breidenthal, no two justices concurred in the same view. Justice Johnston wrote the majority opinion for the other two justices, but also wrote a dissenting opinion. While Justices Allen and Martin agreed on the result, they did not agree on a principle of law as a basis for the result. Under the practice of the court to assign cases before consultation, what occurred in the Breidenthal Case is perfectly apparent. What appears as the majority opinion expressed the views of Chief Justice Martin and Justice Allen at the consultation. When the opinion was written and came to the Chief Justice for inspection he withdrew from it, and wrote an opinion of his own. Therefore there was no opinion of the court in the Breidenthal Case establishing any principle of law. It cannot be regarded as an authority. If, when Breidenthal's appointment was transmitted by the Governor to the Senate, the Senate had proceeded to confirm Johnson, who had previously been appointed, the situation would have been analogous to the instant cases. It would have been equivalent to a rejection of the appointment of Breidenthal. However, in that case the Senate confirmed Breidenthal, which was equivalent to its rejection of Johnson. The

plaintiffs here are not in the same situation as was Bredenthal. He was appointed, confirmed by the Senate, and invested with the powers and prerogatives of the office. The plaintiffs here have never been confirmed by the Senate, have never been invested with the powers and prerogatives of the office, and two of them do not even have commissions which have been lawfully attested.

[2] 2. The defendants each hold a commission signed by the Governor and attested by the secretary of state. They have been confirmed by the Senate. The plaintiffs have not been confirmed by the Senate, and, in the cases of Rice and Goodrich, their commissions have not been attested by the secretary of state. The defendants contend that there is a presumption that they, being the incumbents, possess the legal qualifications to hold their respective offices, and, being in possession of the offices, they have the right to hold them until some one with a better title demands possession.

In *Newman v. United States*, 43 App. D. C. 53, it was held:

"Mere possession of an office, accompanied by a commission from the proper appointing power, creates a presumption that the incumbent possesses the legal qualifications to hold the office."

In *Dorain v. Walters*, 132 Ky. 54, 118 S. W. 313, it was said:

"One who sues to recover a public office has the burden of proving every fact essential to his title, his recovery depending upon the strength of his own title, and not upon the weakness of his adversary's."

In *Wooton v. Wheeler*, 149 Ky. 62, 147 S. W. 914, this language was used:

"In an action by one to recover an office, his legal right to the office must affirmatively appear; that is, he must make out his own case, and establish title to the office in himself. He has no right to appear for the state, by an action in his own name to show that the incumbent is holding an office to which he is not entitled, when he (the plaintiff) has no claim to it himself."

The Constitution of the state of South Dakota provided for a board of regents of education appointed by the Governor and confirmed by the Senate. In the case of *State v. Finnerud*, 7 S. D. 237, 64 N. W. 121, it was held:

"There being no provision, for filling vacancies, in article 14 of the Constitution, creating a board of regents of education, nor in the act of the Legislature enacted to carry into effect that article, a vacancy in such board can only be filled by the Governor, pursuant to the provisions of section 8, art. 4, of the Constitution. By that section, which reads as follows: 'When any office shall, from any cause, become vacant and no mode is provided by the Constitution or law for filling such vacancy, the Governor shall have the power to fill such vacancy by appointment,' the power

of the Governor under such conditions to fill a vacancy is for the unexpired term of the member whose place the appointment is made to fill. When a vacancy is filled by appointment by the Governor under the provisions of that section, no confirmation of the appointment by the Senate is required." Syl.

In *People v. Addison*, 10 Cal. 1, it was said:

"Where the appointment to an office is vested in the Governor, with the advice and consent of the Senate, and the term of the incumbent expires during the recess of the Senate, the Governor has the right to fill such vacancy, and his appointment vests in the appointee the right to hold and discharge the duties of such office for the full term, subject only to be defeated by the nonconcurrence of the Senate."

[3] 3. With respect to the state oil inspector, the statute makes no specific provision for the filling of a vacancy; however, the Constitution requires that the Governor shall see that the laws are faithfully executed. The law contemplates, and the dispatch of public business requires, that the office be filled. It is universally conceded that it was within the power of the executive to fill the vacancy, and the general rule, supported by the great weight of authority, is that the executive may fill the vacancy for the unexpired term. Article 15, § 2, of the Constitution, provides that the tenure of any office not therein provided may be declared by law. When not so declared such office shall be held during the pleasure of the authority making the appointment. The Legislature, by enacting section 5011 of the General Statutes of 1915, provided a definite tenure of office of four years.

"The word 'tenure,' when used in connection with the expression 'tenure of office,' means the term of office." *Territory v. Ashenfelter*, 4 N. M. 85, 12 Pac. 379.

"The words 'term of office' as used in the Constitution in reference to the duration of an appointment refer to the tenure or duration of the office, and not to the incumbent." *Jamison v. Hudson*, 82 Va. 279.

"The word 'term' when used in reference to the tenure of office ordinarily refers to a fixed and definite time, and does not apply to an appointive office held at the pleasure of the appointing power." *Hale v. Bischoff*, 53 Kan. 301, 36 Pac. 752; *Field v. Maister*, 83 Md. 691, 41 Atl. 1087; *Crovatt v. Mason*, 101 Ga. 246, 28 S. E. 891.

Upon the resignation of Motter, Duff was appointed and commissioned by the Governor for the unexpired term. He stepped into Motter's shoes. He became vested with all of the prerogatives and powers which had attached to Motter, and could not be removed except by a lawful proceeding and for cause. *Lease v. Freeborn*, 52 Kan. 730, 35 Pac. 517.

In *Wilson v. Shaw*, 194 Iowa, 23, 138 N. W. 940, it was said:

"The constitutional term of a district judge is a distinct thing or entity. An unexpired term can be predicted only on a pre-existent term of which it is a part. The term lives on even though the incumbent resigns, is impeached, or dies. Personality has nothing to do with the question, nor is a term within the meaning of the Constitution 'the period of a judge's service.' It is axiomatic that the whole is equal to the sum of its parts, and that the part is never equal to or greater than the whole. This is a postulate of logic as well as of mathematics. * * * It is quite generally held that a vacancy in office is within the term, and not in the office. It is the term which survives. The Constitution of this state fixes that term, and its beginning and ending. This is an expressed definition of the word 'term,' and no implied limitation can exist. Furthermore, our statutes contain the same language, and refer to a full term and four-year term and fixed term. When a person is appointed to fill a vacancy for an unexpired term, the unambiguous meaning is that he is to hold for the same term as the person whose place he takes. *Fruitt v. Squires*, 64 Kan. 955, 63 Pac. 643; *Ash v. McVey*, 85 Md. 119, 38 Atl. 442; *State ex rel. v. Fish*, 59 Wash. 492, 110 Pac. 386, 50 L. R. A. (N. S.) 336, and note."

In *Sheen v. Hughes*, 4 Ariz. 337, 40 Pac. 679, it was said:

"The person appointed to fill an office made vacant, after qualifying, possesses all the rights, etc., of the officer whose place he takes. That which is surrendered by the one is gained or acquired by the other. The one loses the office for the remaining or unexpired portion of the term, and the other acquires, by appointment, that which is surrendered."

[4] 4. With respect to the Public Utilities Commission and the court of industrial relations, the Legislature made provision for a succession in office of the incumbents each year. The Utilities Commission is a body of experts. *Railroad v. Utilities Commission*, 95 Kan. 604, 148 Pac. 687. The succession of its members is so provided that it will be a continuing body—that a majority of its members may at all times be men of experience. It requires that three persons shall be appointed and designated to serve, respectively, one for one year, one for a term of two years, and one for a term of three years; that on the expiration of the terms of the three first appointed, one successor shall be appointed and hold his office for a term of three years, and, until his successor shall have been appointed and qualified, and in case of a vacancy in office, the Governor shall appoint to fill the vacancy for the unexpired term.

[7] It is necessary to give force, if possible, to all provisions of the statute. The requirement "that, on the expiration of the terms of the three first appointed, one successor shall be appointed and hold his office for a term of three years," means that the Governor, on the expiration of the term, shall at

once appoint, in order that there be no vacancy in the office. Logical reasoning cannot interpret the language to mean that no appointment was to be made until the next convening of the Senate.

"It is a uniform rule of construction that one part of a statute should be construed by other parts of the same statute, so that, if possible, no clause or part thereof shall be treated as superfluous, and * * * especially * * * when the two are parts of the same section." *State v. Mitchell*, 50 Kan. 289, 33 Pac. 104, 20 L. R. A. 306; *McCreedy v. City of Fort Scott* (Kan. Sup. No. 24905) 218 Pac. 287.

The statute also provides that—

"In case of a vacancy in the office of any commissioner, the Governor shall appoint his successor to fill the vacancy for the unexpired term."

There is substantial authority to the effect that a vacancy may exist for the entire term. It is not necessary to here discuss or pass upon that phase of the question. The Legislature undoubtedly had in mind that efficient public service could best be secured by placing these incumbents beyond the whim and caprice of the appointing power.

The power vested in the Governor to appoint may be exercised only when certain conditions exist: (1) By the expiration of a term; or (2) a vacancy which might be created by death, resignation, or by lawful removal from office. When a term expires the Governor has authority to appoint for a term of three years. Whenever the expiration of a term occurred it became the duty of the Governor to appoint for such term. He could not postpone his act. He could not refuse to perform his duty under the plain intent of the law. *State ex rel. Richardson v. Henderson*, 4 Wyo. 535, 35 Pac. 517, 22 L. R. A. 751. Consequently, the appointment made by him at that time was made pursuant to the authority given him under the statute.

In *State ex rel. Sikes v. Williams*, 222 Mo. 263, 121 S. W. 64, 17 Ann. Cas. 1006, it was said:

"A statute creating an office to be filled by appointment made by the Governor, with the advice and consent of the Senate, which provides for the first appointment at a time when the Senate is not in session, contemplates that, on the expiration of the term of an incumbent, the Governor may make an appointment, and that the Senate will act thereon when the General Assembly meets in session, and the appointee holds the office until the Senate passes adversely on the appointment. * * * The General Assembly provided for the first appointment to be made at a time when the Senate would not be in session. It must have known that the Senate would not be continuously in session, and would not likely be in session at the time, when further appointments were made. The law contemplates that such appointments shall be made at the proper time,

and that the Senate will act upon the appointment at the next session thereafter. The law does not contemplate that there can be no occupant of the office until both the Governor and Senate have acted. Were that true, in case of the death of an occupant at a time when the Senate was not in session, the business of the office would have to cease until the Senate met. Such was never in the minds of the members of the General Assembly. The very fact that the law itself provided for the first appointment to be made at a time when it was not contemplated that the General Assembly would be in session is strongly indicative of the legislative intent. We are unwilling to give the statute now under consideration an interpretation which would manifestly conflict with the clear intention of the lawmaking power and absolutely deprive the Governor of the power to discharge the administrative duties incumbent upon him by reason of such enactment. Laws must be given a reasonable construction, keeping in view the purposes of, as well as the circumstances surrounding, their enactment. Giving to this law such a construction, it must be held that the legislative intent was to authorize the Governor to make appointments to this office at such times as vacancies occurred therein, and that the consent of the Senate would be given or refused at the next succeeding meeting of that body. In the meantime, such appointee, after having otherwise qualified under the act, is entitled to the office until such time as the Senate may pass adversely upon his appointment. Should the Senate refuse to confirm the Governor would then have to appoint another."

[5] 5. The question is propounded, whether or not plaintiffs have shown any legal right to the offices in controversy. Their names were transmitted by Gov. Davis to the Senate for the respective offices. Two contingencies must exist in order for them to succeed: First, there must have existed vacancies in the respective offices; second, they must have received valid appointments. An office may not be filled by a new incumbent until it is vacant. An office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the power and perform the duties which pertain to it. It is vacant when it has no incumbent authorized to perform its functions. *State v. Rhame*, 92 S. C. 455, 75 S. E. 881, Ann. Cas. 1014B. 519; *State v. Harrison*, 113 Ind. 434, 18 N. E. 384, 3 Am. St. Rep. 663; *In re Opinion of Justice*, 67 Fla. 423, 65 South. 4; *State v. Finnerud*, 7 S. D. 237, 64 N. W. 121.

The sending of the names of the plaintiffs to the Senate by Gov. Davis did not operate to create vacancies. The appointing power had already exhausted its prerogatives. The offices in question were filled by incumbents when Gov. Davis transmitted the names of plaintiffs to the Senate. The power of removal from office is not incident to the power of appointment where the term of office is fixed by statute. The power of the Gover-

nor to make a valid appointment does not arise until there is a vacancy in fact. The existing title of an incumbent cannot be extinguished or affected by the erroneous judgment of the executive that the office is vacant.

In *State v. Harrison*, 113 Ind. 439, 18 N. E. 388, 3 Am. St. Rep. 663, the court said:

"The word 'vacancy,' as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the power and perform the duties which pertain to it; and, * * * it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event."

In *State ex rel. Richardson v. Henderson*, 4 Wyo. 548, 35 Pac. 520, 22 L. R. A. 751, the court said:

"There would be no sense in the position that a vacancy could be created by an attempt to fill a vacancy, nor in the view that one appointee to fill a vacancy could be succeeded by another to fill the same vacancy, where the provisional appointment is made from the same source. The vacancy is already filled by the Governor's appointment, and there is no reason why the appointee should be displaced by one appointed by a succeeding Governor. Such a succession in office is not contemplated by the Constitution or by the statute."

See, also, *Borton v. Buck*, 8 Kan. 313; *State v. Board of Education*, 108 Kan. 863, 189 Pac. 915; *People v. Cazneau*, 20 Cal. 503; *People v. Mizner*, 7 Cal. 519; *People v. Addison*, 10 Cal. 1; *Territory v. Ashenfelter*, 4 N. M. 85, 12 Pac. 879; *Territory v. Mann*, 16 N. M. 211, 114 Pac. 362; *Speed v. Common Council of Detroit*, 97 Mich. 198, 58 N. W. 570; *State ex rel. Richardson v. Henderson*, 4 Wyo. 535, 35 Pac. 517, 22 L. R. A. 751; *Sewell v. Bennett*, 187 Ky. 628, 220 S. W. 517.

In *People v. Mizner*, 7 Cal. 519, it was said:

"Where the appointment to an office is vested in the Governor, with the advice and consent of the Senate, and the term of the incumbent expires during a recess of the Legislature, and the Governor appoints a successor to the office, held, that there has been no vacancy in office, and that this appointment vested in the appointee a right to hold for his full term, subject only to be defeated by the nonconcurrence of the Senate. * * * The power of the Governor being exercised he had no further control over the office until the appointee had been rejected by the Senate. Where the term of an office is fixed by the Constitution or the statute the power of removal does not exist in the executive."

[6] 6. What has been stated in reference to the Public Utilities Commission applies with like effect to the court of industrial relations. When a term had expired in 1923 it became the duty of the Governor, under the Con-

stitution and laws to appoint a judge of the court of industrial relations and a member of the Public Utilities Commission. When he had appointed and commissioned Crawford and Greenleaf to their respective offices, and they had become invested with the powers and prerogatives thereof, the Governor had exercised the constitutional power of appointment. No further right to exercise the executive function of appointment thereunder exists until there is again the happening of a contingency specified by law.

In *Marbury v. Madison*, supra, it was said:

"Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person possessing the power has been performed. This last act is the signature of the commission."

7. The power of the Governor having been exercised, he had no further control over the respective offices unless and until the appointees had been rejected by the Senate. If Gov. Davis had advised the Senate of the facts existing in the respective cases—that Mr. Duff had been appointed state oil inspector to succeed Mr. Motter, resigned, and that Messrs. Greenleaf and Crawford had, since the last session of the Senate, been appointed to their respective offices; that he desired the Senate to reject them—and if the Senate had rejected the appointments of the defendants, their offices would thereupon have become vacant, and it would have been within the power of the Governor to appoint persons to fill the respective offices. This, however, did not occur. The Governor proceeded upon the erroneous theory that, inasmuch as the defendants had not already been confirmed by the Senate, it was within his power to revoke their appointments and summarily remove them from office. The Senate, on January 16, 1923, entered upon the consideration of the names of defendants as appointees to their respective offices. This procedure was usual and customary. The only element lacking in the consideration of such recess appointments was the fact that the Governor, in this instance, failed to transmit to the Senate the names of the defendants as having been appointed. The Senate, after due consideration, confirmed the appointments of the defendants, which was, in effect, a rejection of the appointees of Gov. Davis, the plaintiffs herein. The plaintiffs deny any force or validity to the action of the Senate in considering and confirming the appointments of defendants because of the failure of the executive to directly transmit the names of defendants. No good reason is advanced why the Senate would not consider such recess appointments without such direct word from the executive. Judicial notice or knowledge is the cognizance of certain

facts which judges and jurors may properly take and act upon without proof because they already know them. Judicial notice means that the court will bring to its aid and consider, without proof of the facts, its own knowledge of those matters of public concern which are known to all well-informed persons. Legislative notice is far broader than judicial notice. 23 C. J. 58. The legislative department is equipped to deal with any condition, general or special, however manifested or brought to the knowledge of the law-making power. The mass of individual legislation found among the statutes of all the states demonstrates this legislative attribute. *People v. Goldberger* (Sp. Sess.) 163 N. Y. Supp. 663.

The offices in controversy are all located in the capitol building, in which the Senate holds its deliberations. They are important departments of the state government. The Senate may, and often does, have official business with them. It receives reports from them. It considers the service which the departments are, by law, required to perform. It considers the extent of such service and its requirements. It considers and passes appropriations in order that they may lawfully and properly function. Under all the circumstances, the senate cannot shut its eyes to the facts as to whether the respective offices are filled; whether they are functioning under the law, or whether there is a vacancy therein. The Governor's communication sending the appointment to the Senate raises the question: What is the status of the office to which the appointment refers? That question the Senate is obliged to determine for itself, and to make its own investigation in order to discharge its duty. If the investigation reveals the fact that the Governor has already made an appointment of an officer who has qualified, is in possession, is discharging the duties, and is receiving the emoluments of the office, the Senate must determine the course it will pursue in the light of that fact. The Senate, which has official knowledge of all of the acts of another state department, may not close its eyes to an existing fact merely because the executive has failed to transmit a communication giving it the advice. The fact that the Senate is called upon to consent to or confirm appointments presupposes an investigation upon which to base its judgment as to whether or not it should confirm or reject the named appointee. It is a matter of common knowledge that the Senate of Kansas, likewise the Senate of the United States, may, and frequently does, investigate the character, fitness, and ability of the appointee submitted for its consideration. The Senate must be permitted to investigate on its own initiative, and without communication from the Governor, the status of offices; otherwise the Governor could fill and refill them at his pleasure by simply failing to advise

the Senate. No other branch of the government exercises the power of investigation to the same degree as does the legislative branch. The investigation by the Senate brought before it the records of the secretary of state showing the appointments of the defendants. We conclude that the Senate did not go beyond its powers in making the investigation concerning the offices held by the defendants, and, having satisfied itself, that it could properly exercise its judgment thereon. While it is the usual and customary courtesy of the executive to transmit such facts to the Senate, we believe it the better view to hold that the Senate may, on its own initiative, if it so desires, ascertain the facts upon which to base its deliberate and final judgment in confirming or rejecting appointees of the Governor.

[8] 8. We conclude that the defendants were legally appointed to their respective offices at a time when the appointing power had authority to act, and their appointments have been confirmed by the Senate; that no vacancy existed in the respective offices at the time of the attempted appointment of the plaintiffs by Gov. Davis; that it was not within the power of Gov. Davis to create vacancies by revoking or canceling the commissions or appointments of the defendants; that the defendants do not hold such offices at the will of the Governor; that they could not be removed except for cause and by proper proceedings; that the executive power of the Governor is a continuing power, not broken by succession; that, when the appointee to an office, the tenure of which is declared by law, is commissioned and vested with the power and prerogatives of the office, neither the Governor nor his successor can revoke the appointment; that the appointee holds the office for the remainder of the term unless rejected by the Senate, dies, resigns, or is removed for cause by proper proceedings; that there is no provision in our Constitution or laws requiring a nomination of the defendants by the Governor to the Senate before appointment; that the Senate was not required to wait for advice from the Governor before considering such recess appointments, but was entirely within its power in making investigation and basing its judgment of confirmation on the facts ascertained.

Judgment will be awarded in favor of the defendants.

JOHNSTON, C. J., and BURCH, MASON, and MARSHALL, JJ., concurring.

DAWSON, J. (concurring in part and dissenting in part). I concur in the result in case No. 24930, but dissent from the judgments in cases No. 24950 and No. 24955, and from those parts of the opinion which necessarily lead thereto.

HARVEY, J. (concurring in the result in No. 24950 and dissenting in Nos. 24950 and 24955). In the matter of executive appointments requiring the confirmation of the Senate there is no reason for making a distinction between the so-called federal rule and the rule applicable in this state, for the simple reason that no practical difference exists, except in one material respect, which will be later noted. The pertinent portion of the federal Constitution reads:

Article 2, § 2. "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. . . . The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

It is conceded by defendants in their brief that, under this constitutional provision, "where the executive power nominates and by and with the advice and consent of the Senate appoints, the appointment is a conjunctive act, and must be made by the two co-ordinate powers acting together upon a nomination previously submitted by the President." Under this provision it has been the practice for the President to send nominations to the Senate for their action, and, if approved, for him then to issue the commissions. Under that practice the President may withdraw any nomination submitted to the Senate before it is acted upon and submit another name, or, where an appointment has been made by him in the recess of the Senate, he may nominate another person to the Senate for appointment.

The portion of our Constitution pertaining to appointments by the Governor by and with the advice and consent of the Senate, and the only provision of our Constitution mentioning this class of appointments, reads as follows:

Article 7, § 1: "Institutions for the benefit of the insane, blind, and deaf and dumb, and such other benevolent institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be prescribed by law. Trustees of such benevolent institutions as may be hereafter created, shall be appointed by the Governor, by and with the advice and consent of the Senate; and upon all nominations made by the Governor, the question shall be taken in years and days, and entered upon the journal."

Section 2: "A penitentiary shall be established, the directors of which shall be appointed or elected, as prescribed by law."

Section 3: "The Governor shall fill any vacancy that may occur in the offices aforesaid, until the next session of the Legislature, and until a successor to his appointee shall be confirmed and qualified."

Under these provisions it has been the practice in this state for the Governor to make nominations to the Senate, and ask that they be confirmed, and then to issue certificates of appointment. Under this practice the Governors have, from time to time, withdrawn from the consideration of the Senate nominations made by them and not acted upon, and where appointments have been made during the recess of the Senate the Governor has sent the names of persons to fill those positions, and at times has sent the names of persons other than the ones previously appointed.

It is suggested in the opinion that sections 1, 2, and 3 of article 7 of our Constitution apply only to trustees of state institutions; but the practice has been the same between the Governor and the Senate in this state with all officers provided for by legislative enactments whose appointments were to be made by the Governor with the advice and consent of the Senate, or where the appointments were to be confirmed by the Senate. So at the beginning of our government we adopted, with reference to trustees of state institutions, at least, what was the federal rule with regard to this class of appointments, and as a matter of practice have continued it since that time. Certainly it cannot be said that, when the Legislature provides that the trustees, regents, directors, or by whatever name called, of the state institutions shall be appointed by the Governor with the advice and consent of the Senate, following our constitutional requirement as to such officers, and in harmony with the federal Constitution and practice, the Legislature meant a different rule should apply for officers other than trustees of state institutions when it provided that their appointment should be made by the Governor with the advice and consent of the Senate. No such difference has existed between the Governor and the Senate in this state.

An examination of the Senate Journals shows how this matter has been regarded between the Governor and the Senate. The Legislature of 1863, by chapter 43, provided for a board of directors of the state penitentiary to be appointed by the Governor with the advice and consent of the Senate. Gov. Carney sent the following communication to the Senate (S. J. 1863, p. —):

"I hereby nominate for confirmation the following named gentlemen to constitute the board of directors of the state penitentiary."

By chapter 105 of the Laws of 1864 the Legislature provided for a board of regents for the State University, to be appointed by the Governor by and with the advice and

consent of the Senate, and Gov. Carney sent the following communication to the Senate (S. J. 1864, p. —):

"I herewith submit for your consideration the following nominations for regents of the State University."

In 1867 Gov. Crawford sent the following communication to the Senate:

"I have the honor to transmit the following appointments and ask your confirmation of the same: Regents of the Kansas State University.
* * * Commissioners to codify the laws.
* * * Commissioners of Irrigation.
* * *"

The Senate Journal recites:

"On motion the foregoing nominations were confirmed."

In other communications to the Senate Gov. Crawford spoke of transmitting appointments and asking confirmations, and the action of the Senate referred to them as nominations. In 1869 Gov. Harvey sent a communication to the Senate (S. J. 1869, p. —) and called attention to the fact that the then statute relating to the penitentiary took effect March 17, 1868, and that the directors for the penitentiary had been confirmed on March 3, 14 days before the act took effect, and, in order to make the appointments legal—

"I therefore submit the following nominations to the Senate: * * * Before the session closes I purpose to submit to the Senate other appointments to fill existing vacancies and to consummate such changes as may be thought best."

The Senate Journal shows that the nominations made by the Governor were voted upon separately upon roll call, and all were confirmed except one. Two days later the Governor submitted a number of names to the Senate for various positions, stating:

"I submit to the Senate for their confirmation the following nominations: * * *"

The Senate Journal shows that some of the nominations were confirmed and some were not, the action being taken upon roll call. Gov. George T. Anthony used the following form (S. J. 1877, p. 774):

"I respectfully present to your consideration the following nominations: * * *"

Gov. St. John used the following form (S. J. 1879, p. 772, and S. J. 1881, pp. 661, 662):

"I have the honor to report the following appointments for your consideration and respectfully ask that they be confirmed."

Governor Gluck used the following form:

"I have the honor to make the following appointments for your consideration and respectfully ask that they be confirmed." S. J. 1883, pp. 72, 200, 381, 401, 572, 614, 865.

In each of these cases the Senate action spoke of them as nominations, and they were confirmed upon roll call.

Gov. Stanley used the following form (S. J. 1889, pp. 133, 150):

"I have this day appointed and herewith submit to your honorable body for confirmation. * * *"

And at pages 659, 902:

"I have this day nominated and transmit herewith for confirmation. * * *"

Gov. Stubbs (S. J. 1909, p. 519):

"I herewith submit the following nominations for appointment in the public service, subject to your approval and confirmation."

And the same form is used at pages 578, 647, 734, and 846, although at page 587 the word "appointments" is used instead of nominations. Gov. Hodges (S. J. 1913, p. 48):

"I hereby submit the following nominations for appointment for the public service, subject to your approval and confirmation: * * *"

And the same wording is used at pages 83, 664, 757, though at page 316 he used the word "appointments" instead of nominations.

Gov. Capper (S. J. 1915, p. 762) used the following form:

"I respectfully submit the following nominations for public service, subject to your approval and confirmation."

The same form was used by Gov. Allen. The communications also indicate that the Governor withdrew names submitted to the Senate before their action thereon at any time he desired. The records do not indicate any distinction in the communication of the various Governors to the Senate between trustees of the state institutions and other officers whose appointments are required to be confirmed by the Senate. Frequently the names of nominees for trustees of state institutions and of nominees for other offices were contained in the same communication and acted upon by the Senate in the same way. In many instances the records show that the nominations were acted upon on roll call, and the yeas and nays entered in the Journal, though in some instances they were acted upon in executive session, and in a few cases they were acted upon in open Senate, without roll call, the confirmation being unanimous.

From the above it seems clear to me that, so far as the steps to be taken for the appointment of officers to be appointed by the executive, by and with the advice and consent of the Senate, there is no difference between the federal rule and the rule in this state. After the various governors and senators of our state have for 60 years followed the practice of the federal government with reference to the appointment of those officers, to be appointed by the executive by and

with the advice and consent of the Senate, it seems to me we are rather late in discovering that a vital difference exists, especially when we consider that the action of our Governors and Senators has been in harmony with article 7 of our Constitution.

As to the length of time a person appointed to fill a vacancy during the recess of the Senate may serve, there is a difference between the federal constitutional provision and the constitutional provision in this state. The federal Constitution provides:

The President "shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

Our Constitution provides (article 7, § 3):

"The Governor shall fill any vacancy that may occur in the offices aforesaid until the next session of the Legislature and until a successor to his appointee shall be confirmed and qualified."

This is the real distinction between the federal Constitution and ours. By the federal Constitution, when the appointments are made in the recess of the senate to fill vacancies, the terms of the appointees expire at the end of the next session of the Senate; under our constitutional provision such appointee holds office until the next session of the Legislature, and until a successor shall be confirmed and qualified.

Applying our constitutional provision to the case of Barrett v. Duff, now before us: There was a vacancy in the office of oil inspector caused by the resignation of Mr. Motter. The questions arising are: How and by what authority was the vacancy filled, and what is the term of the appointee? The statute authorizing the appointment of oil inspector (Gen. Stat. 1915, § 5011) takes no cognizance of vacancies in that office, and makes no provision for filling a vacancy should one occur. Hence it is of no aid to us in deciding the question presented. The majority opinion purports to find authority to fill this vacancy in article 1, § 3, of our Constitution, which provides:

"The supreme executive power of the state shall be vested in the Governor, who shall see that the laws are faithfully executed."

But the authorities uniformly hold that such constitutional provision does not confer upon the Governor the power to appoint officers, either for full terms or to fill vacancies. The only power the Governor has to make official appointments is that conferred upon him by specific constitutional or statutory provisions, and that has been repeatedly recognized both in our Constitution and in our statutes. The only constitutional or statutory provision we have which authorizes the Governor to appoint some one to fill a vacancy in the office of state oil inspector is section 3 of article 7 of our Constitution, which provides:

"The Governor shall fill any vacancy that may occur in the offices aforesaid, until the next session of the Legislature, and until a successor to his appointee shall be confirmed and qualified."

The point may be made that the office of state oil inspector is not one of the "offices aforesaid" named in this section; but a careful analysis of the matter will show that it properly falls in that class. Under this section Mr. Duff, having been appointed to fill the vacancy, holds until his successor has been confirmed and qualified. Mr. Barrett, never having been confirmed, is not entitled to the office. Hence in this case I concur in the judgment for the defendant.

The cases of *Goodrich v. Crawford* and *Rice v. Greenleaf* differ from the case just discussed in that theirs were full-term appointments. The statutes pertaining to appointments in these offices are similarly worded, and clearly distinguish between full terms and vacancies. Section 1, c. 20, Laws 1920, and section 1, c. 260, Laws 1921. What has been heretofore said concerning the distinction between the federal rule and the law of this state concerning appointments to be made by the Governor with the advice and consent of the Senate applies to these cases. As we have seen, there is, in fact, no difference. Where the statute provides that an appointment shall be made by the Governor by and with the advice and consent of the Senate, and the time the appointment should be made occurs in a recess of the Senate, the authorities upon the status of an appointee naturally divide themselves into three groups as follows: The first group holds that the new appointee does not take the office until the Senate meets, and he is confirmed, and in the meantime the old officer holds over his term. These cases are based upon the doctrine that, since the statute requires the concurrent action of the executive and the Senate (or other confirmatory body), there is no appointment until such concurrent action is had. This rule could not apply, of course, to a newly created office when the first appointment is required by statute to be made when the Senate would not be in session. Neither is it easily applied to a statute fixing definite lengths of successive terms of office which, by the statute, expire at a time when the Senate is not in session. The second group of authorities hold that the Governor should make the appointment at the beginning of the term, even though the Senate be not then in session; but the appointment is only tentative, an ad interim appointment, and is not fully completed until confirmed by the Senate. In such a situation the officer appointed takes the office at the beginning of the term. These cases are based upon the doctrine that, the time having arrived for the appointment to be made, whether because a new office has been created or because of the expiration

of the term of the old officer, it is the duty of the executive to make the appointment, but, since the statute requires confirmation of the Senate, the appointee's right to hold the office for the full term never becomes complete until the appointment is confirmed. Under the authorities noted in both the first and second group above mentioned the executive may, at any time before confirmation by the Senate, substitute another name for the person first named, or the Senate may even, after confirmation, and before a certificate has been issued by the executive, withdraw its confirmation. In other words, these authorities require concurrent action of the executive and the Senate (or other confirmatory body) before the appointment becomes complete, and until such appointment does become complete either the executive or the confirmatory body may withdraw its consent to such appointment. This is in accordance with the practice between the various Governors and Senates of this state, as is definitely shown by an examination of the Senate Journals. The third group of authorities holds that the Governor should make the appointment at the beginning of the term; that in so doing the Governor exhausts his power and authority in the matter; that the appointee takes possession of the office and continues to hold the office for the full term unless the Senate affirmatively rejects his appointment. The authorities of this group are not numerous, and several of them are cited in the majority opinion. Whatever may be their virtue in the states where announced, they are not applicable in this state, because not in conformity to the practice between the executive and the Senate since our state was organized, and for the further reason that under our Constitution (article 7) confirmation is an affirmative action requiring a roll call, and that the yeas and nays be entered in the Journal. In our state you can no more prove a confirmation by the Senate by showing its lack of action than you could prove the passage of a bill by showing that it was never acted upon.

Defendants' rights to the offices were not strengthened by the procedure of the Senate in procuring information of the recess appointments from the Secretary of State and confirming them at a time when the Governor's nomination of the plaintiffs was before the Senate for action. No authority is cited in support of this procedure. To the able argument in support of it, it is sufficient to say: Where the statute requires an appointment to be made by the concurrent action of the executive and a confirmatory body, such concurrent action cannot be established by showing that one of them consented to something which the other did not want to do. Obviously such a procedure is fundamentally unsound.

In these cases the Governor sent to the Senate the names of the plaintiffs, as he had

a right to do under the authorities and under the practice that has existed in this state since its formation. The Senate did not act upon them. After the Legislature adjourned the Governor appointed and commissioned plaintiffs for the unexpired terms, and, in my judgment, they are clearly entitled to the offices.

STATE ex rel. GRIFFITH, Atty. Gen., v.
MATASSARIN et al. (No. 25111.)

(Supreme Court of Kansas. July 7, 1923.)

(Syllabus by the Court.)

1. Health $\S$ 3—Appointees on state board of health not acted on or rejected by Senate entitled to hold offices for full term.

Persons appointed by the Governor as members of the state board of health in pursuance of section 10119 of the General Statutes of 1915 were submitted to the Senate for its action, but that body failed to act thereon, and has not since that time rejected the appointments. After the adjournment of the Legislature the Governor issued commissions to the appointees for terms of three years, which have not yet expired. While these officers were serving under the appointments made, the newly elected Governor notified these members that, the Senate not having confirmed their appointments, he had revoked them. *Held*, that the appointments of the members, although not acted on by the Senate, and which have never been rejected by that body, entitles them to hold their offices to the end of their terms, or until the appointments are considered and rejected by the Senate.

2. States $\S$ 46—Mere recital in commission of appointee of Governor that appointment confirmed does not establish such fact.

Whether or not the Senate confirms or rejects appointments should appear in the journals of that body, and, even if evidence other than that shown in the journals as to the action of the Senate on appointments may be received, it is *held* that a mere recital in the commission issued to the appointee by the Governor that the appointment had been confirmed does not establish the fact.

3. Health $\S$ 3—Governor without power to revoke appointments to state board of health during recess because not acted on by Senate.

In making appointments of members of the state board of health it is the duty of the Governor to transmit such appointments to the Senate for its action thereon, and, if such appointments are made during a recess of the Legislature it is his duty to transmit such appointments to the Senate at the first session after the appointments are made; and, where the Governor reappoints and commissions members of the board for full terms during a recess of the Senate, and such appointments are not transmitted to or acted upon by the Senate at the ensuing session, the offices do not become vacant by such inaction, and the Governor is without power to revoke their appointments by reason thereof.

4. Officers $\S$ 55(1)—Failure of appointee to file and take oath of office held not to create vacancy.

In the absence of a statutory provision that the failure of an appointee to take and file his oath of office shall operate to create a vacancy, such failure by one who is appointed and has entered upon the discharge of his duties, where no action is brought by the state to declare a forfeiture of the office for such omission, will not of itself operate to create a vacancy in the office.

5. Health $\S$ 3—Action of legal member of state board of health in attending and participating in illegal meeting of board held not resignation affecting title to office.

The action of a legal member of the board in qualifying under an appointment, attending and participating in an illegally constituted meeting of the board, where there was less than a quorum of those who assumed to act at such meeting, cannot be regarded as a resignation of his office, or as affecting the title to the office with which he had been vested under a previous legal appointment.

6. Health $\S$ 6—Election of successor of secretary of state board of health resigned held valid.

Under the evidence in the case it is *held* that a meeting of the board duly held on June 5, 1923, and attended by a majority of legal members of the board, was a legally constituted meeting, and its acceptance of the resignation of the secretary and executive officer of the board, and the election of his successor, vested the latter with a good title to his office.

Original proceeding in quo warranto by the State on the relation of Chas. B. Griffith, Attorney General, against Leon Matassarini and others in which one Nyberg intervened, claiming office. Judgment for plaintiff and intervener.

C. B. Griffith, Atty. Gen., and Dennis Madden and Stone, McDermott, Webb & Johnson, all of Topeka, for plaintiff.

Ed. D. McKeever and Frank Doster, both of Topeka, and W. H. Carpenter, of Marion, for defendants.

JOHNSTON, C. J. This is an original proceeding in quo warranto brought in the name of the state, on the relation of the Attorney General, to determine the membership of the State Board of Health, and also as to who is entitled to the office of secretary of that board. The plaintiff alleged that the State Board of Health is composed of the following named persons who were legally appointed, were duly qualified, and are acting members of the board, namely:

Dr. J. E. Hawley,	Dr. H. L. Aldrich,
Dr. J. J. Entz,	Dr. O. D. Walker,
Dr. C. H. Lerrigo,	Dr. C. A. Fisher,
Dr. J. T. Axtell,	Dr. D. E. Smith,
Dr. F. W. Landrum,	Harry K. Allen.

such construction is entitled to much consideration, and, if not controlling, sufficient at least to justify its acceptance where its correctness is not questioned.

4. States $\Leftrightarrow$ 51—Term of state engineer appointed to fill vacancy until new appointment confirmed.

Where state engineer resigned and Governor appointed relator for the remainder of the term, relator was entitled to hold until the appointment and qualification of a successor for the new term unless lawfully removed, or until a vacancy occurred through some other event than the mere expiration of the term for which he had been appointed, and an appointment for the new term to terminate his right to occupancy would require confirmation by the Senate, under Const. art. 3, § 5, article 4, § 7, and article 6, subtit. "Elections," § 4.

5. Quo warranto $\Leftrightarrow$ 51—Allegation as to appointment of state engineer to joint commission not improper in reply.

In quo warranto to determine the right and title to the office of state engineer, where it was claimed that relator's reappointment was invalid, allegations in reply that it was understood that relator should continue as engineer and be appointed the Wyoming member of the Colorado River Commission, though having no force as establishing relator's right to the office under his reappointment, held not improper as an explanation of the reason for a delayed reappointment at the expiration of his term.

6. States $\Leftrightarrow$ 46—Governor's neglect to send name of appointee to Senate did not deprive him of power thereafter to appoint.

Governor's neglect to send the name of appointee as state engineer to the Senate during a session immediately prior to the termination of his then term of office did not deprive the Governor of the power thereafter to appoint for a full or new term with the confirming action of the Senate under Const. art. 4, § 7, article 3, § 5, and article 6, subtit. "Elections," § 4.

7. States $\Leftrightarrow$ 46—When confirmation by Senate not required, its action of no effect.

When confirmation of appointment of state officer by Senate is not required, its action in the matter is of no effect.

8. States $\Leftrightarrow$ 46—Appointment of state engineer by Governor and confirmation by Senate need not be concurrent in point of time.

Under Const. art. 3, § 5, providing that state engineer "shall be appointed by the Governor and confirmed by the Senate," the appointment and the confirmation need not be concurrent in point of time, and an appointment may be made during a Senate recess and be confirmed at its next session.

9. States $\Leftrightarrow$ 46—Appointment of state engineer could be confirmed by Senate after expiration of Governor's term and without executive request.

Appointment of state engineer under Const. art. 3, § 5, during Senate recess, could be con-

firmed at the next session of the Senate, although the term of office of the Governor making the appointment had then expired, and neither the new nor the old Governor requested confirmation, and the Senate was without executive communication concerning the appointment.

10. Constitutional law $\Leftrightarrow$ 50—Senate confirming executive appointments performs administrative function.

The Senate of a state in the exercise of its power to consent to or confirm executive appointments to office performs an executive or administrative, rather than a legislative, function.

11. Officers $\Leftrightarrow$ 6—Official appointment not personal.

The matter of an official appointment is not personal and the right to make it does not attach to the person but to the official upon whom that right is conferred.

12. States $\Leftrightarrow$ 52—State engineer removable by Governor.

State engineer is not removable by impeachment, under Const. art. 3, §§ 18 and 19, and may be removed by the Governor under Comp. St. 1920, § 318, constitutional provisions as to impeachment including only the principal elective state officers mentioned in article 4, § 11, and not officers appointed by the Governor.

13. States $\Leftrightarrow$ 52—Removal only for misconduct or malfeasance.

Comp. St. 1920, § 318, in so far as it may authorize a removal of state officer for other than misconduct or malfeasance in office, stated in Const. art. 3, § 19, as grounds for removal, is void as affecting office of state engineer, created by Const. art. 3, § 5.

14. States $\Leftrightarrow$ 52—Reasons for removal of state engineer must constitute misconduct or malfeasance in office.

Reasons assigned by Governor for removal of state engineer under Comp. St. 1920, § 318, must be such as to constitute misconduct or malfeasance in office.

15. Quo warranto $\Leftrightarrow$ 57—Courts may inquire into existence of facts warranting removal of state engineer.

In quo warranto to determine title to office by one removed by Governor under Comp. St. 1920, § 318, the court may inquire into the existence of the jurisdictional facts, among which are whether the charges upon which the removing power acted were legal cause for removal, or whether the cause was sufficiently specified.

16. States $\Leftrightarrow$ 52—Conduct of state engineer held not "misconduct or malfeasance" in office warranting removal.

That the state engineer caused or allowed his commission as state engineer, issued to him in 1921, by the Governor's predecessor to be presented to the Senate for confirmation without consulting the Governor, and without the latter's knowledge, was not misconduct or

malfeasance in office warranting removal, under Comp. St. 1920, § 313.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Misconduct.]

17. States ~~52~~ — "Misconduct or malfeasance" warranting removal of officer defined.

Misconduct or malfeasance in office, warranting the removal of a state officer under Comp. St. 1920, § 313, means official misconduct or misfeasance, rather than personal misbehavior alone not in any way affecting the incumbent's fitness or capacity to perform the duties of the office, as the power of removal cannot be exercised whimsically or arbitrarily.

Proceedings by the People of the State of Wyoming, on the relation of Frank C. Emerson, against Casper D. Shawver, to determine the right and title to the office of State Engineer. Respondent's answer held insufficient, and demurrer to reply overruled.

W. L. Walls and W. E. Mullen, both of Cheyenne, for relator.

C. L. Rigdon, of Cheyenne, for respondent.

D. J. Howell, Atty. Gen., and N. D. Corbitt, of Laramie, amici curiae.

POTTER, C. J. This is a proceeding in the nature of quo warranto, brought in this court to determine the right and title to the office of state engineer; thereby invoking the original jurisdiction of the court in quo warranto as to all state officers granted by the Constitution. Article 5, § 3. The case has been heard upon a demurrer to the reply which, when first presented, we held would search the entire record as to matters of substance and require a consideration of the sufficiency of the answer, as well as the petition, no previous objection having been made to either of those pleadings. And for that reason we declined to consider alone a question as to the legal effect of certain facts alleged for the first time in the reply. In announcing that conclusion the following authorities were cited: 6 Ency. Pl. & Pr. 320 et seq.; 31 Cyc. 338 et seq.; Bliss on Code Pleading (2d Ed.) § 417a; Phillips on Code Pleading, § 35; 1 Kinkade's Code Pleading, p. 98, § 94; Id. p. 112, § 116; 21 R. C. L. pp. 530, 531, § 02; Headington v. Neff, 7 Ohio, 229, pt. 1; Hillier v. Stewart, 26 Ohio St. 652; State v. L. & N. R. Co., 51 Fla. 311, 40 South. 885; Finch v. Galigher, 131 Ill. 625, 54 N. E. 611; Carlson v. People ex rel., 116 Ill. App. 502. The case was then argued and submitted upon that theory, and is, therefore, before us upon the facts alleged in pleadings.

The pleadings do not present any substantial dispute as to the facts: for, while there are denials in the answer and reply, they relate to the legal effect of facts either admitted or not specifically denied. The pe-

tition alleges in substance: That the relator was appointed state engineer by Governor Robert D. Carey on July 1, 1919, to fill a vacancy caused by the resignation of James B. True; that he qualified and entered upon and discharged the duties of said office until, on April 4, 1921, while holding under said appointment, Governor Carey again appointed him for a term of six years from and after April 1, 1921, and on that date commissioned him for that term; that thereupon he again qualified as required by law, and at the next succeeding legislative session in 1923 the Senate confirmed said appointment, and that relator after said appointment, prior to and after its confirmation, continued in possession and exercised the duties of said office; but that on March 15, 1923, the respondent, Casper D. Shawver, accompanied by the sheriff of Laramie county, appeared at the engineer's office in the Capitol Building, and demanded that relator surrender possession of the office to him, which he claimed under an appointment, void "as relator is advised and believes," made by Governor Ross without the advice and consent of the Senate and when the Senate was not in session; that the said sheriff declared that if relator did not surrender the office he (the sheriff), pursuant to oral instructions from the Governor, would physically remove relator therefrom, and, upon relator's refusal the said sheriff, "acting in the aid and assistance of respondent," seized and forcibly removed relator from the office; whereupon the respondent assumed possession and control of said office to the exclusion of relator, and has since usurped and occupied said office to the exclusion of relator, and pretends to act in the capacity of state engineer, claiming the emoluments of the same.

The answer admits relator's appointment on July 1, 1919, and his qualification and performance of the duties thereunder, but denies that he was lawfully appointed on April 4, 1921; denies that it was lawfully confirmed, and alleges that if relator held said office at any time he held it solely by the appointment of July 1, 1919. The answer admits that on or about April 15, 1923, the respondent took possession of the office and excluded relator therefrom, and has since said date remained in possession and control thereof to the exclusion of relator, but denies that he has usurped or intruded into or occupied the office unlawfully. It is further alleged in the answer that on March 13, 1923, Governor Ross, by written communication addressed to relator and also filed in the office of the secretary of state, subject to inspection by any person interested, removed relator from said office, and thereupon appointed the respondent and issued a commission to him, purporting to appoint him to said office for the term of six

years from March 15, 1923, and that respondent duly qualified thereunder.

The reply denies that relator has been lawfully removed or that the Governor had lawful authority to remove him. It denies that the Governor had any power or authority to appoint respondent on March 15, 1923, or at all, or to issue a commission to him, but alleges that said appointment and commission were beyond the Governor's power and conferred no authority upon respondent to take possession of the office or to exclude relator therefrom, and that said exclusion amounted to an unlawful and unwarranted occupation of it by the respondent. The reply further alleges the appointment of relator, and certain conditions thereof, under a statute enacted in 1921 (Laws 1921, c. 120), as commissioner to represent this state on a joint commission to negotiate a compact between certain named western states, including Wyoming, and the United States, relative to the future utilization and distribution of the waters of the Colorado river and its tributaries. And that is the new matter sought to be eliminated by the demurrer to the reply. In substance the averments in that respect are that relator was appointed as such commissioner without compensation other than the salary allowed for the state engineer under a statute of 1921 increasing the same (Laws 1921, c. 95), in furtherance of the intention and policy of the Legislature and the Governor that relator as state engineer should perform the additional duties of commissioner; that his appointment as said commissioner, which office he still holds, was during the pleasure of the Governor; that he performed the duties of both offices, attending numerous sessions of the commission during 1921 and 1922, which resulted in an interstate agreement known as the "Colorado River Compact," ratified and approved by the Legislature and Governor of this state at the session of 1923 (Laws 1923, c. 3).

[1] We shall first consider, as a question of primary importance, the title of the relator to the office and his right to hold the same prior to and at the time of the alleged proceedings to remove him. That and the other questions in the case will be considered, having in view the principle that the legal right of the relator to the office must affirmatively appear, but without indulging in any presumption in favor of the respondent by reason of the fact of his possession of the office under an alleged appointment by the Governor. Having, as alleged, forcibly obtained possession, he is not entitled to the benefit of any such presumption on this hearing, whatever might otherwise be the rule in a case of this kind. A presumption based upon possession, if recognized at all in this case, should be applied in favor of relator, who for nearly four years was in undisturbed possession of the office until he was forcibly ejected from the official rooms in the manner al-

leged. *Ekern v. McGovern*, 154 Wis. 137, 142 N. W. 395, 46 L. R. A. (N. S.) 798.

The office of state engineer is provided for in the Constitution of the state in these words:

"There shall be a state engineer who shall be appointed by the Governor of the state and confirmed by the Senate: he shall hold his office for the term of six (6) years, or until his successor shall have been appointed and shall have qualified. He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position."

These provisions are found in section 5 of article 8 of the Constitution. That article is entitled "Irrigation and Water Rights," and it provides also for four water divisions to be defined by the Legislature, and for the supervision of the public waters of the state, their appropriation, distribution, and diversion, and of the various officers connected therewith, by a board of control, to be composed of said engineer and the superintendents of said water divisions.

The Constitution also provides:

"When any office from any cause becomes vacant, and no mode is provided by the Constitution or law for filling such vacancy, the Governor shall have the power to fill the same by appointment." Article 4, § 7.

And that applies to the office here in question, and controls the filling of vacancies therein. It is further provided in that instrument that, excepting members of the Legislature and members of a board, two or more of whom are elected at the same time, every person holding any civil office under the state or any municipality therein shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified. Article 6, subtit. "Elections," § 4 (sometimes referred to as section 18 of said article).

[2] The case has been submitted in much the same manner as though there had been an agreed statement of facts; the several facts known by all parties to have existed being assumed. Some facts, however, deemed by us to be more or less important, are not definitely alleged in either of the pleadings. For example, there is no averment stating the facts of the James B. True appointment, such as the date thereof, the term for which he was appointed, the date of its expiration, nor the term of any prior incumbent. Neither is it averred whether the Legislature was in session when Mr. True's term expired or at the time of relator's 1921 appointment or after that, prior to January, 1923. But the fact that Mr. True's term had expired has been assumed, and we know that to have

been the fact as determined by his appointment as well as that the Legislature was not in session at the time of said 1921 appointment, but had adjourned the 1921 session a day or two before the expiration of the stated term of Mr. True, and six weeks or more before the second appointment of relator. Whether either of such facts or others of the same nature may be vitally material or not, so far as they are pertinent they are matters of history of our state government, shown by legislative journals and other public records, of which we may take judicial notice. 23 C. J. 90-93, 120.

Of such facts we think proper to mention the following: Mr. True's name was sent to the Senate with a request for confirmation, on February 9, 1915, and his appointment confirmed on that date, for the full term of six years from February 20, 1915; that being the date of the expiration of the previous six-year term for which Clarence T. Johnston had been appointed and confirmed in 1909, and for the remainder of which term Adrian J. Parshall was appointed and confirmed at the legislative session of 1911, upon Mr. Johnston's resignation. And the procedure in the appointments of Parshall and True followed an established practice respecting this office, disclosing a uniform executive construction of the constitutional provisions relating to the term thereof and the filling of vacancies therein, apparently concurred in by one branch of the legislative department, the Senate, viz.: That it provides for a succession of fixed terms of six years each, so that a vacancy from any cause during a term will constitute a vacancy in the term as well as in the office, to be then filled for the unexpired part of such term, and a full term appointment after the first to be made only upon or in contemplation of the expiration of a previous full term.

[3] Thus upon the resignation of Mr. Mead, the first state engineer, during his second term of 6 years, the vacancy was filled by the appointment of Fred Bond on July 15, 1899, until the next session of the Legislature, and at that session (1901) he was again appointed, the Senate confirming the same, for Mr. Mead's unexpired term. When that term was about to expire in 1903, Mr. Bond was appointed and confirmed for a full term of 6 years, "ending February 21, 1909." Upon his death during 1903, Clarence T. Johnston was appointed, and at the next session of the Legislature (1905) was appointed and confirmed for Mr. Bond's unexpired term. When that term was about to expire, Mr. Johnston, having continued to occupy the office, was appointed and confirmed for a full term of 6 years from February 20, 1909, during which he resigned to be succeeded by Mr. Parshall, as above stated. The propriety of the said practice of the executive and one branch of the legislative department of our state government, or the construction of the

constitutional provisions indicated thereby, has not been questioned as to said office in this court and is not questioned in this case. And under the circumstances, if there might be any doubt about it, such continued practical construction during a period of more than 20 years would be entitled to much consideration, and, if not controlling, sufficient at least to justify its acceptance by the court for the purposes of a decision in this case, without inquiring whether it may fully accord with the general rule of judicial construction.

[4] The appointment of the relator in 1919 was for the period from July 1, 1919, to February 21, 1921, and was clearly intended to cover, as it did, the entire unexpired term aforesaid of his predecessor. It was then known, however, because of the constitutional limitation upon the length of each biennial session of the Legislature, that the date of the expiration of such term would follow very closely the adjournment date of the next session to convene in January, 1921, allowing a successor for the new term to be selected at that session by appointment and confirmation, as provided in the Constitution, and we may assume that to have been understood when the vacancy appointment was made. That was a completed appointment to fill a vacancy, requiring no action by the Senate. Under it the relator was entitled to hold until the appointment and qualification of a successor for the new term, as provided by law, unless lawfully removed, or until a vacancy through some event other than the mere expiration of the term for which he had been appointed. That is conceded by counsel for respondent, upon the authority of State ex rel. Richardson v. Henderson, 4 Wyo. 535, 35 Pac. 517, 22 L. R. A. 751, which settles the question for us in this case, and also the proposition that an appointment for a new term, to terminate the right of an incumbent to hold over, would require confirmation by the Senate.

That case involved the office of state examiner, which the Constitution directs shall be provided for by the Legislature, the incumbent to be appointed by the Governor and confirmed by the Senate. The office was promptly created by an act of the first state Legislature providing that the examiner shall be appointed by the Governor by and with the advice and consent of the Senate, for a term of four years, "and until his successor in office is appointed and shall have qualified," and that, in case of a vacancy in the office, the Governor shall fill the same by appointment until the next meeting of the Legislature. A vacancy having occurred by resignation during the four-year term of the first incumbent, who had been appointed soon after the approval of said act creating the office, the Governor, on December 20, 1902, appointed and commissioned Harry B. Henderson to fill the vacancy, "to hold the

office until the next meeting of the Legislature," which, under the Constitution, would and did convene on January 10, 1893. Said vacancy appointee duly qualified, and was continuing to discharge the duties of the office after the adjournment of said 1893 session of the Legislature, when an action was brought to determine the title thereto by one who had been appointed and to whom a commission had been issued, but without attestation by the secretary of state, after said adjournment "for the unexpired term of Harry B. Henderson, whose said office became vacant on the 10th day of January, 1893." The appointment of said relator Richardson had not been confirmed by the Senate. The court, in deciding that case, construed what was referred to in the decision as section 18, art. 6, of the Constitution, but more properly cited as section 4, subtit. "Elections," of said article, providing for the exercise of the duties of any civil office by the person holding the same until his successor has qualified, "unless removed according to law," and section 7 of article 4, authorizing the Governor to fill a vacancy in any office by appointment, when no other mode has been provided by the Constitution or law for filling the same, and also the statutory provisions for filling a vacancy in said office of examiner by appointment until the next meeting of the Legislature, and that the examiner shall hold his office for four years and until his successor in office is appointed and shall have qualified. The court held that the general provision aforesaid of article 6 applied to the one appointed to fill the vacancy in the office of examiner, and that the mere expiration of a term, or the period for which a vacancy appointment is made, does not constitute a vacancy permitting a provisional or temporary appointment by the Governor, and also that an appointment by the Governor without the advice and consent of the Senate would not deprive said vacancy appointee of his right to continue to exercise the duties of the office. The court said:

"Without some statutory regulation of the matter, a vacancy can only exist in an office when there is no lawful incumbent occupying it. An office cannot be said to be vacant while any person is authorized to act in it and does so act. . . . A careful reading of the numerous decisions of the American courts on the question is convincing that the doctrine is too well entrenched to be dislodged at this time, that where a constitutional or statutory provision exists permitting or commanding an incumbent of an office to continue in the discharge of his duties until his successor is qualified, it must be construed as controlling, and the expiration of the official term, cannot be deemed a vacancy, unless there is some legal successor appointed or elected by some competent authority to take the place of the incumbent. . . . This successor must be one appointed by warrant or authority of law, and not in the absence of it. There would be no sense in the position that a vacancy could

be created by an attempt to fill a vacancy, nor in the view that one appointed to fill a vacancy could be succeeded by another to fill the same vacancy, where the provisional appointment is made from the same source. The vacancy is already filled by the Governor's appointment, and there is no reason why the appointee should be displaced by one appointed by a succeeding Governor."

In the concluding part of the opinion, the court said:

"At that time [the next meeting of the Legislature] a new appointment was necessary and proper, as is conceded, but such appointment could then have been made only . . . by and with the advice of the Senate."

That case has been frequently cited with approval, and is referred to as containing a full review of the authorities supporting the text in 8 Ency. L. (2d Ed.) 1012, note 3. But there was a suggestion at the argument that the views expressed in the case as to what constitutes a vacancy may not accord with the modern trend of authority. We have found no evidence of that. On the contrary the later decisions and comments on the subject very plainly tend to strengthen the court's decision in that case. According to the rule of a few of the cases, where an office is regularly to be filled by executive appointment and confirmation, and a term has expired, an appointment may be made alone by the Governor, effective from its date until rejected or disapproved by the Senate or confirming body, notwithstanding a statutory or constitutional provision authorizing the incumbent of the previous term to hold over until the appointment and qualification of a successor. *State ex rel. v. Murphy*, 32 Fla. 138, 13 South. 705; *State v. Williams*, 222 Mo. 268, 121 S. W. 64, 17 Ann. Cas. 1006. It was held in *People v. Mizner*, 7 Cal. 519, that though a vacancy did not occur on the expiration of the term, during a recess of the Senate, the Governor might then appoint for the new term vesting the office in his appointee subject to be defeated by the nonconcurrence of the Senate. The cited Florida case was referred to in the opinion in the Henderson Case and was distinguished as well as disapproved.

The decision in the Missouri case was based upon the fact that the first appointment to a statutory office was necessarily made during the recess of the Senate for a prescribed term of four years, stating the date that the term would end, and it was held that all subsequent terms must end on the same date at intervals of four years, so that one whose term had so ended could not continue in office as against a successor appointed for the full term, even though such appointment had not been confirmed, for, as also held, it might be confirmed at a subsequent session of the Senate. The decision involved the construction of statutes providing for filling vacancies and

for the holding over by an incumbent, and much consideration was given to a uniform course of executive procedure. The theory of that decision seems, however, to be that a vacancy occurs upon the expiration of the term of an appointive office, authorizing an appointment for the new term and ending the right of an incumbent of the former term to hold over. The cases adopting that theory are exceptional, and conflict not only with the decision of our own court in the Henderson Case, but with the great weight of authority establishing the contrary as the settled rule, though, of course, that rule does not interfere with the filling of an office at the time and in the mode provided by law, at or in contemplation of the expiration of the term for which the incumbent has been elected or appointed. *People v. Bissell*, 49 Cal. 407; *State ex rel. v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321; *State ex rel. v. Metcalfe*, 80 Ohio St. 244, 88 N. E. 738; *Smoot v. Somerville*, 59 Md. 84; *Brady v. Howe*, 50 Miss. 607; *State ex rel. v. Bowden*, 92 S. C. 393, 75 S. E. 866; *Tappan v. Gray*, 9 Paige, 507; *Id.*, 7 Hill 259; *People ex rel. v. Sohmer*, 209 N. Y. 151, 102 N. E. 593, 46 L. R. A. (N. S.) 1202, and note; *State ex rel. v. Compson*, 34 Or. 25, 54 Pac. 349; *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663; *State v. Bryson*, 44 Ohio St. 457, 8 N. E. 470; *People ex rel. v. Cazneau*, 20 Cal. 504; *People v. Tyrrell*, 87 Cal. 475, 25 Pac. 684; *State v. Boucher*, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 530; *People ex rel. v. McIver*, 68 N. C. 467; *Branham v. Long*, 78 Va. 352; *Barrett v. Duff*, 114 Kan. 220, 217 Pac. 913; *Territory v. Mann*, 16 N. M. 744, 120 Pac. 313; *State ex rel. v. Perkins*, 35 Okl. 317, 129 Pac. 730; *Mechem on Pub. Off.* § 123; 23 Ency. L. 346; *Throop on Pub. Off.* §§ 328-331. See, also, citation of authorities in note to *Wendorff v. Dill*, 50 L. R. A. (N. S.) 398. And, generally, a vacancy appointee holds over the same as an incumbent for a full term. *Throop*, § 331.

Several of these cases and others are referred to in the opinion in the Henderson Case. The Ohio case, above cited, of *State v. Metcalfe*, was decided in 1909, and the court quotes from *State v. McCracken*, 51 Ohio St. 123, 36 N. E. 941, as follows: "In contemplation of law there can be no vacancy in an office so long as there is a person in possession of the office legally qualified to perform the duties," and adds: "Other judicial utterances of like import can be cited but it cannot be necessary." The facts in the South Carolina case of *State v. Bowden*, decided in 1912, were: The Governor's appointment of magistrates had been confirmed in February, 1909. They were each appointed for a two-year term. No appointments were sent to the Senate at the session in 1911, but after the adjournment thereof, the Governor undertook to appoint three others as successors to those appointed and confirmed in 1909,

Those appointments were submitted to the Senate at its session in 1912, and rejected. The court stated that the authority of the Governor to appoint magistrates is conferred and limited by the Constitution, and, if the later appointments were not made in accordance therewith, they were of no effect, under the "universally recognized" principle that the Governor of a state has no inherent power of appointment to office, but that his power must be found in the Constitution or statutes; that the Constitution conditions the Governor's power of appointment "on the advice and consent of the Senate"; that an appointment for the full term without the consent of the Senate is beyond the governor's power; and that the term of office of magistrates being fixed by the Constitution at two years, and until their successors are appointed and qualified, one who is appointed to the office and confirmed holds the office until the expiration of two years and until his successor has been appointed by the Governor with the advice and consent of the Senate and has qualified. And thereupon the court further said:

"The failure of the Governor to appoint, or of the Senate to act upon the appointment, or the rejection by the Senate of the appointment of the Governor does not create a vacancy. * * * To take any other view would be not only to erase words from the Constitution, but to attribute to the constitutional convention and the general assembly the purpose to empower the governor to exercise sole control of the appointment of magistrates of the state in total disregard of the constitutional safeguard that his appointment shall be subject to the advice and consent of the Senate. * * * No citation of authority can make the matter plainer than the words of the Constitution, but we think it safe to say that the courts have held with complete unanimity that, when a term of office is fixed by law at a term of years and until the appointment or election and qualification of a successor, the term of the incumbent does not end and there is no vacancy until the expiration of the time named and the appointment or election and qualification of his successor."

The New York case of *People ex rel. v. Sohmer* was decided in 1913. It was thereby decided in substance, as stated in the syllabus in 46 L. R. A. (N. S.) 1202 (209 N. Y. 151, 102 N. E. 593) that, under a statute providing that an office shall be deemed vacant after the expiration of a term for the purpose of choosing a successor, the Governor cannot, where the term expires while the Senate is in session, appoint a successor upon the resignation of the incumbent after its adjournment although such incumbent, under the statute, held over until his successor was appointed; other portions of the statute providing that a vacancy in the office of one appointed by the Governor, with the advice of the Senate, shall be filled in the same manner as the original appointment, but giving the

Governor and interim power of appointment if a vacancy occurs other than by expiration of the term while the senate is not in session, and declaring that an office may become vacant by resignation before the expiration of the term. The court divided upon the question of the creation of a vacancy upon the resignation of the hold-over incumbent; the majority view being that, since the office became vacant by statutory declaration, for the purpose of choosing a successor, at the expiration of the term which occurred while the Senate was in session, that vacancy continued, rendering the incumbent's resignation of no effect in creating the vacancy, and preventing the office from being lawfully filled by appointment of the Governor alone, as in case of a vacancy occurring during a Senate recess. The general rule as to vacancies where an incumbent holds over does not seem to have been questioned, but inferentially recognized. And that rule was expressly recognized in the dissenting opinion, wherein it was said by Chief Justice Cullen:

"The failure to appoint or elect his successor in office, or a failure of such successor to duly qualify, would not create a vacancy, because despite of such failures there would be a person entitled by law to continue in the office and discharge its duties: The scheme of officials holding over despite the expiration of the original term has prevailed in this state from early times, and also is prevalent in other states. The decisions are uniform both in this state and in the other states, so far as they are cited to us by the Attorney General, that where there is a provision for a holding over, there can be no vacancy in the office."

And we quote the following from the L. R. A. note to that case:

"It has already been stated that the courts are quite generally agreed that, so long as there is in office a person legally authorized to hold the same and discharge its duties, whether he be one lawfully elected or appointed for a fixed term or whether he be a hold over, there is no vacancy within the meaning of statutory or constitutional provision authorizing special or temporary appointment by the executive. As an illustration of the attitude of the courts on this more general question, reference may be had to an early New York case denying the right of the Governor to appoint, even where the term expired after the legislative adjournment, and holding that the sole object of such an ad interim appointment was to prevent a public injury through want of an incumbent, until an appointment could be made in the regular mode, and that where there was a hold-over provision there was no vacancy entitling the Governor to appoint. *Tappan v. Gray*, 9 Paige, 307, affirmed in 7 Hill, 259. So it is, when the courts come down to the question as to ad interim appointments where the term expires during a session of the Legislature, but the statute provides for holding over. In such circumstances the courts hold in the case of an officer appointed by the Legislature or either body thereof, or by the Gov-

ernor, with the advice and consent of the Legislature or either body, that there is no vacancy at the end of the term, since the 'hold-over' provision is expressly designed to meet such a contingency, and that the Governor cannot exercise his special power of appointment when the term of office expires during a legislative session."

We cannot close the discussion of this question without referring to a case recently decided in Colorado, *Walsh v. People*, 72 Colo. 406, 211 Pac. 646, which, viewing the question from a different standpoint, demands and has received our very careful and respectful consideration. We do not understand the decision to disagree with the general rule above stated, where there is an incumbent entitled to "hold over." But it construes a constitutional provision like that in article 6 of our Constitution for the continued exercise of the duties of an office by a holding incumbent until his successor shall have been duly chosen and qualified, as authorizing something less than a holding over, and implying that the incumbent becomes a mere "locum tenens." Upon that construction the court upheld an appointment by the Governor during a Senate recess as a vacancy appointment, notwithstanding it purported to be made for a new term, and in that respect the case differs essentially from the decision of this court in the *Henderson* Case. That learned court, however, in its reference to the *Henderson* Case, seems to have overlooked the fact that the statute providing for the office of examiner, considered in that case, expressly provides that the examiner shall "hold his office for four years and until his successor . . . is appointed and shall have qualified." And that right would, as generally held, vest also in a vacancy appointee. But it is true that in the *Henderson* Case the constitutional provision aforesaid, found in article 6, was construed as conferring the same hold-over right, and the same construction of the provision is found as to another office in *Ballantyne v. Bower*, 17 Wyo. 356, 99 Pac. 569, 17 Ann. Cas. 82. In the Colorado case some effect seems to have been given to another provision of the Constitution of that state, authorizing the Governor in case of a vacancy to appoint a person "to discharge the duties of the office until the next meeting of the Senate, when he shall nominate some person to fill such office." (Italics ours), which, the opinion states, uses the words "discharge the duties" in contradistinction to the words "to fill the office." We do not have a provision like that in our Constitution or statutes. Notwithstanding that difference, perhaps slight only, between the constitutional provisions, the opinion is respectfully expressed in the Colorado case that this court in our two cases aforesaid misconstrued the provision for exercising the duties of an office by one holding it until the selection and qualification of a successor, in giving to it the same effect as a provision for holding

over the term, and our said decisions seem to have been understood by the learned court in that case, as the only decided cases, with a single stated exception, depending upon a provision like that in their Constitution and our own for "exercising the duties of the office."

We are not at all convinced that said provision in article 6 of our Constitution was misconstrued in either of the two cases above mentioned decided by this court, but if we had now any doubt about it we should regard the question as fully settled for this state by said decisions. But the premise that no decisions other than those in our two cases and perhaps one case in another state, have depended upon similar enactments is, we believe, erroneous. The same provision was construed in at least two other cases; the early New York case of *Tappan v. Gray*, 9 Paige, 507, establishing the rule in that state, and the California case of *People v. Tyrrell*, supra. We have not taken time to examine others.

The opinion in the case of *Tappan v. Gray* shows that the court did not perceive any substantial difference between a provision that an officer shall hold over and one that he shall discharge the duties of the office after his term. Nor do we. But the language of the provision in our Constitution is that "every person holding any civil office . . . shall, unless removed according to law, exercise the duties of such office." The one who "holds" the office, unless "removed," is granted the authority. In our opinion, the provision cannot mean anything less than that he remains, unless removed, while continuing to discharge its duties, the lawful incumbent of the office, and with the same title he was holding under for the term. The point is not, perhaps, important in the case now before us, for the reason that the engineer is authorized by the provision of the Constitution creating the office to hold his office for the term of six years, or until his successor is appointed and qualified. Nevertheless the other provision of article 6 also applies, but with the same effect.

There was, therefore, no vacancy in 1921 authorizing appointment on that ground, and a new term appointment would require confirmation. But relator contends that the confirmation of his appointment at the 1923 session of the Senate completed that appointment, making it effective from its date, and he claims to have held under it at the time of his alleged removal and exclusion from the office. That appointment must be considered as one for a new term. It does not purport to have been made or intended to fill merely a vacancy, and we agree with respondent's contention that an appointment for that purpose would have added nothing to the force or effect of the relator's original appointment. Whether April 1, 1921, stated in the commis-

sion as the beginning of the new term, would be the proper date instead of the date in February of the expiration of the previous term, assuming for the moment the validity of the appointment, need not be considered, since the point is not raised and is of no importance on this hearing. The dates of the beginning and ending of the successive terms of this office appear to have varied slightly, without any apparent suggestion of impropriety.

[5, 6] In view of the fact that the regular six-year term, for the unexpired part whereof relator had been appointed, was to expire shortly after the adjournment of the legislative session of 1921, it would have been proper for a new appointment to be made and acted upon by the Senate at that session, and while it may have been the duty of the Governor to send the name of an appointee to the Senate at that session for its consideration, as stated in several of the cases on the subject, we do not doubt that there may exist substantial reasons for an occasional neglect of such duty without intending to ignore the Senate or deprive it of its prerogative in the matter of appointments. And we understand that the withholding of the name of an appointee for this office from the Senate session of 1921 is intended to be explained in the reply by the averment that, in furtherance of the intention and policy of the Governor and the Legislature, it was understood that the relator should continue as engineer and be appointed the Wyoming member of a stated joint commission, to serve without compensation other than the salary to be provided for the engineer's office under a statute of that session increasing it. And we know that the statute increasing the salary was not finally passed until the last day of the session, February 19, nor approved until February 21. While that part of the reply is of no force, in our opinion, for the purpose of affirmatively establishing relator's right to the office, we think it not improper as an explanation of the reason for the delayed appointment, and to that extent only do we regard it as material. Nor would the Governor's neglect to send a name to the Senate during that session deprive him of the power thereafter to appoint in the manner provided by law; that is to say, if for a full or new term, with the confirming action of the Senate. *State ex rel. v. Kuhl*, 31 N. J. Law, 191, 17 Atl. 102. It is contended for respondent in this connection that a full term appointment, if authorized at the time, could not become effective until confirmed, that the alleged confirmation was ineffectual because occurring after the expiration of the term of the Governor making the appointment and after he had been succeeded in office by another, and for the reason also that the appointment was not communicated to the Senate, nor consent or confirmation requested by the Governor. Replying to those contentions

it is argued that the appointing and confirming acts need not be concurrent as to time, but that the latter may occur at any Senate session following the date of the appointment; that the Senate's confirming power may be exercised without executive request or communication; and that upon the expiration of a term the Governor may appoint for a new term subject to the approving action of the confirming body, to relate back to the date of the appointment.

These opposing contentions have been stated because, in part, they lead us into a field of inquiry where the decisions are comparatively few in number, and owing to that fact, as well as differences in constitutional and statutory provisions, they cannot, perhaps, be said to have developed a settled law on the subject. But in some respects the law may be said to be fairly well settled. It has been thought that an expression of the court in *State v. Henderson*, supra, referring to the action of the Senate confirming Henderson's appointment, may indicate a consideration in that case of one phase of the question. But we are satisfied that the court had in view only the particular facts of that case, and had reference only to an appointment not requiring but complete without confirmation. This is what the court said:

"It appears that the Senate did not act upon the nomination of Stone by Governor Osborne, possibly because it desired to have Henderson continue in the office. This is shown by the action of the Senate confirming him. This was ineffectual, as the appointment . . . was not made to the Senate, but until the Legislature met. At that time, a new appointment was necessary and proper, as is conceded, but such appointment could then have been made only by Governor Osborne, by and with the advice [and consent] of the Senate."

[7] Henderson's appointment was to fill a vacancy "until the next meeting of the Legislature." On the first day of the next meeting the Senate adopted a resolution reciting the facts of that appointment and confirming it, and adjourned without acting upon an appointment of another person to the office by the succeeding Governor. The court's above-quoted statement we take to mean that the Senate's action was ineffectual for the reason that the appointment was made only until the meeting of the Legislature, and for that reason also that the appointment was not made to the Senate. We do not understand that it was intended to refer in any way to the fact that the appointment had not been officially communicated to the Senate, and under the circumstances there was no necessity for a decision as to that matter. The point decided was that, when confirmation by the Senate is not required, its action in the matter is of no effect, and that we believe to be the general rule. *People v. Cazneau*, 20 Cal. 506; *Sewall v. Bennett*, 137 Ky. 620, 220 S. W. 517.

[8] The procedure under a provision for an official appointment by the Governor with the advice and consent of the Senate, or to be confirmed by the Senate is sometimes described or referred to as requiring "concurrent" action of the Governor and Senate. But it is evident that in most, if not all, of the instances where that expression is found in judicial decisions in the connection stated, the purpose is not to speak of the time when the Governor and Senate must respectively act, but rather their co-operation or association in the same act. "Concurrent" is defined not only as "existing or happening at the same time," but also: "Acting in conjunction, agreeing in the same act or opinion; contributing to the same event or effect; co-operating." See "Concurrent," Webster's New Int. Dict. And there would seem to be no propriety in the use of the word as descriptive of the acts essential to the validity of such an appointment, except to express merely the necessity of consent by the confirming body. Certainly the language of the provision for appointing to the office here in question—"shall be appointed by the Governor and confirmed by the Senate"—does not necessarily imply that the two acts must be concurrent in point of time. Indeed, consideration of a recess appointment by the Senate at its next session is expressly provided for in several states by Constitution or statute, evidencing that such separation of the required acts, in the matter of time, is not regarded as at all incongruous. See *State v. Williams*, 20 S. C. 13; *Stamps v. Tittle* (Tex. Civ. App.) 167 S. W. 776; *Sewall v. Bennett*, supra. And the generally accepted rule seems to be that the two acts need not necessarily occur at the same time, though it may be conceded that, when required, the confirming act is essential to complete the appointment. It is held, therefore, that, where an appointment subject to approval by the Senate has been made during a senate recess, that body may act at its next session, at least when the appointment is communicated to the Senate for its consideration by the Governor. *Shepherd v. Haralson*, 16 La. Ann. 134; *State v. Young*, 137 La. 102, 68 South. 241; *People v. Blanding*, 63 Cal. 333; *People v. Addison*, 10 Cal. 1; *Walsh v. People*, 72 Colo. 406, 211 Pac. 646; *State v. Williams*, 222 Mo. 268, 121 S. W. 64, 17 Ann. Cas. 1006; *Commonwealth v. Waller*, 145 Pa. 235, 23 Atl. 382. See, also, *People v. Mizner*, 7 Cal. 510.

In the cited Pennsylvania case, it appeared that the respondent had been appointed and commissioned and had qualified in the place of one who had died, and had assumed and continued in possession of the office until the hearing; that, the Senate not being in session at the time of his appointment, the same Governor, at the next session, occurring in January, 1891, nominated the respondent for confirmation for a term to date from the 1st

day of March, 1890, the date when respondent had gone into office under the original appointment, and on January 20, 1891, the Senate confirmed such appointment; but the succeeding Governor, who was inaugurated on the same day and prior to said confirmation, nominated another for the office, which nomination the Senate rejected, and after the adjournment of the Senate the Governor assumed to appoint and commission the one who had been rejected for the full term of four years. The court held that the former Governor's appointee having been confirmed was properly in office, and said:

"The confirmation of respondent by the Senate necessarily extends his original appointment for the balance of the unexpired term."

We have already referred to the Missouri case of *State v. Williams*. The opinion in that states that the law contemplates that appointments shall be made at the proper time, and that the Senate may act upon them at its next session. In the Colorado case, *Walsh v. People*, referred to in an earlier part of this opinion, it appeared that Walsh, the respondent, had been appointed by a former Governor on May 10, 1918, for a term of four years from June 15, 1918, and confirmed on January 8, 1919, his name having been sent to the Senate for confirmation. The court held that the term of the office could not exceed two years, but said:

"Although it is true that the appointment of May 10, 1918, must be regarded as an appointment 'to discharge the duties,' which we will call an appointment ad interim, and even though it had been expressly such, yet we see no reason why the Governor and Senate might not at 'the next meeting' of that body, if they chose, have regarded that interim as a part of the term and have made the permanent appointment accordingly."

It is also held that a confirmation will relate back to the time of the nomination or appointment or when the appointee took possession of the office, as the case may require. *Shepherd v. Haralson*, supra; *Dyer v. Bayne*, 54 Md. 37. The Maryland Constitution provided that officers appointed by the Governor and Senate shall be nominated to the Senate within 50 days from the commencement of each regular session, and that the term of office, except in cases otherwise provided for in the Constitution, shall commence on the first Monday of May next ensuing the appointment, but the beginning of the term of the office involved in the case cited was fixed by law as the first Monday of March next following the appointment. A nomination for the office was sent to the Senate within the required period of 50 days, but was not acted upon until April 5, when it was confirmed. Against the contention that the confirmation was too late to validate the appointment for that year and that the appointee could not take office until the first

Monday in March of the succeeding year, the court said:

"The efficient and only discretionary act of the Governor in making the appointment was in making the nomination; and the Senate having no other power over the nomination than to concur or nonconcur in it, the act of the Governor became complete and effective with the concurrence of the Senate, and it related back to the time of the nomination. The act of the Senate, and the subsequent ministerial act of the Governor in issuing the commission, both related to the principal act of the Governor in making the nomination; the commission being evidence only of the appointment. And the appointment being thus allowed to speak as from the time of the principal act done in making it, all difficulty upon the terms of the Constitution is at once removed. There can be no good reason why the principle of relation should not be applied in a case like the present, as it is constantly applied in many others, for the advancement of justice, and to give full and complete effect to legal proceedings. We think it should be so applied."

That principle is recognized in *Walsh v. People*, and *Commonwealth v. Waller*, supra, and other cited cases sustaining a confirmation as effective from the date of a recess appointment, or the taking possession of the office thereunder. And the propriety of the Senate acting upon recess appointments for full terms at its next session seems also to have been recognized in this state in the case of certain other appointments made by Governor Carey during the recess between the sessions of 1921 and 1923, which were confirmed upon the request of his successor in office. Several other appointments for full terms and one, at least, for an unexpired term of several years, but dating from the beginning of the term, appear to have been made by Governor Carey soon after the adjournment of the Legislature in 1921. And in several of such instances, upon the request of his successor in office, Governor Ross, the appointments were confirmed by the Senate at its next session (1923) for terms beginning early in 1921.

The published Senate Journal of 1923 discloses that on February 7, a communication was received from the Governor, dated February 6, from which we quote:

"Governor Robert D. Carey having appointed Mr. Fred W. Geddes as a member of the Board of Trustees of the University of Wyoming for a period of six years, after the last session of the Legislature had adjourned, I hereby nominate Mr. Fred W. Geddes, of Centennial, Wyoming, for a term of six years from February 23, 1921. I respectfully request your advice and consent to the same."

Other like communications of the same date were received, mentioning full six-year term appointments by Governor Carey of Dean Prosser and J. A. Elliott, each as a member of the University Board. And each of the persons so named was confirmed for

a term beginning February 22, 1921. S. J. 1923, p. 225. By another executive communication dated February 15, the Senate was informed that on September 20, 1921, Governor Carey appointed A. E. Roedel as a member of the Board of Pharmacy for a term of six years from February 21, 1921, to fill out the unexpired term of W. P. Hays, who had resigned, and requesting consent to that appointment, and it was thereupon confirmed. S. J. 1923, pp. 363, 374. And we understand said appointees had respectively occupied the offices named from approximately the date of the recess appointments respectively. We have no doubt that such request was deemed essential by Governor Ross, in each instance, to authorize the Senate to act in the matter; yet the difference in time between the original appointment and confirmation was not regarded as an obstacle to the latter, and that is the point upon which the instances are cited.

[9] This brings us to the contention that the confirmation was ineffective for the reason (1) that Governor Carey had been succeeded in office by Governor Ross, and (2) that the Senate acted without executive communication or request. As shown above, the Senate on February 15, 1923, considered and confirmed certain appointments made by the former Governor in 1921, for terms beginning in that year. That was in response to communications from the present Governor. Two days later, the last day of that session, the Senate proceeded to consider and confirm the relator's appointment. The proceedings concerning it are recorded in the Senate Journal as follows:

"The President brought the attention of the Senate to the following appointment of Governor Robert D. Carey, which, with the consent of the Senate, he instructed the chief clerk to read, the said appointment being as follows: 'Here is copied the commission appointing the relator, Emerson, for the term of six years from April 1, 1921, signed by Governor Carey, attested by the signature of the secretary of state, and the great seal of the state.' Mr. President: Mr. Lee: I move that the Senate resolve itself into open executive session. The motion carried. Executive session. The following appointment of Governor Robert D. Carey was read: (Commission again copied in full.) Mr. President: Mr. Lee: I move that the Senate do now advise, consent and confirm the appointment of Frank C. Emerson as state engineer for a term of six years from the first day of April, A. D. 1921."

The Journal then shows a roll call on the motion, resulting in 17 affirmative votes, excused 3, and absent 5, and continues:

"Whereupon, President Skovgard declared the Senate had, by its vote, confirmed the appointment of Frank C. Emerson as state engineer."

It does not appear that Governor Ross sent any name to the Senate for said office during said session. And there can be no question

but that by its said action the Senate did confirm the Emerson appointment for said full term, if it then had authority to act upon it.

While we understand what counsel means by the argument that the expiration of the term of the Governor making the appointment, and the fact that he had been succeeded in office by another, deprived the Senate of its confirming power as to that appointment, we do not understand upon what principle that argument can prevail. Neither of those facts was deemed an obstacle to the valid confirmation of the same Governor's appointments in the other instances above mentioned. And those confirmed appointments are not, in our opinion, to be considered as made solely by the succeeding Governor, but merely as recognized, consented to, and adopted by him, and at his request confirmed. They could not be joint appointments. There is only one Governor in office at any time, and there is always a Governor under our laws, the Constitution and statutes providing for a succession in the office to prevent an interregnum. We think it is not a valid argument that the Senate by its action confirming relator's appointment confirmed an appointment made by a private citizen. When the appointment was made, and for approximately a year and nine months thereafter, Governor Carey was Governor, and his commission of the relator is attested by the great seal of the state attached thereto by its proper custodian, the secretary of state, who, no doubt, kept a record thereof in his office as required by law. Comp. Stat. 1920, § 110.

As already indicated, we do not think the appointment became effective until confirmed; but, when properly confirmed for the term stated in the appointment, that act might relate back to the date when the relator assumed possession under the appointment, if necessary to validate the appointment from that date and the Senate expressly confirmed the appointment for the term beginning as stated in the Governor's commission. If the appointment might legally have been withdrawn by Governor Carey during his term, or by Governor Ross after he succeeded to the office, and before confirmation, that was not done. Hence, at the time the Senate acted, the appointment was on record as an executive act and was confirmed as such.

In the Pennsylvania case above cited, *Commonwealth v. Waller*, the confirmation is shown, by the decision of the trial court published as a part of the report of the case, to have occurred after the inaugural of the new Governor, though on the same day. The Supreme Court, in reversing that decision and sustaining the confirmation as extending the original appointment for the balance of the term, said nothing as to the time of

the day that the Senate acted, evidently deeming the fact immaterial whether its action was before or after the inaugural; and certainly the court regarded the action of the Senate as confirming an appointment by the Governor, notwithstanding that the individual who, as Governor, had made the appointment and nomination had gone out of office. The Supreme Court of Kansas has recently said in *Barrett v. Duff*, 114 Kan. 220, 217 Pac. 918:

"The supreme executive power of the state is vested in the Governor. Const. art. I, § 3. This executive power is continuous—never ending. It knows neither names nor persons. It began with the first Governor, has continued ever since, and will continue unbroken so long as the Constitution exists."

And again, in *State v. Matassarini*, 114 Kan. 244, 217 Pac. 930:

"The supreme executive power vested in the Governor is a continuous one, and is to be exercised as the law provides by the one who happens to hold the office at the time of its exercise. Terms of office are not ended, nor is there any authority to revoke appointments because there has been a change or succession in the office of Governor."

We shall have occasion presently to refer again to one of these Kansas cases, for it is directly in point upon the question of the necessity of an executive communication submitting an appointment to the Senate to authorize that body to act. Our Constitution and statutes contain 25 or more separate provisions for official appointments by the Governor with the consent of or to be confirmed by the Senate, and the word "nominate" is used in only 4 of those provisions. If we are correct in the result of a rather hasty examination. Those occasional cases are the State Veterinarian, the Board of Live Stock Commissioners, the Board of Pharmacy Commissioners, and the University Trustees, and they are found in the statutes; those relating to the Veterinarian and the Live Stock Commissioners having been originally enacted while Wyoming was under a territorial form of government and the procedure for submitting federal appointments to the United States Senate would naturally be followed. And it may be doubtful whether the statutory requirement that the Governor "nominate" members of the University Board may be controlling, since the Constitution declares only that they shall be "appointed" by the Governor with the consent of the Senate. The usual provision in the statutes for appointments by the Governor is that he shall appoint by and with the advice and consent of the Senate, and a provision in those words is found in the Constitution for the appointment of the state geologist and inspector of mines. But the words employed in that instrument providing for the selection of the state ex-

aminer and state engineer are, in each case, that he shall be appointed by the Governor and "confirmed by the Senate."

Notwithstanding the very infrequent use in our statutes of the word "nominate" when directing an appointment by the Governor, with the consent of or to be confirmed by the Senate, a reference to the published legislative journals coming under our observation has disclosed the fact that the several Governors for at least 20 years have been in the habit of using a form of communication stating that the Governor nominates for the described office and term, and requesting the consent or confirmation of the Senate. That custom has no doubt resulted from using as a model the phraseology of presidential communications to the Senate of the United States submitting official nominations to that body. The use of the word in the case of federal appointments is proper to comply with the provision of the Constitution of the United States providing that the President shall "nominate" and by and with the advice and consent of the Senate shall appoint. Said executive custom in this state, however, is not sufficiently potent, in our opinion, to require or justify the court, in determining the right of the Senate to exercise its confirming or rejecting power in the absence of executive communication, to construe the meaning or effect of the word "nominate" or a provision that the Governor shall "nominate," where a nomination is not required for the particular office in question. Nor, except in the very few instances in our statutes providing that the Governor shall nominate, do they contain anything restricting the authority of the Senate in the exercise of its said power to cases where its action has been directly invited by a communication from the Governor, unless such restriction is to be implied from the fact that its power is to advise and consent to or confirm or to refuse to consent or confirm. And that we think presents a very important question and one upon which the authorities directly in point are few. They support, however, the contention that the Senate may act upon an appointment where such action is provided for by law, although the appointment has not been communicated to it by the executive or through his office.

[10] The orderly and contemplated method is of course an executive communication placing the matter before the Senate for its consideration, and that is the method usually employed here and elsewhere. We suppose also that upon a reasonable anticipation of a necessity therefor the Senate might request by resolution the submission to it of recess appointments which when so submitted it would be authorized to consider under its said power. But why may not the Senate act upon an appointment of which it has knowledge, if the Governor should refuse or

neglect to ask for such action especially where the appointee is known to have entered upon the duties of the office? A provision for an appointment by the Governor with the consent of or to be confirmed by the Senate directs not only what shall be done, but also in effect what shall not be done. The affirmative act of the two governmental agencies is required to confer title to an office under such a provision. A completed appointment cannot be made in any other way than as so provided. *People v. O'Toole*, 164 Ill. 344, 45 N. E. 683; *Clark v. State*, 177 Ala. 193, 50 South. 259. While the Governor's act in selecting the person to be considered for an office may be the principal and perhaps the more important one of the two, it is not alone sufficient. A construction of such provision denying the right of the Senate to act in any case unless directly requested to do so by the Governor or by a communication from his office would obviously give him the power to ignore the coordinate right of the Senate, and might mean the abolition of that right, and certainly would make it entirely dependent upon the Governor's pleasure. The probability of that effect would be more marked, perhaps, where a recess appointment for a fixed term is held to be effective until rejected by the Senate, but under the rule adopted in this state, and to which we adhere, that confirmation when required is necessary to complete an appointment, the same result would not be impossible. Indeed, we think the point may be illustrated by the facts in this case, showing two appointments to the same office, each for a full term of six years extending beyond the term of the governor making it, neither of which has been submitted by executive communication to the Senate. If allowed to stand, said second appointment might of course be submitted at the next session of the Senate. But if not so submitted, would not the effect above suggested follow from a decision that the Senate would then be powerless to act? It is usually held that the Senate, in the exercise of its power to consent to or confirm executive appointments, performs an executive or administrative rather than a legislative function. *Herman v. Harwood*, 58 Md. 1. And see *Opinion of Justices*, 72 Me. 542.

In *Sewall v. Bennett*, 197 Ky. 626, 220 S. W. 517, cited above on another point, the Senate adopted a resolution rejecting certain recess appointments by a former Governor and confirming new appointments for the same positions by the Governor then in office, and that action was sustained. That case, aside from the statement of certain principles, is important upon the question here to the extent only that it shows a consideration of and rejection of recess appointments without their having been submitted to the Senate by executive communication. And there

was apparently no suggestion in the case that such action was improper. Governor Morrow, who had succeeded Governor Stanley, informed the Senate that, subject to its consent, he had appointed certain named officers. We quote from that case a part of the Senate resolution:

"The Governor having informed the Senate that he has, subject to the consent and approval of the Senate, appointed * * * and having asked that the Senate take appropriate action upon said appointments: * * * Be it resolved * * * that all vacation appointments [to sa. board] * * * by Governor A. O. Stanley be, and the same are, by the Senate hereby rejected, and the appointment of said [naming three appointees] * * * this day submitted by the Governor Edwin P. Morrow to the Senate for its approval be, and the same is, hereby consented to and confirmed by the Senate."

Governor Stanley's appointees contended that their appointments were valid and complete without confirmation. The court held against them, upon a consideration of the several provisions of the statute affecting the matter, and a greater part of the opinion is taken up with a consideration of that matter. But, concluding the opinion, the court said in substance: That the Governor, unless the statute creating the office otherwise provides, must submit the appointments to the Senate at its first session after making the appointments, and that no person whose appointment is not approved by or is rejected by the Senate is entitled to hold the office after another person appointed thereto by the Governor has been approved by the Senate. We find nothing in the opinion to indicate that the Senate was deemed to be without authority to consider and reject such appointments, though not directly submitted for its action by the executive.

The above-cited Kansas case of *Barrett v. Duff*, decided in July of the present year, but not published until after the submission of the case at bar, presented a situation somewhat similar to that in this case. The appointments were made during a recess of the Legislature following its session of 1921, as we understand, for fixed terms to expire on specified dates in 1925, and the Governor making them was thereafter succeeded in office by another, presumably before the next legislative session. Said appointments were not communicated to the Senate at that next session; but, without any such communication, they were severally acted upon and confirmed at that session. In that case, it appeared also that the succeeding Governor had transmitted to the Senate the names of other persons for the same offices, with the information that he had revoked and cancelled the aforesaid appointments of his predecessor. The procedure of the Senate respecting said appointments is stated in the opinion in substance as follows:

That the Legislature having convened on January 9, 1923, the Senate in regular session on January 16 adopted a motion to consider recess appointments. The aforesaid recess appointments were then referred to a Senate committee. On specified dates thereafter from February 21, 1923, to and including March 16, 1923, the new Governor transmitted to the Senate the names respectively of his appointees in place of Governor Allen's appointees. Said appointees of Governor Allen had each entered upon the discharge of his duties at or about the time of his appointment. On March 7 the Senate, in executive session, confirmed the said appointments of Governor Allen and for the terms for which they had respectively been made. Governor Allen's successor, Governor Davis, also issued papers "in form and with intent" to commission the persons respectively whose names he had sent to the Senate.

The same contention was made there as here, that a confirmation to be effective must be in response to a communication by the executive directly to the Senate. The court considers that contention at some length, and refers to the fact that the statutes do not provide for a nomination by the Governor preceding the Senate action, but that his privilege and duty is to appoint by and with the advice and consent of the Senate, thereby differing from the provision of the federal Constitution regulating federal appointments. And the power of the Senate to act under the conditions stated is further discussed as follows:

"The Senate, on January 16, 1923, entered upon the consideration of the names of defendants as appointees to their respective offices. This procedure was usual and customary. The only element lacking in the consideration of such recess appointments was the fact that the Governor, in this instance, failed to transmit . . . the names of the defendants as having been appointed. The Senate, after due consideration, confirmed the appointments of the defendants, which was, in effect, a rejection of the appointees of Gov. Davis, the plaintiffs herein. The plaintiffs deny any force or validity to the action of the Senate . . . because of the failure of the executive to directly transmit the names of defendants. No good reason is advanced why the Senate would not consider such recess appointments without such direct word from the executive. . . . The offices in controversy are all located in the Capitol Building, in which the Senate holds its deliberations. They are important departments of the state government. The Senate may, and often does, have official business with them. It receives reports from them. It considers the service which the departments are, by law, required to perform. It considers the extent of such service and its requirements. It considers and passes appropriations in order that they may lawfully and properly function. Under all the circumstances, the Senate cannot shut its eyes to the facts as to whether the respective offices are filled; whether they are

functioning under the law, or whether there is a vacancy therein. . . . The Senate, which has official knowledge of all of the acts of another state department, may not close its eyes to an existing fact merely because the executive has failed to transmit a communication giving it the advice. . . . The Senate must be permitted to investigate on its own initiative, and without communication from the Governor, the status of offices; otherwise the Governor could fill and refill them at his pleasure by simply failing to advise the Senate. . . . The investigation by the Senate brought before it the records of the secretary of state showing the appointments of the defendants. We conclude that the Senate did not go beyond its powers in making the investigation concerning the offices held by the defendants, and, having satisfied itself, that it could properly exercise its judgment thereon. While it . . . the usual and customary courtesy of the executive to transmit such facts to the Senate, we believe it the better view to hold that the Senate may, on its own initiative, if it so desires, ascertain the facts upon which to base its deliberate and final judgment in confirming or rejecting appointees of the Governor."

There were three appointments and three cases disposed of in the one opinion. Five of the justices joined in the opinion. The other two concurred in the result as to one of the cases, which involved a vacancy appointment, and dissented as to the others. One of them wrote a dissenting opinion, in which it was said upon the question now under consideration that the defendants' rights were not strengthened by the Senate's procedure; that no authority was cited in support of that procedure; and that, where the statute requires an appointment to be made by the concurrent action of the executive and a confirmatory body, such concurrent action cannot be established by showing that one of them consented to something which the other did not want to do. That is substantially the argument made here by respondent's counsel, based upon the fact that the Governor who made the appointment went out of office before it was confirmed. We think the fallacy in it is to be found in the implication that the Governor did not want what the Senate consented to, for it assumes what we believe to be erroneous, that because the appointments were made by one who had since retired from office they had ceased to be executive acts, or to express the executive will.

[11] The appointment here was made by one who was Governor when it was made, and while he remained Governor his appointee acted under it, though remaining in possession as his own successor. And, so far as we are advised, the appointment and possession of the office was acquiesced in by the other officials of the executive department of the state government, and we assume the appointment to have been a matter of record in the office of the secretary of state, as required by law. The mat-

ter of an official appointment is not personal. The right to make it does not attach to the person, but to the official upon whom that right is conferred. The appointment of relator, whether valid or not, was an official act, and by no progress of time or change in the succession to the Governor's office could it be changed from an official to a private or personal act. The Pennsylvania case of *Commonwealth v. Waller* is fairly in point on this, for, in that case, it appeared that the only communication the Senate had at the time of its action was from one who had been succeeded by another. It is certainly in point as against the proposition that a confirmation of the appointment of a Governor who prior thereto had gone out of office is a consent to an act which the Governor did not want, based upon the fact that the new Governor may not have desired such confirmation.

The provision as to the office here in question found in the Constitution does not say that the appointment made by the Governor shall be confirmed by the Senate when requested by the former; or upon a communication by him submitting the matter to the Senate. And we perceive no substantial reason for adding by construction any such restriction upon the Senate's right to act. We have no doubt that to maintain the orderly procedure above mentioned and to avoid friction in the administration of the affairs of the state government concerning the matter under consideration, the senate should not act hastily or without the appearance of some reasonable ground; nor should it endeavor by first proposing any such action to impose its will upon the executive. Each of these public agencies should be left free to act in the manner intended by the provisions granting the power. It appears, however, in this case, that the Senate did not act until the last day of its session, when, no doubt, it was well understood that the said appointment would not be sent to it for consideration.

The fact of this appointment could not have been otherwise than well known to the Senate. We need not specify the apparent reasons for such knowledge, except to say that the office is an important one and its quarters are on the same floor as the Senate chamber in the Capitol Building, and, as alleged, the appointment had been delayed to carry out a stated policy and purpose of the Governor and Legislature.

Another case, *Larsen v. City of St. Paul*, 83 Minn. 473, 86 N. W. 459, is somewhat in point on this question. It involved the right to the office of police sergeant by one appointed by the mayor. Although an appointment to the office required the consent of the common council of the city, it seems to have been the fact that its consent was not asked. At least it appears that the council had never acted upon the appointment by direct

vote. It was held that said appointee having entered upon the discharge of the duties of the office, his name having appeared as sergeant on the monthly pay roll submitted to and approved by the council for more than seven years, and through its approval payments were made to him during that period, the council by those acts had given its consent to the appointment.

There was no actual change in the possession of the office when the relator, as alleged, assumed to act under the 1921 appointment, for he was then in possession under the previous appointment. The only change, if any, was in the title under which possession was retained. Had another person been the vacancy appointee and continued to hold under it, we do not think he could have been legally compelled to surrender possession to the relator until the latter could show that he had been duly appointed and confirmed for a full term. But if, in that case, possession had been voluntarily surrendered to him, the relator would have been at least a *de facto* officer until confirmed, and then such officer *de jure* relating back to the date of his possession. Upon the facts here, however, during said interim he was not only *de facto* but *de jure* the state engineer, for he was entitled to hold under his vacancy appointment until the due appointment and qualification of a successor.

But whatever the title under which the relator was properly holding the office, the question arises upon the pleadings whether, or not he was lawfully deprived of his right thereto by the alleged removal proceeding. It is conceded that the Governor acted in that matter under the provisions of section 318, Comp. Stat. 1920, originally enacted in 1905 (L. 1905, c. 59, § 1), reading as follows:

"Any officer or commissioner of the state of Wyoming who shall hold his office or commission by virtue of appointment thereto by the Governor, or by the Governor by and with the advice and consent of the Senate, may be removed by the Governor from such office or commission for maladministration in office, breach of good behavior, willful neglect of duty, extortion, habitual drunkenness, or any other cause deemed sufficient by the Governor to justify and warrant such removal: Provided, reason for such removal shall be filed in the office of the secretary of state in writing, subject to inspection by any person interested."

[12] The validity of the removal is challenged, first, on the ground that the state engineer is removable only by impeachment under the provisions of sections 18 and 19, art. 3, of the Constitution. viz.:

"Sec. 18. The Governor and other state and judicial officers except justices of the peace, shall be liable to impeachment for high crimes and misdemeanors, or malfeasance in office, but judgment in such cases shall only extend to removal from office and disqualification to hold

any office of honor, trust or profit under the laws of the state. The party, whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial, judgment and punishment according to law.

"Sec. 19. All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law."

The same contention was made in this court as to the office of superintendent of a water division of the state, and it was held that said office, although mentioned in the Constitution by a provision directing the Legislature to provide for the appointment of superintendents of water divisions, and also when describing the constituent members of the board of control (article 3, §§ 2, 4), did not come within the meaning of "other state" officers declared to be liable to impeachment, but that the incumbent was subject to removal under section 19 of the Constitution and the statute aforesaid. *State ex rel. Hamilton v. Grant*, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 1 L. R. A. (N. S.) 538, 116 Am. St. Rep. 983. The court said:

"It will be observed that the causes for impeachment are, 'for high crimes and misdemeanors; or malfeasance in office,' including only criminal conduct or positive wrongdoing, while officers not liable to impeachment may be removed for 'misconduct or malfeasance in office,' thus very greatly extending the causes for removal authorized to be provided for by law. We are very clearly of the opinion that it was not the intention of the framers of our Constitution to require that the jurisdiction of the high court of impeachment should be invoked to try and remove minor and subordinate officers, especially as the term of office of many of such officers would expire by limitation during the session of the Legislature at which they could be impeached, and, again, that court would have no jurisdiction in cases of 'misconduct' not amounting to a high crime or misdemeanor, or malfeasance in office. We are strongly inclined to the opinion, without deciding the point, that the officers liable to impeachment are the Governor and other state officers mentioned in section II, art. 4, of the Constitution, which does not include the office in question. Certainly, and it has generally been so considered, that only the superior executive and judicial officers of a state are subject to impeachment, and we have found no case where an officer holding by appointment, or an inferior officer of any kind, has been held subject to impeachment. On the other hand, it has been held that such officers are not so subject. 15 A. & E. Enc. (2d Ed.) p. 1065; *State ex rel. Hitchcock v. Hewitt*, 3 S. D. 187; *State ex rel. Stearnes v. Smith*, 6 Wash. 496, 33 Pac. 974; *State ex rel. McGreavy v. Burke*, 8 Wash. 412 (30 Pac. 281)."

And the court quoted from the cited South Dakota case a remark to the effect that the language in the Constitution of that state defining what officers shall be liable to impeachment did not include officers ap-

pointed by the Governor; said language being like that employed in our section 18, aforesaid, and even more inclusive, for "all" other state officers were the words there used following the mention of the office of Governor.

The Hamilton Case has since been cited with approval in *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 573, where the right of the Governor to remove a magistrate whose appointment had been confirmed by the Senate was involved; and the court said, preceding that citation:

"The use of such general terms as 'all executive and judicial officers,' 'all civil officers,' and the like in the impeachment articles of Constitutions, where they must have been meant to have some limited meaning, is one of the most curious anomalies of legislation. However difficult the task, the court must try to find the line of distinction which the convention probably had in mind and mark that as the true line. * * * Search for the line of distinction. * * * in the light of the history of the subject in this state and of judicial authority in this country, leads to this conclusion: Every executive and judicial officer whose authority and jurisdiction extends over the entire state—in whose official conduct the entire state is concerned—and whose office was created by the Constitution, or created by statute and filled by election by the people at large, is removable by impeachment or by the Governor on the address of the General Assembly or by conviction of embezzlement or of appropriation of trust funds and in these modes only. * * * The few precedents on the subject indicate perplexity of the courts, but they also indicate approval of the line between impeachable and nonimpeachable officers which we have stated."

The Justices of the Supreme Judicial Court of Massachusetts, in an opinion to the House of Representatives on this subject, said that it was necessary to determine whether county commissioners came within the description of "officers of the commonwealth"; that there were several classes of civil officers within the commonwealth, for example, town or city officers, county officers, district officers, and state officers; and that in a certain sense, all might be deemed to be officers of the commonwealth, and that the view that all are subject to impeachment might accordingly be possible. But that the impeachment provision was not intended to include all civil officers of every grade; and they held that officers liable to impeachment were those "elected by the people at large, or provided for in the Constitution for the administration of matters of general or state concern," concluding by stating:

"Considering the nature and character of the proceedings by impeachment, it does not seem wise to extend their scope by a doubtful construction." *Op. of Justices*, 167 Mass. 599, 46 N. E. 113.

Learned writers upon the subject of removal of public officers by impeachment appear to have differed as to the precise nature of the proceeding, and the necessary ground therefor. In an article by Professor Theo. W. Dwight, first prepared as a lecture to the students of the Columbia College Law School, published in 1867 in volume 3 (N. S.) American Law Register, pages 257-283, it is said that impeachments, like indictments, are methods of procedure in criminal cases, and that the person impeached can only be convicted of a crime known to the law, and that, since there are no crimes against the United States which are not statutory, an officer of the United States would not be liable to impeachment except for a crime committed against the statutory law. The contrary view was taken by Judge William Lawrence of Ohio in an article published in the same year and in the same volume of the American Law Register, pages 641-680, who declared that impeachment was not a mode of criminal procedure and the grounds therefor were not limited either to crimes defined by statute or recognized at common law; and he concluded his discussion by saying:

"The result is that an impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or (for) an improper purpose."

In a later article on the subject by G. Willett Van Nest (1882) (18 Amer. Law. Review, 798-817) it is stated as that writer's opinion that impeachment is a criminal trial and that a true crime must be charged, but he disagreed with the doctrine that under the Constitution of the United States impeachment would lie only for a statutory crime. He said in the concluding paragraph:

"It is only required to be shown that an act has been committed which comes within the definition of a crime; and it frequently occurs that acts of public officers constitute crimes, which, if committed by private individuals would be adjudged harmless. . . . Whether a crime does or does not appear can be determined to some extent by the decisions of the Senate in case of impeachment, but it is generally to be decided by common-law rulings in similar cases; and in new cases we must frequently be guided by definitions furnished us by writers on the common-law as a result of a close study of the cases decided in the common-law courts."

In a note the word "crime" is said to be used, not in a technical sense, but as meaning a criminal act, the chief element of

which is the evil, as distinguished from the virtuous intention.

In view of the serious nature of an impeachment proceeding, and the tendency of the courts to limit the operation of general terms, in Constitutions defining its scope, so as to exclude therefrom all minor and subordinate officers, even though they might come strictly within the terms so employed, it seems clear that the term "other state officers," as found in our Constitution providing for such proceeding, should not be construed as including or intended to include every officer who, for other purposes, might properly be classed as a state officer. The words are used in connection with the office of Governor, and may, for that reason, as well as the reason above suggested, be limited to officers of a grade that might properly be included with that of Governor, to accomplish the purpose of the provision. There must be some line of distinction, and we are disposed to leave the question where it was left in the case of *State v. Grant*, supra, leaving the court still inclined to the opinion, under the existing relevant constitutional and statutory provisions, that the officers declared liable to impeachment, aside from judicial officers, are the Governor and the other elective state officers mentioned in section 11 of article 4 of the Constitution; such other officers so mentioned being the secretary of state, the auditor, the treasurer, and the superintendent of public instruction. Those officers, with the Governor, are the only elective state officers, aside from certain judicial officers, and each is elected by the people at large for a term of four years. They constitute the principal and essential state officers. They are provided for in the article of the Constitution entitled "Executive Department." And the only other office mentioned in that article is that of state examiner (section 14), which, is directed to be provided for by the Legislature as an appointive office, thus distinguishing it from the others by the manner of selection, and tending, we think, to indicate a distinction in the minds of the framers of the Constitution when providing for or mentioning the few other state officers especially named in that instrument, which may be considered for the purpose, at least, of determining what officers are therein declared liable to impeachment.

Whether that provision might be extended by construction to any other state officer hereafter made elective by statute need not be and is not considered. No other has, up to this time, been made elective, and the matter might, perhaps, be expressly provided for by the statute creating the office or making it elective. Several appointive state officers have been provided for in addition to those mentioned in the Constitution, and for various terms, usually two or

four years. Among them may be mentioned in this connection: The commissioner of public lands, upon whom has been imposed the duties concerning state lands originally discharged by the superintendent of public instruction, as provided by statute; the state board of equalization, composed of three members, taking the place of the board originally provided for in the Constitution to be composed of the auditor, treasurer, and secretary of state, and said present board constitutes also the public utilities commission, named in the statute as the "public service commission;" and the insurance commissioner, upon whom is imposed duties originally imposed upon the state auditor. These are all important offices, proper, we think, to be classed with the appointive state offices provided for in the Constitution. And the fact that one such office with a specifically designated field of duty is named in the Constitution is not alone sufficient, in our opinion, to justify the court in holding the provision for impeachment applicable to it. The safer and more reasonable construction, we think, is that such provision, exclusive of judicial officers, includes only, under existing conditions, the elective state offices aforesaid.

[13] The removal proceeding is challenged also on the ground that the removal statute aforesaid, in so far as it may authorize a removal for other than misconduct or malfeasance in office (the causes stated in section 19 of article 3 of the Constitution) is void, if applicable at all to the office here in question created by the Constitution with a fixed term. And we think that contention must be sustained, though perhaps the proposition might better be stated in a different form, viz.: That the Legislature is without power as to this office, so created by the Constitution, to add to the causes for removal therein specified. 29 Cyc. 1410; 22 R. C. L. 561; 23 Ency. L. (2d Ed.) 431; Cooley's Const. Lim. 64; Commonwealth v. Williams, 79 Ky. 42, 42 Am. Rep. 204; Lowe v. Commonwealth, 3 Metc. (Ky.) 237; State ex rel. v. McNeely, 24 La. Ann. 19; Dawson v. Phillips, 78 W. Va. 14, 88 S. E. 456; Machem on Public Officers, § 457; People ex rel. v. Howland, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 535.

It is said in Dawson v. Phillips, supra:

"If it could be said that any of the causes specified in the statute are not included within either of the several classes specified in the Constitution, . . . the statute would not be thereby rendered wholly void, but void only to the extent that it impinges upon the Constitution."

The court said in the earlier case of Lowe v. Commonwealth, supra:

"It seems to us that there can be but one view of this question, which is, that wherever the Constitution has created an office and fixed

its term, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the Legislature to remove such officer or suspend him from office for any other reason or in any other mode than the Constitution itself has furnished."

Judge Cooley, in his work above cited, said:

"Another rule of construction is, that when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition, or to extend the penalty to other causes."

And Mechem says, in his work above cited:

"Where no constitutional provision interferes, it must rest with the Legislature to determine what causes shall be sufficient to warrant a removal, but where the Constitution provides that officers may be removed for a given cause, defining it in terms which have a definite and well-understood legal meaning, it is not competent for the Legislature to extend its scope by adding or incorporating offences which do not fall within that meaning. The statement of one cause is an implied prohibition to the Legislature's adding to it or extending it to other causes."

The cases holding that a mere statutory office—one created solely by the Legislature—is within legislative control, and may be abolished, or the incumbent made removable in manner declared by the Legislature, also in effect sustain the rule above stated as to an office created by the Constitution. See People v. Lippincott, 67 Ill. 333; Taft v. Adams, 60 Mass. (3 Gray) 128; State v. Douglas, 26 Wis. 428, 7 Am. Rep. 87; State v. Prater (N. D.) 139 N. W. 334. It is said in Taft v. Adams:

"Where an office is created by law, and one not contemplated, nor its tenure declared by the Constitution, but created by law solely for the public benefit, it may be regulated, limited, enlarged or terminated by law, as public exigency or policy may require."

In State v. Douglas, the court say:

"It is readily conceded that in a case of a constitutional office, the tenure of which is prescribed by that instrument, the Legislature cannot abridge the term thereof. . . . But in respect to an office created entirely by an act of the Legislature, the case is different."

And in State v. Prater:

"This legislative power of removal concerning a public office created by statute [italics ours] is not subject to the restrictions of the constitutional provisions concerning the removal of certain officers by impeachment or other officers upon stated grounds."

The controlling constitutional provision, quoted above when discussing the matter of

impeachment. Is that all officers not liable to impeachment shall be subject to removal in such manner as may be provided by law "for misconduct or malfeasance in office." The Legislature may provide by law the method and manner of removal under that provision, but it may not add a cause not comprehended within the meaning of misconduct or malfeasance in office. We understand counsel for respondent to have proceeded in their argument upon a different theory, for much emphasis was placed upon the provision of the statute authorizing removal for "any other cause deemed sufficient by the Governor." Some of the causes stated in the statute would no doubt constitute either misconduct or malfeasance in office, and to that extent the statute is applicable to the office in question, rendering also applicable, to the same extent, the method of removal provided by the statute. But it might be questionable whether such prescribed procedure would apply as to the office here in question with respect to a cause or reason for removal not falling within the meaning of the causes specified as aforesaid in the Constitution.

The method provided by the statute is merely that the reason for the removal shall be filed in the office of the secretary of state in writing, subject to inspection by any person interested. That was held to be a sufficient procedure in *State ex rel. Hamilton v. Grant*, supra, the court saying:

"To our minds the language of the proviso is inconsistent with the idea of a hearing. The sole restraint upon the action of the Governor is the filing of his reasons for the removal, and the consequent check of public opinion. . . . Being vested with the power to appoint many subordinate officers for whose conduct he is, in a measure at least, held responsible to the people, it was no doubt deemed wise by the Legislature to also invest him with the power of summary removal of such appointive officers for misconduct in office, whatever might be the source of his information and knowledge of such misconduct, so long as in his judgment it existed; and that the filing of his reasons was a sufficient guaranty of his good faith, and that the power would not be abused, but would be exercised only when a faithful execution of the laws required it. . . . The law can be repealed if proven to be vicious. Its wisdom does not concern us, for our duty is simply to declare the law as we find it to be."

That case was decided in 1905, shortly after the statute was enacted, and the statute has not been repealed, nor, so far as we are advised, has there been any attempt to repeal or change it in any particular. We shall accept the case, therefore, as ruling this case upon the question so decided. The court, in that case, however, added to the quoted statement the following:

"There is no claim advanced by counsel for the relator that the reasons assigned by the Governor are not such as, if true, would con-

stitute maladministration or misconduct in office, and they seem to us to be well within those terms."

[14, 15] Thus it seems that the court then deemed it necessary to the validity of the removal proceeding that the reasons assigned shall be such as to constitute misconduct or malfeasance in office. And, upon a careful consideration of the question in this case, the court is now of that opinion. Indeed, it is conceded that the court may inquire into the facts of the removal to determine whether the Governor has kept within his jurisdiction, and, therefore, whether the cause assigned is one for which the removal is authorized by law. And we agree with the respondent's contention that judicial cognizance of the governor's action does not reach beyond the jurisdictional inquiry. But that the court may go that far, where the removal is authorized only for cause or for causes specified in the Constitution or statutes, is, we think, well settled; at least that is the prevailing rule, and we think more reasonable than a rule denying the right of judicial inquiry or review in such cases. That is to say, the court may inquire into the existence of the jurisdictional facts, among which are:

"Whether the charges upon which the removing power acted were legal cause for removal, or whether the cause was sufficiently specified." 22 R. C. L. 574; 29 Cyc. 1410; 23 Ency. Law (2d Ed.) 429; Mechem on Pub. Off. § 456; Throop on Pub. Off. §§ 392-398; Village of Kendrick v. Nelson, 13 Idaho, 244; 89 Pac. 755, 12 Ann. Cas. 993; *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228; *State v. Hay*, 45 Neb. 321, 63 N. W. 821; *State v. Frazier*, 47 N. D. 314, 192 N. W. 545.

The court say, in *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796:

"An officer exercising such power . . . acts in a quasi judicial capacity, and the matter of procedure must be of a quasi judicial character, and as the officer is an inferior tribunal, as such he must be amenable to the court when acting in excess of the jurisdiction conferred. . . . Neither this nor any of the numerous authorities go further than to hold that excess of jurisdiction is jurisdictional. . . . Whether the Governor, exercising the power of removal, acquired jurisdiction to act and proceeded to a finality without excess of jurisdiction, may be inquired into whenever the result is called in question collaterally or directly."

In a note to *State ex rel. Kinsella v. Eberhart*, 39 L. R. A. (N. S.) 788, it is said:

"But it seems that the courts will look into the questions of the Governor's power and jurisdiction, and of the legality or existence of the ground assigned by the Governor."

In the cited Idaho case, it was held, quoting from the syllabus by the court:

"Where a statute provides that an officer may be removed for certain specified causes, the order of removal must be based and founded upon some one or all of such causes, and cannot be made for other causes."

[16; 17] The relator challenges the validity of the alleged removal proceeding on the further ground that the reasons assigned by the Governor for the removal do not constitute either misconduct or misfeasance in office. The cause assigned was the commission of a flagrant breach of good behavior detrimental to the public service, and an act of insubordination, by causing or allowing his commission as state engineer, issued to him in 1921, to be presented to the Senate for confirmation without consulting the Governor and without the latter's knowledge. Since the validity of the removal must depend upon the sufficiency of the cause or reasons assigned to vest jurisdiction in the Governor, we shall quote the entire statement of the reasons filed with the secretary of state, omitting only the address and signature, but stating that it was addressed to the secretary of state by name and title, and signed by the Governor. It was dated March 13, 1923, and reads:

"Under and by virtue of the authority vested in the Governor of the state of Wyoming by section 318, Wyoming Compiled Statutes of 1920, I hereby remove Frank C. Emerson from the office of state engineer.

"This action is taken because, contrary to the dignity of the office to which he was appointed after the adjournment of the Sixteenth State Legislature and in violation of the comity which should exist between any appointive state officers and the chief executive, in whom is vested the appointive power, Mr. Frank C. Emerson participated in and attempted an usurpation of the functions of the Governor by allowing an ad interim commission as state engineer, issued to him in 1921 by my predecessor after the adjournment of the Sixteenth State Legislature, to be presented to the Senate of the Seventeenth State Legislature for confirmation without the consent or knowledge of the Governor.

"Without the Governor having submitted any communication whatsoever to the Senate requesting the confirmation of his appointment as state engineer, he, without consulting the Governor and without the Governor's knowledge, allowed to be submitted to the Senate at three o'clock in the morning his commission for confirmation. Such an act on his part was extraordinary and unprecedented and subversive of all orderly procedure, and constituted a flagrant breach of good behavior which was detrimental to the public service. If tolerated by the executive it would establish a precedent that would tend to destroy the efficiency of the government and would place a premium upon gross insubordination, and lead other appointive officers in the future when moved by the desire to retain office regardless of the wishes of the appointive power to follow his example, not only by exceeding their own authority and attempting to force the hand of the Governor, but by boldly presuming as he has done to

exercise the power of the Governor to communicate executive appointments to the Senate.

"By his failure to observe the proper respect that is due to the office of Governor he has destroyed his usefulness as a public officer and made it wholly impossible for him and the executive to work in harmony. Such action as that of which he is guilty cannot be safely tolerated."

The above is from a certified copy from the office of the secretary of state furnished us upon the hearing by respondent's counsel, and differs in some particulars from the communication set out in the answer, alleged to have been addressed to the relator and filed with the secretary of state, but which, it seems, was merely sent to relator. That document uses the personal pronoun "you" in place of relator's name in the statement filed with the secretary of state, and contains matter not in the statement filed with the secretary of state, including the following in its closing paragraph:

"The services which you have rendered the state in the capacity of state engineer have not been ignored by me, and it may not be amiss to say, indeed, that requests for your appointment emanating from yourself and your friends were not without their weight with me, but these facts serve only to render your offense the more serious. The affront which you have offered leaves me no course but to take this action of removing you."

It seems necessary at this point to inquire into the meaning of misconduct or misfeasance in office, the causes stated in the Constitution for which the state engineer may be removed. The thought would naturally occur, it seems to us, that those words have reference to some official misconduct or misfeasance, rather than personal misbehavior alone not in any way affecting the incumbent's fitness or capacity to perform the duties of the office. And so the courts have held. It is said in *Mechem on Public Officers*, § 457:

"Where the removal is to be for official misconduct or for misfeasance or maladministration in office, the misconduct which shall warrant a removal of the officer must be such as affects his performance of his duties as an officer, and not such only as affects his character as a private individual. In such case, it is necessary 'to separate the character of the man from the character of the officer.' Misconduct, willful maladministration or breach of good behavior, in office, do not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or the official neglect to do an act which ought to have been done, will constitute the offence, although there was no corrupt or malicious motive."

The same principle is stated in *Throop*, at section 367:

"Where the Constitution or a statute authorizes a removal for official misconduct, or misfeasance, misconduct, or maladministration in office, or similar acts of misbehavior in office,

the general rule is that the officer can be removed only for acts or omissions relating to the performance of his official duties, not for those which affect his general moral character, or his conduct as a man of business, apart from his conduct as an officer."

In *Board v. Williams*, 96 Md. 232, 53 Atl. 923, the court say:

"The phrase 'for cause' does not mean the arbitrary will of the appointing power, for that might be the outgrowth of mere whim, caprice, prejudice or passion, which would, in reality, be no cause at all. But the phrase 'for cause' must mean some cause affecting or concerning the ability or fitness of the incumbent to perform the duty imposed upon him. . . . Hence it must be inefficiency, incompetency or other kindred disqualification. . . . When the right to remove can be exercised only for specific cause, or for cause generally, the appointing power cannot arbitrarily remove the officer."

To the same effect: 29 Cyc. 1410; 22 R. C. L. 571; *State v. Board*, 45 Mont. 188, 122 Pac. 589; *Townsend v. Council*, 71 Minn. 379, 74 N. W. 150; *Moulton v. Scully*, 111 Me. 428, 89 Atl. 944; *Jones v. State*, 104 Ark. 261, 149 S. W. 56, Ann. Cas. 1914C, 302; *State v. Slover*, 113 Mo. 202, 20 S. W. 789; *State ex rel. v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228; *State v. McGarry*, 21 Wis. 496. And "cause" prescribed as ground for the removal of an officer means "legal cause," so that the power cannot be exercised whimsically or arbitrarily. *People v. Lord*, 9 Mich. 227; *Dullam v. Wilson*, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 123; *Hagerty v. Shedd*, 75 N. H. 393, 74 Atl. 1055; *Farish v. Young*, 18 Ariz. 298, 158 Pac. 845; *Judges' Cases*, 102 Tenn. 509, 521, 53 S. W. 134; *State v. Hay*, 45 Neb. 321, 63 N. W. 831; *State v. Frazier*, 47 N. D. 314, 182 N. W. 545; *Lancaster v. Hill*, 136 Ga. 405, 71 S. E. 731, Ann. Cas. 1912C, 272. In the case last cited, the court say:

"Sufficient cause means legal cause, and that which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. . . . We do not think that the words 'sufficient cause' should be construed to embrace any cause not affecting the competency of the officer and his official conduct."

In *Jones v. State*, supra, it is said that the general terms "incompetency," "malfeasance," "misfeasance," and "nonfeasance" have reference to official conduct.

Tested by the principles aforesaid, the conviction is forced upon the court that the removal of the relator cannot be sustained as for a cause specified in the Constitution, or in the statute so far as applicable to the office in question. Further than that we need not decide. We think it very clear that the charge specified in the filed statement of the reasons for the removal did not involve any act or omission that could properly be

held to amount to misconduct or misfeasance in office. The relator is charged in that statement, and also in the statement directed and sent to him, with having allowed his commission as state engineer to be presented to the senate for confirmation without the Governor's knowledge or consent. That is all. The statement that in doing it the relator had participated in and attempted a usurpation of the function of the Governor is merely an interpretation of the effect of the act charged. We are quite unable, however, to agree with that interpretation. The Senate proceedings above quoted do not indicate that the relator assumed or pretended to represent or to exercise any power or prerogative of the Governor or the Governor's office. They clearly show, we think, the fact, or at least a recognition of the fact, that the Senate was not acting upon any communication or request from the Governor, and this appears more clearly comparing those proceedings with the proceedings confirming the other Governor Carey appointments communicated to them by Governor Ross. The Senate certainly understood that it was not acting pursuant to executive request when adopting the resolution or motion confirming relator's appointment, but that it was acting in the absence of such request.

Nor do we think the act charged amounted to insubordination, if it might be conceded that lack of obedience to the authority of the Governor in a matter not pertaining to the discharge of the duties of the engineer's office would constitute misconduct or malfeasance in office, within the meaning of those terms as used in the Constitution when prescribing causes for removal. The Senate is a co-ordinate branch of the appointing power as to said office, and we think it cannot be held an offense or official misconduct for an officer to confer with members of the Senate about confirming an appointment of himself already made or anticipated, or to inform them of the fact that he has been appointed.

The absence of any authorized cause for removal in the charge that the relator participated in and allowed his commission to be presented to the Senate for confirmation without consulting the Governor, or the implied charge that he may have requested such confirmation, becomes the more apparent when we consider what, if any, harm was caused the executive office by that act. If the confirmation under those circumstances might be held ineffectual, the only result would be to continue the relator in office under his vacancy appointment, which he would remain entitled to hold after the adjournment of said legislative session and during the recess of the Senate, unless removed according to law, or a vacancy should occur by some event other than the mere expiration of the term. For the Governor had not

sent the name of any person for this office to the Senate during that session. And the effect of the situation was no different, assuming, as we have held, that the confirmation was effective, except that he would then be holding the office under his later appointment as confirmed. In either event, a vacancy not occurring otherwise, the relator's removal would be necessary to authorize the appointment of a successor.

If, as we have felt necessary to hold, the Senate might properly act as it did in confirming the relator's appointment, then surely, as a corollary of that principle, the relator could not properly be held guilty of misconduct or misfeasance in office, because of the fact that he had allowed the Senate so to act or had participated in or allowed his commission to be presented to the Senate for that purpose. The truth is that, after much reading and consideration of the reasons stated for the removal, the court is unable to extract therefrom anything more than that by relator's act aforesaid he incurred the displeasure of the Governor, who considered that act a personal affront. But to hold that to be a sufficient ground for removal would be tantamount to a declaration that the Governor, arbitrarily, through mere whim or caprice, or personal dislike or displeasure, may remove any appointive officer subject to removal by him under the Constitution or the statute aforesaid. And it is very clear that the court would not be justified in going to that extent, at least as to the office in question which is only partially controlled by the statute, as above explained.

As a result of the views hereinbefore announced, the respondent's answer must be held insufficient and his demurrer to the reply overruled, and unless further facts are to be pleaded an order will be entered declaring the relator entitled to the office and directing the appropriate relief.

BLUME and KIMBALL, JJ., concur.

BANKERS' CONST. CO. v. AMERICAN NAT. BANK OF CHEYENNE. (No. 1084.)

(Supreme Court of Wyoming. Jan. 22, 1924.)

1. Corporations ⇨519(3)—Finding that contract made with promoters of corporation was intended to be adopted by it held warranted.

In an action on a quantum valebant for material furnished a corporation over and above that specified in a building contract, evidence held sufficient to warrant a finding that the contract was made with the promoters of the corporation with the intention that it should be adopted by the corporation; that it was not mutually abandoned; and that the amount

claimed over and above that specified in the contract was claimed by reason of changes made.

2. Corporations ⇨448(2)—Contract made by promoters of corporation becomes contract of corporation when adopted by it.

A contract made by the promoters of a corporation on its behalf becomes the contract of the corporation, so that it is both entitled to the benefit and liability thereon, if it adopted it, after coming into existence.

3. Corporations ⇨519(3)—Evidence held sufficient to show that corporation adopted contract made by promoters.

Evidence that a corporation made whatever payments were made on a contract made with the promoters of the corporation prior to its existence, that it received and accepted the benefit of the contract, and in a suit for material furnished over and above that specified therein, relied upon and defended under it, held sufficient to show that the corporation had adopted the contract.

4. Principal and agent ⇨171(9)—Principal relying on unauthorized contract made by agent impliedly adopts it.

If a principal seeks to enforce rights based on the unauthorized contract of an agent or seeks to take advantage of the contract; or to set it up in a cross-action, by way of defense to a suit brought against him, he thereby impliedly adopts or ratifies such contract.

Appeal from District Court, Laramie County; William C. Mentzer, Judge.

Action by the Bankers' Construction Company against the American National Bank of Cheyenne. Judgment for defendant, and plaintiff appeals. Affirmed.

George P. Steele, of Denver, Colo., and Kinkead, Ellery & Henderson, of Cheyenne, for appellant.

Lacey & Lacey and W. E. Mullen, all of Cheyenne, for respondent.

BLUME, J. [1] This action is in quantum valebant, brought by the Bankers' Construction Company, plaintiff and appellant, against the American National Bank, defendant and respondent, to recover the sum of \$7,312.93 alleged as a balance due plaintiff from defendant by reason of furnishing, delivery, and installment by plaintiff for defendant of certain banking room equipment, furniture, and fixtures in the Hynds building in the city of Cheyenne. The total value of such equipment, furniture, and fixtures is alleged to be of the value of \$42,204.68, of which defendant paid the sum of \$34,891.75, leaving due the balance above mentioned. The defendant answered and filed a cross-petition, alleging that it was organized under the banking laws of the United States, on June 21, 1919; that prior thereto, on February 22, 1919, John Huy and J. C. Kinney entered into a contract with plaintiff for the work and

STATE of West Virginia ex rel. John G.
FOX, Attorney General, etc.,

v.

Raymond BREWSTER.

No. 10665.

Supreme Court of Appeals of West Virginia.

Submitted Sept. 7, 1954.

Decided Oct. 12, 1954.

The State of West Virginia, on the relation of the Attorney General, brought quo warranto proceeding against member of the State Board of Education to oust and expel the member from his office. The Circuit Court of Kanawha County, Frank L. Taylor, J., entered judgment adverse to the Attorney General, and he brought error. The Supreme Court of Appeals, Riley, J., held that the executive power vested in the office of the Governor is, under the state Constitution, a continuing power, not broken by succession, and where, pursuant to statute creating State Board of Education, the power of the Governor has been exercised by appointment of a member of the board during a recess of the Senate, and appointee has qualified and has become vested with powers and emoluments of the office, neither the Governor, who has made the interim appointment, nor his successor has further control over the appointment, and the name of another person may not be substituted for that of the appointee, unless and until the original appointment has been rejected by the Senate.

Affirmed.

1. Quo Warranto ⇨10

Office of member of the West Virginia Board of Education is a "public office" within meaning of statute dealing with an information in the nature of quo warranto. Code, 18-2-1, 53-2-4.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Office".

2. Schools and School Districts ⇨47

Office of member of the West Virginia Board of Education is not created by the state Constitution, and therefore the Legislature, in prescribing terms of office, powers, duties and compensation of members, and manner of appointment of members, acted pursuant to constitutional provision that the Legislature, in cases not provided for in the Constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and manner in which they shall be elected, appointed and removed. Code, 18-2-1; Const. art. 4, § 8.

3. Constitutional Law ⇨26

The state Constitution is not a grant of powers to the Legislature.

4. Constitutional Law ⇨26

The Legislature may enact any law not prohibited by the state Constitution or federal Constitution.

5. Officers ⇨2

Constitutional provision reserving to the Legislature, in cases not provided for in the Constitution, the plenary power to prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and manner in which they shall be elected, appointed, and removed, includes the agent of person who may appoint, as well as the formality with which it should be done. Const. art. 4, § 8.

6. Schools and School Districts ⇨47

Members of the West Virginia Board of Education, other than the State Superintendent of Schools, are to be appointed by the Governor, by and with the advice and consent of the Senate, pursuant to statute creating the State Board of Education, and are not to be nominated by the Governor and appointed thereafter by and with the advice and consent of the Senate pursuant to constitutional provision that the Governor shall nominate, and, by and with advice and consent of the Senate, appoint all

officers whose offices are established by the Constitution, or shall be created by law, and whose appointment or election is not otherwise provided for. Code, 18-2-1; Const. art. 7, § 8.

7. Schools and School Districts ⇨47

The Senate could properly act on the appointment by the Governor of a member of the State Board of Education during a legislative interim, notwithstanding that the Governor had not by direct message to the Senate submitted the name of the appointee for the Senate's approval. Code, 18-2-1.

8. Schools and School Districts ⇨47

Expiration of term of office of de jure member of State Board of Education, other than State Superintendent of Schools, during recess of Senate does not create a "vacancy" within meaning of statutory provision that any "vacancy" on board shall be filled by the Governor by appointment for unexpired term, or within meaning of constitutional provision that in case of a "vacancy" in a nonelective office, occurring during a recess of the Senate, the Governor shall, by appointment, fill such "vacancy" until next session of Senate when he shall make a nomination for such office. Code, 18-2-1; Const. art. 7, § 9.

See publication Words and Phrases, for other judicial constructions and definitions of "Vacancy".

9. Schools and School Districts ⇨47

The statute creating the State Board of Education, read in connection with sections of the Constitution providing for sessions of the Legislature, the length thereof, and the convening of extraordinary sessions of the Legislature, evidences an intent of the Legislature to vest in the Governor the power to appoint a member of the State Board of Education when the term of a de jure member thereof expires during a recess of the Senate. Code, 18-2-1; Const. art. 6, §§ 18, 19, 22.

10. Statutes ⇨212.1, 212.5

In construing statutes, courts must presume knowledge on part of the Legislature

of provisions of the state's organic law relating to the subject-matter thereof, as well as of the principles of the common law, and will not impute to the Legislature any intention to obstruct or impede operation of constitutional provisions, or to innovate on the settled policy of the law.

11. Schools and School Districts ⇨47

When, at expiration of term of a de jure member of the State Board of Education during recess of the Senate, the Governor reappoints the member whose term has expired, or appoints another person, for the ensuing term, the Governor thereby exhausts all power in reference to the appointment vested him under statute creating the State Board of Education, and thereupon the appointee becomes a de jure member of the board for the term of office to which he has been appointed, subject to confirmation of the Senate when it next convenes. Code, 18-2-1.

12. Schools and School Districts ⇨47

States ⇨43

The executive power vested in the office of the Governor is, under the state Constitution, a continuing power, not broken by succession, and where, pursuant to statute creating State Board of Education, the power of the Governor has been exercised by appointment of a member of the board during a recess of the Senate, and appointee has qualified and has become vested with powers and emoluments of the office, neither the Governor, who has made the interim appointment, nor his successor has further control over the appointment, and the name of another person may not be substituted for that of the appointee, unless and until the original appointment has been rejected by the Senate.

13. Schools and School Districts ⇨47

Where term of member of State Board of Education has expired during legislative interim, and the Governor has made an interim appointment of a member of the board for the ensuing term, the appointee becomes a de jure member of the board for the whole of the ensuing term, subject to

confirmation by the Senate, and such appointee cannot be removed from his *de jure* office by the Governor unless there has been compliance with statutory provision specifying and limiting grounds for removal of member of the board by the Governor, and the manner of such removal. Code, 18-2-1.

14. Statutes $\Rightarrow$ 96(4)

Statutory provision dealing with removal of members of the State Board of Education by the Governor is an enactment dealing generally with removal of members of the board, and is not a special act interdicted by constitutional provision that the Legislature shall not pass local or special laws in enumerated cases. Code, 18-2-1; Const. art. 6, § 39.

Syllabus by the Court.

1. Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, creating the West Virginia Board of Education, providing how the board shall be constituted, the terms of office of the members thereof, the filling of vacancies on the board, the removal of members of the board, and the qualification of members thereof by taking the prescribed oath, was enacted pursuant to the provisions of West Virginia Constitution, Article IV, Section 8.

2. West Virginia Constitution, Article IV, Section 8 vests in and reserves to the Legislature, in cases not provided for in the Constitution, the plenary power to prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed.

3. In the application and interpretation of a state constitution, as distinguished from the Constitution of the United States, the constitution of a state is not a grant of powers to the Legislature thereof, but the Legislature is the supreme law-making body within the state, and, as such, may enact any law not prohibited by the Con-

stitution of the United States or the state constitution.

4. "Prescribing the 'manner' in which public officers shall be elected and removed, as expressed in the 8th section of art. 4 of the constitution of the State of West Virginia, when read and considered in connection with article 7, secs. 1 and 8, and sec. 40 of article 6 and other sections of the same constitution, includes the agent or person who may appoint, as well as the formality with which it should be done." Pt. 3 Syl., *Bridges v. Shallcross*, 6 W.Va. 562.

5. Under the provision of Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, prescribing that the members of the West Virginia Board of Education, other than the state superintendent of schools, " * * * shall be * * * appointed by the governor, by and with the advice and consent of the Senate," and the provision of West Virginia Constitution, Article VII, Section 8, excluding from the operation of Section 8 those officers "whose appointment or election is not otherwise provided for", the members of the West Virginia Board of Education, other than the state superintendent of schools, shall be appointed by the governor, by and with the advice and consent of the senate, pursuant to the provisions of Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, and not nominated by the governor, and thereafter appointed by and with the advice and consent of the Senate, pursuant to the provisions of West Virginia Constitution, Article VII, Section 8.

6. The Senate may properly act on the appointment of a member of the West Virginia Board of Education by the governor during a legislative interim, notwithstanding the governor has not by direct message to the Senate submitted the name of the appointee for the Senate's approval.

7. The expiration of the term of office of a *de jure* member of the West Vir-

ginia Board of Education, other than the state superintendent of schools, during a recess of the Senate does not create a vacancy within the provision of Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, or West Virginia Constitution, Article VII, Section 9, which provides that in case of a vacancy in a nonelective office, occurring during a recess of the Senate, the governor shall, by appointment, fill such vacancy, until the next session of the Senate when he shall make a nomination for such office.

8. Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, read in connection with Sections 18, 19, and 22, Article VI, of the West Virginia Constitution, providing for sessions of the Legislature, the length thereof, and for the convening of extraordinary sessions of the Legislature, evidences an intent of the Legislature to vest in the governor the power to appoint a member of the West Virginia Board of Education, when the term of a *de jure* member thereof expires during a recess of the Senate.

9. "In construing statutes, courts must presume knowledge on the part of the legislature, of the provisions of the organic law of the state, relating to the subject matter thereof, as well as of the principles of the common law, and will not impute to that body any intention to obstruct or impede the operation of constitutional provisions, or to innovate upon the settled policy of the law." *Webb v. Ritter*, Pt. 5 Syl., 60 W.Va. 193 [54 S.E. 484].

10. When, at the expiration of the term of a *de jure* member of the West Virginia Board of Education during a recess of the Senate, the governor reappoints the member whose term has expired, or appoints another person, for the ensuing term, the governor thereby exhausts all power in reference to the appointment vested in him under Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1; and thereupon the ap-

pointee becomes a *de jure* member of the board for the term of office to which he has been appointed, subject to the confirmation of the Senate when it next convenes.

11. The executive power vested in the office of the governor of this State is, under West Virginia Constitution, a continuing power, not broken by succession, and where, pursuant to the provisions of Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, the power of the governor has been exercised by the appointment of a member of the West Virginia Board of Education during a recess of the Senate, and the appointee has qualified and become vested with the powers and emoluments of the office, neither the governor, who has made the interim appointment, nor his successor, has further control over the appointment, so that the name of another person may be substituted for the appointee, unless and until the original appointment has been rejected by the Senate.

12. Where the term of a member of the West Virginia Board of Education has expired during a legislative interim, and the governor has made an interim appointment of a member of the board for the ensuing term, the appointee becomes a *de jure* member of the board for the whole of the ensuing term, subject to confirmation by the Senate, and such appointee cannot be removed from his *de jure* office by the governor, unless the provisions of Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, providing for, specifying and limiting the grounds for the removal of a member of the West Virginia Board of Education by the governor, and the manner of such removal, have been complied with.

13. The clause contained in Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, providing for the removal of members of the West Virginia Board of Education by the governor is an enactment dealing generally with

the removal of members of the West Virginia Board of Education, and is not a special act interdicted by the provisions of West Virginia Constitution, Article VI, Section 39, and as the grounds for removal specified in Section 1 of the statute are fairly contained in the several classes of grounds for removal contained in West Virginia Constitution, Article VII, Section 10, the clause is not violative of the West Virginia Constitution.

John G. Fox, Atty. Gen., Arden J. Curry, Asst. Atty. Gen., for plaintiff in error.

Estep, Chambers & Smith, Logan, for defendant in error.

Vincent V. Chaney, Charleston, amicus curiae for The Senate of the State of West Virginia.

RILEY, Judge.

The Attorney General of West Virginia, Honorable John G. Fox, filed in the Circuit Court of Kanawha County a petition praying for leave to file an information in the nature of a writ of *quo warranto* against the respondent, Raymond Brewster, praying that due process of law be awarded in the name of the State of West Virginia against Raymond Brewster, returnable to the next term of the circuit court to cause him to answer the information and disclose to the circuit court by what warrant, right or lawful authority he has intruded upon and usurped the public office of member of the West Virginia Board of Education from the Fourth Congressional District of West Virginia, for the unexpired term ending on June 30, 1961, and that the respondent be ousted and expelled by the judgment of the circuit court from such office for the unexpired term thereof. To the petition the respondent filed an answer, to which answer the petitioner filed a replication, and the respondent filed a rejoinder to the replication. To the final order of the Circuit Court of Kanawha County, entered on March 1, 1954, finding that no vacancy existed in the office of member of the West Virginia Board of Education, on June 30,

1952, upon the expiration of the five-year term for which the respondent Brewster had been lawfully appointed and had served as a *de jure* officer, adjudicating that the respondent has shown that he has a lawful right and title to the office of member of the West Virginia Board of Education for the term expiring on June 30, 1961, and refusing the judgment of ouster prayed for by the relator, this writ of error is prosecuted.

The proceeding was tried in the Circuit Court of Kanawha County upon the written stipulation of facts agreed to and entered into by Arden J. Curry, Assistant Attorney General of West Virginia and counsel for petitioner, and F. Paul Chambers, of counsel for the respondent, Raymond Brewster.

[1,2] The office in controversy of member of the West Virginia Board of Education was established by Code, 18-2-1, as amended and re-enacted by Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, and is a public office within the meaning and intent of Code, 53-2-4, as amended. The stipulation provides, and we so hold, that such office is not created by the Constitution of the state of West Virginia, and that in prescribing the terms of office, powers, duties and compensation of members of the West Virginia Board of Education, and the manner in which the members shall be appointed, the Legislature acted pursuant to the authority granted to it by the West Virginia Constitution, Article IV, Section 8, which provides that: "The Legislature, in cases not provided for in this Constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed."

Code, 18-2-1, as amended and re-enacted by Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, establishing the State Board of Education as a corporation to be known and designated as the West Virginia Board of Education,

provides in Section 1 of Article 2 of Chapter 72, Acts of the Legislature, Regular Session, 1947, that:

"There shall be a state board of education, to be known as the West Virginia board of education, which shall be a corporation and as such may contract and be contracted with, plead and be impleaded, sue and be sued, and have and use a common seal. The state board shall consist of ten members, of whom one shall be the state superintendent of schools, ex officio, who shall not be entitled to vote. The other nine members shall be citizens of the state, appointed by the governor, by and with the advice and consent of the Senate, for overlapping terms of nine years, except that the original appointments shall be for terms of one, two, three, four, five, six, seven, eight and nine years, respectively. At least one but not more than two members shall be appointed from each congressional district, and at least one member shall be of the Negro race.

* * * * *

"The governor shall appoint all members of the state board as soon after the effective date hereof as is practicable for respective terms of office beginning on the first day of July, one thousand nine hundred forty-seven. Any vacancy on the board shall be filled by the governor by appointment for the unexpired term. The terms of office of present members of the state board shall expire on the thirtieth day of June, one thousand nine hundred forty-seven.

"No member of the state board may be removed from office by the governor except for official misconduct, incompetence, neglect of duty, or gross immorality and then only in the manner prescribed by law for the removal by the governor of state elective officers."

The stipulation states that at all times pertinent to the decision of this case, the respondent, Raymond Brewster, was eligi-

ble for appointment as a member of the West Virginia Board of Education; and, as the case was presented to the circuit court and tried on the basis of the factual situation portrayed by the stipulation of counsel, it becomes necessary in the decision of this case to set forth the pertinent facts contained in counsel's stipulation.

On July 1, 1947, when the Legislature was in recess, the Governor of this State, Honorable Clarence W. Meadows, pursuant to Code, 18-2-1, as amended and re-enacted by Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, "appointed" the respondent, Raymond Brewster, to the "public office" of member of the West Virginia Board of Education for the five-year term ending on June 30, 1952, by a letter of appointment directed by the then Governor to the Secretary of State of West Virginia, with a copy thereof to the Clerk of the State Senate. Pursuant to this letter a commission of appointment was issued to the respondent, in accordance with Code, 6-4-3, which appointment was accepted by the respondent, who qualified by taking the requisite oath, and respondent received such office in the manner provided by law. The letter of Governor Meadows, dated July 1, 1947, addressed to the Honorable William S. O'Brien, then Secretary of State, a copy of which was mailed or delivered to the Clerk of the State Senate, reads:

"As Governor of the State of West Virginia, I have today appointed Raymond Brewster of Huntington, Cabell County, (4th Congressional District), a member of the West Virginia Board of Education, for the term ending June 30, 1952.

"Please issue commission accordingly."

The next session of the State Senate, after the appointment of the respondent, Raymond Brewster, by Governor Meadows was legally organized and convened on January 12, 1949, as provided by the Constitution of West Virginia, Article VI, Section 18.

Though the term of office of Clarence W. Meadows, as Governor of the State of West Virginia, expired on January 18, 1949, Governor Meadows did not at any time during his term of office submit the name of the respondent, Raymond Brewster, to the State Senate "for nomination" to the office of member of the West Virginia Board of Education for the five-year term ending June 30, 1952, "unless all or a part of the facts stipulated in numbered paragraph (4) [of the stipulation] had such legal effect;" and the stipulation specifically provides that the petitioner does not agree or admit that the facts stipulated in numbered paragraph (4) of the stipulation had such legal effect, and the respondent does not agree or admit that it was necessary for Governor Meadows to submit the name of the respondent to the State Senate, in order for the Senate to properly consider and consent to the appointment. Paragraph (4) of the stipulation provides:

"That, as required by Section 1 of Article 2 of Chapter 5 of the Official Code of West Virginia, as amended, the Secretary of State of West Virginia, at all times relevant herein, kept and preserved a public record described by statute as 'a journal of executive proceedings,' and designated by the Secretary of State as the 'Executive Journal,' in which said Secretary of State recorded all pertinent data relating to appointments to office made by the Governor and commissions issued pursuant thereto and that said Secretary of State likewise filed, kept and preserved as public records all letters of appointment executed by the Governor of the State of West Virginia; that pursuant to his duties as aforesaid the Secretary of State properly filed, kept and preserved as a public record the aforesaid letter of Clarence W. Meadows appointing this respondent as a member of the West Virginia Board of Education and that he likewise recorded and properly indexed in the aforesaid journal a rec-

ord of said appointment and issuance of a commission by the Governor pursuant thereto, which record included all pertinent data contained in the aforesaid letter of appointment and the aforesaid commission."

At the expiration of the term of his office on January 18, 1949, the Legislature then being in session, Governor Meadows was succeeded as Governor of the State of West Virginia by the Honorable Okey L. Patteson, who, at the then pending regular session of the Legislature, submitted to the State Senate on March 9, 1949, a written list of names, which included the name of the respondent, Raymond Brewster, "naming" Brewster to the office of member of the West Virginia Board of Education for the term ending June 30, 1952, for the Fourth Congressional District, and requesting the favorable advice and consent of the Senate to make such named appointments; and the State Senate, acting upon the list of names submitted by Governor Patteson, confirmed the respondent, Raymond Brewster, for the office of member of the West Virginia Board of Education for the term ending June 30, 1952, but the stipulation expressly states that the respondent does not agree or admit that it was necessary for Governor Patteson affirmatively to submit the name of the respondent to the Senate for confirmation in order for the Senate properly to consider and consent to the appointment of respondent to the office of member of the West Virginia Board of Education, for the term ending June 30, 1952.

The stipulation further states that Governor Patteson by letter dated June 26, 1952, and directed to the Honorable D. Pitt O'Brien, Secretary of State of West Virginia, with a copy to Honorable J. Howard Myers, Clerk of the State Senate, during the recess thereof, "reappointed" the respondent Raymond Brewster to the office of member of the West Virginia Board of Education, effective July 1, 1952, for the term ending June 30, 1961, a copy of which letter was filed with

the petitioner's information in this cause as an exhibit thereto and made a part of the stipulation.

Though the respondent accepted the "appointment" tendered to him by Governor Patteson, and duly qualified as a member of the West Virginia Board of Education by taking the prescribed oath of office, and contemporaneously with the issuance of the letter of appointment by Governor Patteson of June 26, 1952, and pursuant to Code, 6-4-3, a commission was issued to the respondent, the stipulation states that the respondent Brewster does not agree or admit that his appointment was in fact and in law a nomination of respondent by Governor Patteson for the office in question. The stipulation states that "at the time of the aforesaid appointment of Raymond Brewster by Governor Okey L. Patteson; on June 26, 1952; the respondent, Raymond Brewster, was lawfully serving as a member of the West Virginia Board of Education, pursuant to his original appointment by Governor Clarence W. Meadows; for the term ending June 30, 1952," and that, pursuant to the duties imposed upon the Secretary of State by statute, the Secretary of State filed, kept and preserved as a public record, Governor Patteson's letter of June 26, 1952, appointing the respondent, Raymond Brewster, to the office of member of the West Virginia Board of Education, and properly recorded and indexed the same in the journal of executive proceedings, known as the "Executive Journal," a public record, of the appointment and commission issued pursuant thereto, all of which is shown by the certificate of the Secretary of State filed as an exhibit to respondent's answer and made a part of the stipulation.

The stipulation further states that Governor Patteson forwarded a copy of the letter of appointment dated June 26, 1952, to the Honorable J. Howard Myers, Clerk of the State Senate, and editor of the West Virginia Blue Book, a book published pursuant to statute, stating various and comprehensive facts concerning the State, its

government, and its officials, with the duties of each thereof, which Clerk of the State Senate in a letter dated June 27, 1952, addressed to Governor Patteson, acknowledged receipt of Governor Patteson's letter of June 26, 1952.

The next session of the State Senate following the appointment of the respondent, Raymond Brewster, by Governor Patteson was legally organized and convened on January 14, 1953, as provided by West Virginia Constitution, Article VI, Section 18.

Though Governor Patteson's term of office as Governor of West Virginia expired on January 18, 1953, he did not, as Governor of the State of West Virginia, and during his term as Governor, at any time take any action, other than that heretofore recited, with reference to the appointment of the respondent, or any other person, to the office of member of the West Virginia Board of Education for the term ending June 30, 1961; and the stipulation states that the respondent does not agree or admit that it was necessary for Governor Patteson to take further action in order for the State Senate properly to consider and consent to the appointment of respondent to the office in question.

On January 18, 1953, while the Legislature, which had convened on January 14, 1953, was still in session, Honorable William C. Marland duly qualified as Governor of West Virginia, and during the session of the State Senate did not nominate the respondent, Raymond Brewster, for the office in question for the remainder of the term thereof ending June 30, 1961; but Governor Marland did on March 12, 1953, submit to the State Senate a written list of names, which included the name of one Homer Gebhardt, purporting to nominate Gebhardt to the office of member of the West Virginia Board of Education for the Fourth Congressional District for the term ending June 30, 1961, and the State Senate during its next regular session, convened after the action of Governor Patteson in reference to the office of member of the West Virginia Board of Education

for the Fourth Congressional District, took such action as is shown by a copy of the minutes of the State Senate's meeting in executive session on March 14, 1953, a copy of which is made an exhibit to petitioner's information and made a part of the stipulation.

The Executive Journal of the State Senate of March 14, 1953, discloses that Governor Marland's letter of March 12, 1953, was laid before the President of the Senate and read by the Clerk of the Senate, which letter listing the names and addresses of ninety-six "nominees" of Governor Marland, together with the office to which each had been "nominated", included: "For Member of the West Virginia Board of Education—Homer Gebhardt Huntington, Cabell County, (R) 4th Congressional District." The minutes of the executive session of the State Senate held on March 14, 1953, disclose that the members of the Senate present voted unanimously in the affirmative on the question: "Shall the foregoing nominations of the Governor, with the exception of the nominations for West Virginia State Board of Education and West Virginia University Board of Governors, for the positions and terms shown in his communication, be confirmed?" Then, upon motion duly carried, the letter of Governor Patteson, dated June 26, 1952, addressed to Honorable D. Pitt O'Brien, Secretary of State of West Virginia, notifying the Secretary of State that Governor Patteson had "reappointed" the respondent, Raymond Brewster, as a member of the West Virginia Board of Education, effective July 1, 1952, for the term ending June 30, 1961, and requesting that a commission be issued to the respondent accordingly; and the letter of June 23, 1952, addressed by Governor Patteson to the Secretary of State in reference to the reappointment of A. C. Spurr of Fairmont, as a member of the West Virginia University Board of Governors, effective July 1, 1952, for the term ending June 30, 1961, were read to the Senate and spread upon the executive records of the meeting. Acting upon these letters, the Senate thereupon, while still in executive session, adopted a motion that

the communications of Governor Patteson under date of June 26, 1952, addressed to the Secretary of State, with respect to the nomination of Raymond Brewster to the West Virginia Board of Education, a signed copy of which, the motion recites, was delivered to Honorable J. Howard Myers, Clerk of the Senate, and the letter of June 23, 1952, in reference to the "reappointment" of A. C. Spurr as a member of the West Virginia University Board of Governors, be treated and considered by the Senate as the "nominations" of the gentlemen named, "as required by the Constitution and statutes." The Senate then, upon motions duly carried "confirmed" the nomination of the respondent for member of the West Virginia Board of Education for the term set out in Governor Patteson's communication, and confirmed "the nomination of A. C. Spurr, of Fairmont, Marion County, for member of the West Virginia University Board of Governors, for the position and term set out in the communication from Governor Okey L. Patteson"; and the President of the Senate announced that both nominations had been confirmed by a majority of the members elected to the Senate having voted in the affirmative. And, finally, so far as the actions of the State Senate bear on the decision in this case, the Senate, upon motion duly adopted, refused "to act on the nominations of Homer Gebhardt, of Huntington, Cabell County, for member of the West Virginia State Board of Education, and Carl J. Carter, M.D., of Fairmont, Marion County, for member of the West Virginia University Board of Governors, for the reason that no vacancy in the offices for which these gentlemen were nominated, now exists."

The stipulation further states that following the convening of the regular session of the State Senate on January 14, 1953, and that at all times thereafter, the respondent, Raymond Brewster, has continued to attend all meetings held by the West Virginia Board of Education, and at such meetings and otherwise respondent has continued to assume, use, exercise, enjoy and perform the franchise and office,

together with the functions, duties and powers thereof, of member of the West Virginia Board of Education for the term of office ending on June 30, 1961, and that in particular the board on February 5 and 6, 1953, duly held a meeting at its offices in the State Department of Education at the State Capitol in Charleston, West Virginia, at which respondent was present and did assume, use, exercise, enjoy and perform the franchise and office, together with the functions, duties and powers thereof as a member of the board from the Fourth Congressional District for the term beginning July 1, 1952, and ending June 30, 1961; and more particularly the respondent in the same way participated in like meetings held at the State Capitol in Charleston on March 25 and 26, 1953, but the stipulation states that the petitioner does not agree or admit that respondent was legally exercising the power of the office in question, or was acting in the capacity of a *de jure* officer.

Further the stipulation states that respondent still does hold the public office in question for the term thereof ending on June 30, 1961, but petitioner does not agree or admit that respondent holds the office in question in the capacity of a *de jure* officer.

The stipulation states that a certified copy of the letter dated March 12, 1953, from Governor Marland to the State Senate, appointing Homer Gebhardt to the office of member of the West Virginia Board of Education for the Fourth Congressional District, filed with the information in this proceeding as an exhibit thereto, is made a part of the stipulation, but that the respondent does not agree or admit that the letter constitutes a nomination or had any legal effect.

Further, the stipulation states in Section (24) thereof that neither Governor Patterson nor Governor Marland took any action to revoke the appointment of the respondent, Raymond Brewster, as a member of the Board of Education for the term beginning July 1, 1952, and ending June 30, 1961, unless the action of Governor Marland in

submitting to the State Senate "the aforesaid nomination" of Homer Gebhardt to the office in question had such legal effect; and further it is stated in the stipulation that the petitioner does not agree or admit that it was necessary for Governor Patterson or Governor Marland to take any action to revoke the appointment of the respondent. The stipulation further states that the petitioner denies the relevancy of the paragraph numbered (24) in the stipulation.

The stipulation states in the paragraph numbered (25) that after the action of the State Senate on March 14, 1953, in confirming the appointment of the respondent, Raymond Brewster, to the office in question, and in refusing to act upon the nomination of Homer Gebhardt to such office, Governor Marland has not attempted to make any other or further nomination or appointment for membership on the West Virginia Board of Education to take the place of the respondent, Raymond Brewster, as a member of the board; but the stipulation states that the petitioner does not agree or admit that it was necessary for Governor Marland to make any further nomination or appointment of any person to take the place of the respondent, Raymond Brewster, as a member of the board of education, and further the stipulation states that the petitioner specifically denies the relevancy of the paragraph numbered (25).

It is further stipulated that it has been the common practice of the Governors of this State to submit to the Senate next in session, a written list of the names of the appointees of the Governors during recesses of the Senate, with a request for the favorable advice and consent of the Senate on such appointments.

Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, creating a state board of education to be known as the West Virginia Board of Education, providing how it shall be constituted, the terms of office of the members thereof, the filling of vacancies on the

board, the removal of members of the board, and the qualification of members thereof by the taking of the prescribed oath, is controlling in the decision of this case; and was enacted by the Legislature, pursuant to the plain and plenary provisions of West Virginia Constitution, Article IV, Section 8, which provides: "The Legislature, in cases not provided for in this Constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed."

[3, 4] In *Eskew v. Buckhannon Bank*, 115 W.Va. 579, 587, 177 S.E. 433, 437, this Court applied the rule applicable in the interpretation of every State Constitution, as distinguished from the Constitution of the United States, that the Constitution of a state "is not a grant of powers to the Legislature, and the Legislature is supreme unless restricted by the Constitution." To the effect that the State Legislature is the supreme law-making body within the State, and, as such, may enact any law not prohibited by the State or Federal Constitutions, see *Harbert v. Harrison County Court*, 129 W.Va. 54, 39 S.E. 177; *State v. Huber*, 129 W.Va. 198, 40 S.E.2d 11, 168 A.L.R. 808, and generally 4 M. J., Constitutional Law, Section 61, and the many cases cited under notes 17, 18, 19 and 20 thereof. See in particular the cases of *State ex rel. Thompson v. Morton* and *State ex rel. Donohoe v. Hutchinson*, W.Va., 84 S.E.2d 791.

[5] In the year following the adoption of the present Constitution of West Virginia in 1872, which contained Article IV, Section 8, this Court held in point 3 of the syllabus of *Bridges v. Shallcross*, 6 W.Va. 562, that: "Prescribing the 'manner' in which public officers shall be elected and removed, as expressed in the 8th section of art. 4 of the constitution of the State of West Virginia, when read and considered in connection with article 7, secs. 1 and 8, and sec. 40 of article 6 and other sections of the same constitution, includes the agent

or person who may appoint, as well as the formality with which it should be done."

[6] For the reason that Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, in clear language, which is mandatory in its express terms, provides that the members of the West Virginia Board of Education, other than the state superintendent of schools, " * * * shall be * * * appointed by the governor, by and with the advice and consent of the Senate," initially it is important to note that West Virginia Constitution, Article VII, Section 8, which *inter alia*, provides that "The Governor shall *nominate*, and by and with the advice and consent of the Senate, * * * appoint all officers whose offices are established by this Constitution, or shall be created by law, and *whose appointment or election is not otherwise provided for*, * * *" (italics supplied), has no application in the decision of this case.

By virtue of the italicized words contained in West Virginia Constitution, Article VII, Section 8, excluding from the operation of this section those officers "*whose appointment or election is not otherwise provided for*," this Court is at liberty to apply in the decision of this case the unambiguous and mandatory provisions of Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, which statute was enacted under the broad provisions of West Virginia Constitution, Article IV, Section 8, vesting in and reserving to the Legislature, in cases not provided for in the Constitution, the power to "prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed." Unlike West Virginia Constitution, Article VII, Section 8, which empowers the governor to *nominate*, and by and with the advice and consent of the Senate appoint, certain officers designated therein, the statute under consideration and

controlling in the decision of this case provides that the governor shall "appoint" the nine members of the West Virginia Board of Education, other than the state superintendent of schools, by and with the advice and consent of the Senate.

[7] It should also be observed that the issuance of a commission to the respondent, Raymond Brewster, as a member of the West Virginia Board of Education for the Fourth Congressional District for the term ending June 30, 1952, pursuant to the letter addressed to the Secretary of State by Clarence W. Meadows, then Governor of this State, dated July 1, 1947, is of no moment in the decision of this case. *Marbury v. Madison*, Secretary of the United States, 1 Cranch 137, 2 L.Ed. 60. At the time of respondent's appointment to the board of education, pursuant to Governor Meadows' letter, the Legislature was not in session. When the Legislature convened at its next regular session on January 12, 1949, as provided by West Virginia Constitution, Article VI, Section 18, the Senate took no action with reference to Governor Meadows' letter.

Governor Meadows' term as Governor of this State having expired on January 18, 1949, without the Senate having taken any action on the letter of July 1, 1947, Honorable Okey L. Patteson, who succeeded Governor Meadows as Governor of the State, on March 9, 1949, submitted to the State Senate a list of names, which included the name of the respondent for member of the West Virginia Board of Education for the Fourth Congressional District for the term ending June 30, 1952, and requested the favorable advice and consent of the Senate to appoint the named persons. The Senate, acting upon the list submitted by Governor Patteson, having confirmed the respondent for the office of member of the board of education for the term ending June 30, 1952, the respondent, no matter what his status was prior to the time that the State Senate acted on Governor Patteson's list of appointments, was a *de jure* member of the West Virginia Board of Ed-

ucation for the term of office which expired or June 30, 1952.

This brings us directly to the question whether the expiration of the term of Raymond Brewster as a *de jure* member of the West Virginia Board of Education on June 30, 1952, created a vacancy during the recess of the State Senate. If the expiration of Brewster's term as a *de jure* member of the board of education on June 30, 1952, created a vacancy, we would have the question before us whether the provision of Section 1, Article 2, Chapter 72, Acts of the Legislature, 1947, amending and re-enacting Code, 18-2-1, providing: "Any vacancy on the board shall be filled by the governor by appointment for the unexpired term", is unconstitutional, in that it does not require, as provided by West Virginia Constitution, Article VII, Section 9, that "In case of a vacancy, during the recess of the Senate, in any office which is not elective, the Governor shall, by appointment, fill such vacancy, until the next meeting of the Senate; when he shall make a nomination for such office, and the person so nominated, when confirmed by the Senate, * * * shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified."

At this point it is to be noted that West Virginia Constitution, Article VII, Section 9, providing for the filling of a vacancy in a nonelective office during the recess of the Senate, and thereafter for nomination by the governor and confirmation by the Senate, does not contain the qualifying provision contained in West Virginia Constitution, Article VII, Section 8, that "* * * and whose appointment or election is not otherwise provided for; * * *."

[8] We, however, are of opinion that the expiration of respondent's term of office on June 30, 1952, as a *de jure* member of the West Virginia Board of Education, did not create a vacancy within the meaning of either West Virginia Constitution, Article VII, Section 9, or Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code,

18-2-1. We are well aware, however, that the decisions of the Courts in other jurisdictions on the question whether the expiration of the term of a *de jure* officer constitutes a vacancy are variant. For the many divergent decisions in other jurisdictions, see generally 43 Words and Phrases, dealing with the expiration of a term of public office, pages 616, 618 and 619, and the Cum. Pocketpart of Volume 43. See in particular the case of *People ex rel. Ryder v. Mizner*, 7 Cal. 519, which is exactly in point with the case at bar on the question whether the expiration of respondent's *de jure* term of office on June 30, 1952, created a vacancy, in which case the Supreme Court of California, in considering a provision of the Constitution of California similar to the provision empowering the Governor of this State to appoint members of the West Virginia Board of Education, contained in Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, held that where the appointment of an office is vested by the Constitution of California in the governor, with the advice and consent of the Senate, and at the expiration of the term of an incumbent during a recess of the Legislature the governor appoints a successor to the office, " * * * there was no vacancy within the true intent and meaning of the Constitution, * * *" and the appointment vested in the appointee a right to hold the office for the full term thereof, subject to be defeated by the nonconcurrence of the Senate. See generally 67 C.J.S., Officers, § 50, in which the rule is stated that: "The law abhors vacancies in public offices, and courts generally indulge in a strong presumption against a legislative intent to create, by statute, a condition which may result in an executive or administrative office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions."

The question as to what constitutes a vacancy in a public office has been considered by this Court. In point 3, erroneously designated in the Official Reports

as point 2, of the syllabus of *Kline v. McKelvey*, 57 W.Va. 29, 49 S.E. 896, this Court held that incumbency of an office by holding over does not preclude the existence of a vacancy as the basis for the exercise of the appointive power under Section 5, Chapter 45, of the West Virginia Code, 1899; in *State v. Scott*, 36 W.Va. 704, 15 S.E. 405, this Court held that the word "vacancy", when used in a statute, does not necessarily presuppose a former incumbent of office, but that it describes also the condition of an office newly created, and never filled by any previous incumbent, as was so in the case of *Bridges v. Shallcross*, supra; and in point 1 of the syllabus of *State ex rel. Jones v. Ingram*, Recorder of the Town of Cedar Grove, 135 W.Va. 548, 63 S.E.2d 828, this Court held that there is no vacancy where there is an incumbent legally authorized to discharge the duties of his office. The holdings in these cases by this Court are not applicable to the case at bar, because this case concerns the specific question whether the expiration of the term of a member of the West Virginia Board of Education, during the recess of the Senate, constitutes a "vacancy" within the meaning of Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, so as to bring into operation the provisions of West Virginia Constitution, Article VII, Section 9.

As heretofore stated, West Virginia Constitution, Article IV, Section 8, vested in the Legislature full and plenary power, in cases not provided for by the Constitution, to prescribe by general laws, the terms of office, powers, duties and compensation of all public officers and agents and "the manner in which they shall be elected, appointed and removed"; and Constitution, Article VII, Section 8, provides that the governor shall "nominate", and, by and with the advice and consent of the Senate, "appoint" the officers, whose offices are established by the Constitution or shall be created by law, and "whose appointment or election is not otherwise provided for; * * *." By the very provisions of the Constitution itself we are at liberty to apply the express

provisions of Section 1, Article 2, Chapter 72, Acts of the Legislature, 1947, amending and re-enacting Code, 18-2-1.

Section 1 of the statute inferentially expresses the legislative fiat that a vacancy does not occur in the office of member of the board by virtue of the expiration of the term of a *de jure* member. By the express language of Section 1 of the statute the Legislature expressed the intent that the word "vacancy", as used in the statute, means the result of a fortuitous event occurring during the unexpired term of an office. It follows that upon the expiration of Raymond Brewster's term as a *de jure* member of the West Virginia Board of Education on June 30, 1952, no vacancy occurred. It also follows that Governor Patteson was at liberty under the provisions of the statute itself to make an appointment for the term beginning July 1, 1952, and ending on June 30, 1961. This he did by his letter of June 26, 1952, addressed to Honorable D. Pitt O'Brien, Secretary of State, with a copy thereof directed to the Clerk of the State Senate, stating that he "had reappointed" the respondent, Raymond Brewster, to the office of member of the West Virginia Board of Education for the term beginning July 1, 1952, and ending June 30, 1961.

[9] That the Legislature intended by the enactment of Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, to vest in the governor the power to appoint a member of the board of education during the recess of the Senate, whenever the term of a *de jure* member expires, appears clearly from the provisions of the statute itself, read in connection with West Virginia Constitution, Article VI, Sections 18, 19, and 22. Section 18 of the Constitution provides: "* * * The first session of the Legislature, after the adoption of this Constitution, shall commence on the third Tuesday of November, 1872; and the regular biennial session of the Legislature shall commence on the second Wednesday of January, 1875, and every two years thereafter, on the same day." Section 19 pro-

vides for the convening of extraordinary sessions of the Legislature. Section 22 provides: "All sessions of the Legislature, other than extraordinary sessions, shall continue for a period of sixty days from the date of beginning. But all regular sessions may be extended by the concurrence of two-thirds of the members elected to each house." Section 22, which originally read: "No session of the Legislature, after the first, shall continue longer than forty-five days, without the concurrence of two-thirds of the members elected to each House", was amended to its present form under Senate Joint Resolution No. 3, page 498, Acts of the Legislature, 1919, by an amendment adopted on February 12, 1919, and ratified at the general election held in November, 1920.

[10] The Legislature, in the enactment of Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, as in the case of all legislative enactments, was presumed to know the provisions of the West Virginia Constitution. In point 5 of the syllabus of *Webb v. Ritter*, 60 W.Va. 193, 54 S.E. 484, this Court held: "In construing statutes, courts must presume knowledge on the part of the Legislature of the provisions of the organic law of the state, relating to the subject-matter thereof, as well as of the principles of the common law, and will not impute to that body any intention to obstruct or impede the operation of constitutional provisions, or to innovate upon the settled policy of the law."

Surely the Legislature did not intend by the enactment of the statute creating the West Virginia Board of Education to create an hiatus in the membership of that board.

It is important to note that Section 1 of the statute provides that the nine members of the West Virginia Board of Education, other than the state superintendent of schools, an *ex officio* member who shall not be entitled to vote, shall be "appointed by the governor, by and with the advice and consent of the Senate, for overlapping terms * * *, except that the original appoint-

ments shall be for terms of one, two, three, four, five, six, seven, eight and nine years, respectively"; that "The governor shall appoint all members of the state board as soon after the effective date hereof as is practicable for respective terms of office beginning on the first day of July, one thousand nine hundred forty-seven"; and that "The terms of office of present members of the state board shall expire on the thirtieth day of June, one thousand nine hundred forty-seven."

As the Legislature is presumed to know the provisions of West Virginia Constitution, Article VI, Sections 18, 19 and 22, which govern the sessions of the Legislature, the express wording of the statute shows that the Legislature intended that the Governor of the State would be required, under Section 1 of the statute, in many instances to make interim appointments, when the terms of the members of the board of education expire, that is, except on the rare occasions when there is an extraordinary session of the Legislature, or when the regular session, under Article VI, Section 22 of the Constitution, has been extended by the concurrence of two-thirds of the members elected to each House.

Unlike the Constitution of the United States, Article II, Section 2, which provides that the President of the United States "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: * * *", which the Supreme Court of the United States had under consideration in the famous case, decided early by that Court, of *Marbury v. Madison*, supra; and unlike West Virginia Constitution, Article VII, Section 8, which provides for the nomination by the governor of certain officers, and West Virginia Constitution, Article VII, Section 9, which provides for the filling of a vacancy in a non-elective office during the recess of the Senate, the statute pertinent to the decision of this case, Section 1, Article 2,

Chapter 72, Acts of the Legislature, Regular Session, 1947, vests in the Governor the power, at the expiration of the term of a *de jure* member of the West Virginia Board of Education to "appoint", as distinguished from "nominate", a qualified person as a member of the West Virginia Board of Education.

[11] Therefore, when, as the respondent Raymond Brewster's term as a *de jure* member of the board, which was to expire on June 30, 1952, was nearing its close, Governor Patteson by his letter of June 26, 1952, addressed to the Secretary of State, a copy of which was delivered to the Clerk of the Senate, "reappointed" the respondent to the board for the ensuing term, beginning July 1, 1952, and ending June 30, 1961, he thereby exhausted all his powers under the statute, and created Brewster a *de jure* member of the West Virginia Board of Education for the ensuing term, with all the powers and emoluments of a member of the board of education, which were and would be invested in him until the State Senate acted thereon, as provided by Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947. That Governor Patteson addressed his letter of June 26, 1952, to the Secretary of State, which directed that a commission be issued to the respondent, Raymond Brewster, accordingly, and sent a copy of that letter to the Clerk of the Senate, is, in our opinion, of no moment in the decision of this case. The letter to the Secretary of State only evidences the fact that Governor Patteson did, in fact, appoint the respondent, Raymond Brewster, to the West Virginia Board of Education for the ensuing term, subject to confirmation of the appointment by the Senate, pursuant to Section 1. If, however, the Senate had not acted favorably on Governor Patteson's appointment of respondent to the board of education, the governor would have been at liberty to appoint another person. See *State ex rel. Downey v. Sims*, 125 W.Va. 627, 26 S.E.2d 161, in which this Court held unconstitutional Chapter 52, Acts of the Legislature, 1943, which provides that "No person whose nomination for office has been

rejected by the senate shall be again nominated for the same office during the session in which his nomination was so rejected, unless at the request of the senate, nor shall he be appointed to the same office during the recess of the senate, nor shall he be appointed, during the recess of the senate in which his nomination was rejected, to any other office the nomination for which must be submitted to the senate for confirmation."

Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, in clear language vests in the governor the power to make the appointment for the term succeeding the term held by the respondent, which would expire on June 30, 1952, and the Legislature by the use of the words in Section 1 "by and with the advice and consent of the Senate" intended that an appointment made during a legislative interim should be subject to confirmation by the Senate when convened. Both of these events occurred in the case of respondent, and he, therefore, became by the action of Governor Patteson in the first instance during the legislative interim, and by the confirmation of the Senate, a *de jure* member of the board of education for the term expiring on June 30, 1961. The requirements of Section 1 of the statute having been complied with in both particulars, it matters not how the Senate became informed of Governor Patteson's action in appointing the respondent.

[12] Governor Patteson having effectively appointed respondent a member of the board of education for the term in question, subject to confirmation by the Senate, the fact that Governor Patteson's term of office expired on January 18, 1953, and his successor as governor, Honorable William C. Marland, in submitting to the State Senate the names of his appointees by his message of March 12, 1953, substituted the name of Homer Gebhardt for that of the respondent, did not void the appointment of respondent by Governor Patteson during the legislative interim. Governor Patteson having created by his appointment the respondent a *de jure* member of the West Vir-

ginia Board of Education for the term beginning July 1, 1952, and ending June 30, 1961, subject to confirmation by the Senate, neither he nor his successor, Governor Marland, could, without rejection of respondent's appointment by the Senate, remove respondent from the *de jure* office which he held, without compliance with Section 1 of the statute, which provides that: "No member of the state board may be removed from office by the governor except for official misconduct, incompetence, neglect of duty, or gross immorality and then only in the manner prescribed by law for the removal by the governor of state elective officers. "

Imbedded in our organic law is the postulate that the executive power is a continuing power, not broken by succession, and serves to preserve the stability and integrity of constitutional government. *Barrett v. Duff*, 114 Kan. 220, 217 P. 918.

In *Barrett v. Duff*, supra, involving original proceedings in *quo warranto* to determine the titles to the offices of state inspector of oils, judge of the court of industrial relations, and member of the public utilities commission, the Supreme Court of Kansas, *inter alia*, had under consideration Section 1, Chapter 29 of the Laws of 1920 of Kansas, which created a tribunal, to be known as the court of industrial relations, which was to be composed of three judges, who were to be appointed by the governor, by and with the advice and consent of the Senate. The Court held that the appointment of the defendant Duff, who was duly qualified and entered upon his official duties as a judge of the court of industrial relations, could not be revoked or annulled by a governor succeeding the governor who made the appointment, notwithstanding the latter governor had substituted another for the appointee Duff to the Kansas Senate before the Senate had acted on Duff's appointment; and that the confirmation by the Senate of Duff's appointment served to vest him with the office in question for the term for which he had been appointed. So this case is in point with the instant case. The holding of the Supreme Court of Kansas in the

Duff case is aptly stated in points 1, 3, 4, and 6 of the syllabus prepared by the Court, which read:

"1. The executive power of the Governor is a continuing power, never ending, and not broken by succession.

* * * *

"3. Where the power of the Governor has been exercised by the appointment to an office, and the appointee has qualified and been vested with the powers and prerogatives of the office, neither the Governor nor his successor has any further control over the appointment unless and until the appointee has been rejected by the Senate.

"4. Where the term of an office is fixed by statute, the power of removal does not exist in the executive except so far as provided by statute.

* * * *

"6. When the appointee to an office, the tenure of which is declared by law, is commissioned by the Governor and vested with the power and prerogatives of the office, neither that Governor nor his successor can revoke the appointment."

Consonant with the holding of the Supreme Court of Kansas, the Court of Appeals of Kentucky held in the case of *McChesney v. Sampson, Governor*, 232 Ky. 395, 23 S.W.2d 534, 586, that one appointed by the governor as a member of the state text book commission for a definite term of years, who has accepted the appointment; qualified and entered into the exercise of the functions of the office, cannot summarily and without cause be removed from office, where the statute, Section 3750 of the Kentucky Statutes provides: "'No person appointed to an office by the governor, by and with the advice and consent of the senate, shall be removed therefrom by the governor, during the term for which he was appointed, unless for failure to discharge, or neglect in the performance of the duties of his office * * *'", notwith-

standing the consent of the Senate of Kentucky to the appointment required by statute had not been obtained. In that case the Court held that under the provision of the Constitution of Kentucky, Kentucky Constitution Section 91, requiring the Secretary of State of Kentucky to keep a register of the official acts of the governor, an appointment of an officer by the governor is not required to be communicated to the Senate; but the Senate must take notice of the contents of the register, and at its next session under the mandatory provision of Ky.St. Section 3750, act on appointments.

In the case of *People ex rel. Ryder v. Mizner*, supra, in which the Supreme Court of California held *inter alia* that a governor, who has made an interim appointment at the expiration of an incumbent's term of office during a recess of the Legislature, has exhausted the full power of appointment vested in him by the Constitution of California, subject to the action of the Senate thereon.

The rationale of the rule governing the removability of officers appointed by the executive applied in the cases of *Barrett v. Duff*, supra; *McChesney v. Sampson*, Governor, supra, and *People ex rel. Ryder v. Mizner*, supra, is stated by Chief Justice Marshall in the case of *Marbury v. Madison*, supra, as follows: "Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it." But as the Supreme Court of the United States in the

Marbury case had under consideration United States Constitution, Article II, Section 2, which provides that: " * * * he [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint [certain enumerated officers] and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: * * * ", the quoted statement of the Court, though highly persuasive in the decision of the case at bar, does not bear on the precise question in the case at bar, and was not necessary to the decision in the Marbury case.

That the State Senate at the regular session of the Legislature, which was organized and convened on January 14, 1953, acted on Governor Patteson's appointment of the respondent for the term as member of the West Virginia Board of Education ending on June 30, 1961, appears clearly from the Executive Journal of the Senate of March 14, 1953. It would be redundant and is unnecessary for this Court to recite in detail the happenings at that executive session of the State Senate. It suffices to say that the Executive Journal of the State Senate for that day discloses that the message of Governor Marland, dated March 12, 1953, listing the names and addresses of ninety-six "nominees", together with the office to which each had been "nominated", including "For Member of the West Virginia Board of Education—Homer Gebhardt, Huntington, Cabell County, (R) 4th Congressional District"; that the members of the Senate present voted unanimously in the affirmative on the question whether the appointments made by Governor Marland, with the exception of the "nominations" for West Virginia Board of Education and West Virginia University Board of Governors for the positions and terms contained in Governor Marland's message, be confirmed; and that Governor Patteson's letter, dated June 26, 1952, addressed to the Secretary of State, purporting to "reappoint" the respondent, Raymond Brewster, as a member of the West Virginia Board of Education for the term beginning July 1, 1952, and ending June 30, 1961, and re-

questing that a commission be issued to the respondent accordingly, was likewise read to the Senate. The Senate thereupon adopted a motion that the letter be treated and considered by the Senate as a "nomination" by the Senate of the respondent as a member of the West Virginia Board of Education for the term in question; that upon motion the Senate confirmed the nomination of the respondent as member of the board for that term; and that the Senate, upon motion duly adopted, refused to act on the nomination of Homer Gebhardt for member of the West Virginia Board of Education, submitted by Governor Marland, as well as the nomination of Carl J. Carter, M. D., of Fairmont, for member of the West Virginia University Board of Governors, "for the reason that no vacancy in the offices for which these gentlemen were appointed now exists."

[13] As respondent, Raymond Brewster, by virtue of his initial appointment to the board of education for the term ending June 30, 1961, together with the commission issued to him for that office, became a *de jure* and legally constituted member of the board for the term in question, it follows that Governor Marland's attempt to appoint Homer Gebhardt as a member of the West Virginia Board of Education in lieu of the appointment made by Governor Patteson was ineffective, and did not serve to remove the respondent from the *de jure* office to which he had been legally appointed by Governor Patteson, by and with the advice and consent of the Senate, for the full term ending June 30, 1961, because in no uncertain terms Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, amending and re-enacting Code, 18-2-1, provides that "No member of the state board may be removed from office by the governor except for official misconduct, incompetence, neglect of duty, or gross immorality and then only in the manner prescribed by law for the removal by the governor of state elective officers."

The manner prescribed by law for the removal by the governor of such elective of-

ficers is fully embraced in Code, 6-6-5, which provides for the removal by the governor of any state officer holding an elective office; and Code, 6-6-6, provides in detail the procedure for such removal and for an appeal to this Court, or to a Judge thereof in vacation, by any person feeling aggrieved by his removal from office by the governor. Code, 6-6-6, provides that an elective officer sought to be removed from office shall be removed by the governor only after a hearing bearing on the charges for removal, if such is required by the officer against whom charges may have been brought or by the governor at his own instance.

The requirement of Code, 6-6-6, that the charges against an elective state officer, in order to ground removal, "shall be reduced to writing" is mandatory, and should be sufficiently explicit to furnish the defendant with notice of the nature of the charges so as to enable him to contest the wrongful act or acts with which he is charged. 15 M.J., Public Officers, Section 37; Moore v. Strickling, 46 W.Va. 515, 33 S.E. 274, 50 L.R.A. 279. To the effect that the provisions of Section 7, Chapter 7, West Virginia Code, 1913, now enlarged in Code, 6-6-8, so as to embrace the procedure for the removal of county, district and municipal officers, that the charges against public officers sought to be removed "shall be reduced to writing and entered of record by the court," [Code, 6-6-7] must be literally complied with as a prerequisite to valid process against the officer sought to be removed, see Dawson v. Phillips, 78 W.Va. 14, 88 S.E. 456. For an exhaustive annotation bearing on the questions of legislative power and executive power to remove a public officer without notice and hearing, see State ex rel. Nagle v. Sullivan, 98 Mont. 425, 40 P.2d 995, 99 A.L.R. 321, annotation, pages 336-405, inclusive.

The provision of Section 1, Article 2, Chapter 72, Acts of the Legislature, Regular Session, 1947, providing for, specifying and limiting the grounds for the removal of a member of the West Virginia Board of Education, and the manner for such re-

moval by the governor is grounded upon a salutary public policy, and evidences a legislative intent that the West Virginia Board of Education, inasmuch as it is an integral part of the free school system of this State, should be composed of members, who, as far as possible, are free from political pressure.

[14] The clause providing for the removal of members of the West Virginia Board of Education by the governor, contained in the statute, is an enactment dealing generally with the removal of the members of the West Virginia Board of Education, and is not a special act, interdicted by the provisions of West Virginia Constitution, Article VI, Section 39. Moreover, as the grounds specified in the statute are fairly contained in the several classes of grounds for removal of officers appointed by the governor, contained in West Virginia Constitution, Article VII, Section 10, the clause is, for that further reason, not unconstitutional. Dawson v. Phillips, supra. For a full discussion of the power of the Legislature to provide for the removal of officers appointed by the governor, see the opinion of this Court in State ex rel. Thompson v. Morton, and State ex rel. Donohoe v. Hutchinson, supra, in which the Court held constitutional, Code, 6-6-4, which provides: "Any person who has been, or may hereafter be appointed by the governor to any office or position of trust under the laws of this State, whether his tenure of office is fixed by law or not, may be removed by the governor at his will and pleasure. In removing such officer, appointee, or employee, it shall not be necessary for the governor to assign any cause for such removal."

For the foregoing reasons we are of opinion that the Circuit Court of Kanawha County did not err in denying the prayer of the petition that a writ issue ousting and expelling the respondent, Raymond Brewster, from the office which he now holds as a *de jure* officer for the term beginning July 1, 1952, and ending June 30, 1961. Therefore, the order of the circuit court entered on March 1, 1954, adjudicating that

II. General rule; application of rule generally.

a. In general.

At first sight, it would seem entirely reasonable and in accord with public policy to allow the appointive power the privilege of reconsideration. From the point of view of the one appointed to the office, however, to permit such reconsideration, after the power of appointment has been completely and finally exercised in the manner prescribed by law and the title to the office has become fixed, is to take from him a vested right. Also, from the point of view of stability and certainty in the administration of public affairs, it is desirable that there should be some point of time at which an appointment to office becomes finally and irrevocably fixed. As said in the famous case of *Marbury v. Madison* (1803) 1 Cranch (U. S.) 137, 2 L. ed. 60: "Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised."

Although there are circumstances under which an appointment to office may be reconsidered and revoked, it may be stated as a general rule that an appointment once made is irrevocable and not subject to reconsideration. This view represents the great weight of authority.

United States.—*Marbury v. Madison* (1803) 1 Cranch, 137, 2 L. ed. 60; *United States v. Smith* (1932) 286 U. S. 6, 76 L. ed. 954, 52 S. Ct. 475 (confirmation of appointment).

Alabama.—*Draper v. State* (1911) 175 Ala. 347, 57 So. 772, Ann. Cas. 1914D, 301. See *State ex rel. Smith v. Justice* (1917) 200 Ala. 483, 76 So. 425.

California.—See *People ex rel. Ryder v. Mizner* (1857) 7 Cal. 519; *People ex rel. Wetherbee v. Cazneau* (1862) 20 Cal. 504.

Colorado.—See *People ex rel. Williams v. Reid* (1887) 11 Colo. 133, 17 Pac. 302.

Connecticut.—*State ex rel. Coogan v. Barbour* (1885) 53 Conn. 76, 22

Atl. 686, 55 Am. Rep. 65; *State ex rel. Seofield v. Starr* (1906) 78 Conn. 636, 62 Atl. 512.

Illinois.—*People ex rel. Laist v. Lower* (1911) 231 Ill. 527, 96 N. E. 346, 36 L.R.A. (N.S.) 1203 (rule recognized).

Indiana.—*Weir v. State* (1884) 96 Ind. 311. See *State ex rel. Sauter v. Richey* (1930) 202 Ind. 116, 172 N. E. 119.

Kansas.—*Barrett v. Duff* (1923) 114 Kan. 220, 217 Pac. 918.

Kentucky.—*Hoke v. Field* (1873) 10 Bush, 144, 19 Am. Rep. 53. See *Bell v. Sampson* (1930) 232 Ky. 376, 23 S. W. (2d) 575; *McChesney v. Sampson* (1930) 232 Ky. 395, 23 S. W. (2d) 584; *Board of Education v. McChesney* (1930) 235 Ky. 692, 32 S. W. (2d) 26.

Maine.—*State v. Phillips* (1887) 79 Me. 506, 11 Atl. 274 (former appeal in (1887; Me.) 10 Atl. 447).

Massachusetts.—See *Putnam v. Langley* (1882) 133 Mass. 204; *Keough v. Holyoke* (1892) 156 Mass. 403, 31 N. E. 387; *Atty. Gen. v. Dole* (1897) 168 Mass. 562, 47 N. E. 436.

Michigan.—See *People ex rel. Andrews v. Lord* (1861) 9 Mich. 227; *Speed v. Detroit* (1893) 97 Mich. 198, 56 N. W. 570 (for further proceedings, see *Speed v. Detroit* (1894) 98 Mich. 360, 57 N. W. 406, 22 L.R.A. 842, 39 Am. St. Rep. 555); *Atty. Gen. v. Corliss* (1894) 98 Mich. 372, 57 N. W. 410; *THORNE v. SQUIER* (reported herewith) ante, 126 (rule recognized but held inapplicable); dissenting opinion in *North v. Wagner* (1933) — Mich. —, 249 N. W. 494.

Minnesota.—*State ex rel. Childs v. Wadham* (1896) 64 Minn. 313, 67 N. W. 64 (confirmation of appointment).

New Jersey.—*Atty. Gen. v. Love* (1877) 39 N. J. L. 476, 23 Am. Rep. 234 (affirming (1876) 39 N. J. L. 14); *State ex rel. Whitney v. Van Buskirk* (1873) 40 N. J. L. 463 (confirmation of appointment).

New York.—*Achley's Case* (1856) 4 Abb. Pr. 35 (dictum); *People ex rel. Mosher v. Stowell* (1879) 9 Abb. N. C. 456; *Re Fitzgerald* (1903) 82 N. Y. Supp. 311 (affirmed in (1903) 88 App. Div. 434, 84 N. Y. Supp. 1125) (confirmation of appointment); *Casler v.*

Tanzer (1928) 134 Misc. 48, 234 N. Y. Supp. 571.

Ohio.—See *State ex rel. Goodin v. Este* (1835) 7 Ohio, pt. 1, p. 134; *State ex rel. Calderwood v. Miller* (1900) 62 Ohio St. 436, 57 N. E. 227, 78 Am. St. Rep. 732.

Pennsylvania. — See *Ewing v. Thompson* (1862) 43 Pa. 372.

Rhode Island. — See *Richardson's Appeal* (1858) 5 R. I. 606.

Tennessee.—*State ex rel. Pierce v. Hardin* (1931) 163 Tenn. 471, 43 S. W. (2d) 924; *State ex rel. O'Dell v. Thomas* (unreported case set out in *State v. Hardin*, supra).

Texas.—See *Collins v. Tracy* (1871) 36 Tex. 546.

Vermont. — See *Mason v. School Dist.* (1848) 20 Vt. 487; *Chandler v. Bradish* (1851) 23 Vt. 416.

Virginia.—See *Kirkham v. Russell* (1882) 76 Va. 956.

West Virginia.—*Taylor v. Board of Education* (1931) 111 W. Va. 52, 160 S. E. 299.

Wisconsin.—*State ex rel. Burdick v. Tyrrell* (1914) 158 Wis. 425, 149 N. W. 280, Ann. Cas. 1916E, 270.

Canada.—*Tuck v. Victoria* (1892) 2 B. C. 179.

And it has been said that the general rule that an appointment cannot be revoked by the appointing power applies to appointments made by a single executive, an executive board, a court, or a legislative body or board. *State ex rel. Scofield v. Starr* (1906) 78 Conn. 636, 63 Atl. 512, *infra*, subd. IV. c, 2.

And it would seem that the form adopted by the appointing power as the method of expressing its will is immaterial on the question of the irrevocability of the appointment. Thus, in discussing an appointment by resolution of two boards acting concurrently, the court in *Achley's Case* (1856) 4 Abb. Pr. (N. Y.) 35, said: "What the law requires is, that a majority of each should concur in an appointment; and when such concurrence is ascertained, the appointment becomes absolute, irrevocable, and complete for the term of the appointee. The boards, having adopted the form of a resolution for the pur-

pose of more easily or conveniently communicating with each other, cannot in any way alter or affect the legality of their proceedings, and render inchoate or ineffectual what would otherwise be complete and final."

Also, the fact that the body making the appointment has the power to amend or alter its records does not give it the power to revoke an appointment; since it is the act of appointment, and not the mere recital in the record, which invests the appointee with his official character. *Weir v. State* (1884) 96 Ind. 311.

And where the appointment is made following the expiration of the term of one of the members of the appointing body and while such member is holding over in the office, it has been held that the appointment is nevertheless valid, and not subject to rescission at the next meeting after the qualification of the new member, where, under the laws of the state, the old incumbent is entitled to exercise the duties of his office until his successor has been appointed. *People ex rel. Williams v. Reid* (1887) 11 Colo. 138, 17 Pac. 302.

The rule has also been applied to recommendations to office. Thus, in *People ex rel. Laist v. Lower* (1911) 251 Ill. 527, 96 N. E. 346, 36 L.R.A. (N.S.) 1203, where, upon a request for a list of persons eligible to fill a vacancy, a civil service commission, which had no power to appoint to any office, but whose only function was to hold examinations and to certify to the eligibility of applicants seeking appointments, certified the name of a certain person as eligible to fill the vacancy, such person having received the highest rating on an examination held by the commission, but it later appeared that the person so certified had not complied with the law of the state requiring members of that profession to procure a license, it was held that it was within the power of the commission to revoke the certificate.

b. Change in personnel of appointive power.

It is not intended in this division of the annotation to take up a discus-

sion of the general question of whether appointments made by an appointive power are binding on its successor. (For a general treatment of the right of a municipal council to bind its successor, see 19 R. C. L. 893.) Rather, it is only intended to call attention to those cases within the scope of the annotation in which a successor in office claimed the right to reconsider appointments made by his predecessor.

In most of the cases in which the right of reconsideration was asserted in favor of a successor in office, the fact that the appointment had been made by a prior incumbent is not mentioned by the court. Probably the best explanation of the lack of attention given to this point is to be found in the fact that offices in which the executive power of appointment is vested are generally regarded as continuous offices, the power of the successor with respect to matters arising in the previous administration being considered as exactly the same as that of his predecessor.

Thus, in passing upon the power of a successor in the governor's office to revoke appointments made by his predecessor before the confirmation of such appointments by the senate, the Kansas court has said: "The supreme executive power of the state is vested in the governor. . . . This executive power is continuous—never ending. It knows neither names nor persons. It began with the first governor, has continued ever since, and will continue unbroken so long as the Constitution exists. It follows that, in respect to the offices in question, Governor Davis had the same power and no greater power of removal than that which would have been possessed by Governor Allen had he remained in office." *Barrett v. Duff* (1923) 114 Kan. 220, 217 Pac. 913, discussed at length *infra*, subd. III. b.

For a good illustration of a case involving the right of a legislative or administrative body to bind its successor by an appointment to office, attention is called to *Kirkham v. Russell* (1882) 76 Va. 956. In that case an outgoing common council, which had

appointed certain city officers at the beginning of its term in accordance with an ordinance providing that such appointments should be made at the first regular meeting following the installation of the council, attempted to repeal the ordinance, substituting therefor an ordinance providing that such officers should be appointed on a prescribed date just a few days before the expiration of the term of office of the council, and, acting under this new ordinance, proceeded to appoint a new set of officers, in derogation of the rights of the incoming council. In denying the right of the outgoing council to bind its successor in this manner, and in upholding the claims of those who had been appointed to the offices by the incoming council, which had disregarded the appointments made by its predecessor and had made its own appointments in accordance with the old ordinance, the court took the view that, first, the ordinance adopted by the outgoing council and the act of the council in making appointments thereunder were an unreasonable exercise of the power of the council, and, therefore, null and void; and that, secondly, the council having once appointed a set of officers at the beginning of its term in accordance with the old ordinance, its power with respect to appointments was exhausted and could not again be exercised by it.

For cases discussed in other divisions of the annotation in which it appears that the right of reconsideration was asserted by a successor in office, but in which this fact was not mentioned in the decision of the court, see the following cases: *Marbury v. Madison* (1803) 1 Cranch (U. S.) 137, 2 L. ed. 60, *infra*, subd. V. c; *People ex rel. Wetherbee v. Cazneau* (1862) 20 Cal. 504, *infra*, subd. III. b; *Harrington v. Pardee* (1905) 1 Cal. App. 278, 82 Pac. 83, *infra*, subds. III. b, and V. c; *People ex rel. Williams v. Reid* (1887) 11 Colo. 138, 17 Pac. 302, *supra*, subd. II. a; *Barrett v. Duff* (1923) 114 Kan. 220, 217 Pac. 913, *infra*, subd. III. b; *North v. Wagner* (1933) — Mich. —, 249 N. W. 494, *infra*, subd. IV. d; *Thorne v. Squier*

(Mich.) (reported herewith) ante, 126, *infra*, subd. IV. d; Atty. Gen. v. Love (1877) 39 N. J. L. 476, 23 Am. Rep. 234 (affirming (1876) 39 N. J. L. 14) *infra*, subd. V. d. And see Witherspoon v. State (1925) 138 Miss. 310, 103 So. 134, *infra*, subd. VI. b.

c. Power to add new members.

Assuming that an appointment once made is irrevocable, and that an appointive power, although dissatisfied with the board or committee appointed by it, and feeling that the best interests of the municipality or district require the removal of such board or committee, nevertheless cannot rescind its former action and revoke the appointment, the question arises as to whether the appointive body cannot accomplish the same result indirectly by adding a sufficient number of new members to the board or committee, so that the persons originally appointed will constitute only a minority of the whole board or committee.

In Vermont it has been held that this cannot be done. *Mason v. School Dist.* (1848) 20 Vt. 487; *Chandler v. Bradish* (1851) 23 Vt. 416, holding that, where a school district decides at a regular annual meeting that its prudential committee for that year shall consist of one member, and appoints one of its members to that office, but at a subsequent meeting decides that the prudential committee shall consist of three members, and proceeds to add two members to the appointment already made, the member first appointed is entitled to the sole occupancy of the office, and the second appointments are of no effect. As said in *Mason v. School Dist.* (Vt.) *supra*: "The district, at their annual meeting, having elected to appoint but one for committee for the ensuing year, their power over the subject became thereby exhausted, and they could not resume it until a vacancy should occur."

Likewise, in Rhode Island; where, at an annual meeting of the school district, it was decided that one trustee should be appointed for the ensuing year, and a person was appointed

to fill that office, but the district at an adjourned meeting rescinded the vote passed at the previous meeting and appointed two other persons as cotrustees, it was held that, having once decided to have only one trustee for the year, the district thereafter could not add to that number. *Richardson's Appeal* (1858) 5 R. I. 606.

But a contrary result has been reached in Massachusetts. *Kingsbury v. Centre School Dist.* (1846) 12 Met. (Mass.) 99, holding that it was competent for a school district, at an adjourned meeting, to add to the number of a prudential committee chosen by it at its annual meeting; *Atty. Gen. v. Dole* (1897) 163 Mass. 562, 47 N. E. 436, holding that a decision made at a town meeting fixing the number of selectmen might be rescinded at an adjourned meeting so as to enlarge the number of selectmen.

III. Rule as applied to appointments by single executive.

a. In general.

In the case of appointments made by a single executive, such as a governor, mayor, etc., it is undisputed that the appointment once made is irrevocable.

United States.—*Marbury v. Madison* (1803) 1 Cranch. 137, 2 L. ed. 60. See *United States v. Smith* (1932) 236 U. S. 6, 76 L. ed. 954, 52 S. Ct. 475 (confirmation of appointment).

Alabama.—*Draper v. State* (1911) 175 Ala. 547, 57 So. 772, Ann. Cas. 1914D, 301.

California. — See *People ex rel. Ryder v. Mizner* (1857) 7 Cal. 519; *People ex rel. Wetherbee v. Cazneau* (1862) 20 Cal. 504.

Illinois.—*People ex rel. Laist v. Lower* (1911) 251 Ill. 527, 96 N. E. 346, 36 L.R.A. (N.S.) 1203 (rule recognized).

Kansas.—*Barrett v. Duff* (1923) 114 Kan. 220, 217 Pac. 918.

Kentucky.—*Hoke v. Field* (1873) 10 Bush. 144, 19 Am. Rep. 58. See *Bell v. Sampson* (1930) 232 Ky. 376, 23 S. W. (2d) 575; *McChesney v. Sampson* (1930) 232 Ky. 395, 23 S. W. (2d) 584.

Michigan.—See *People ex rel. Andrews v. Lord* (1891) 9 Mich. 227.

Ohio.—See *State ex rel. Goodin v. Este* (1835) 7 Ohio, pt. 1, p. 134.

Pennsylvania. — See *Ewing v. Thompson* (1862) 43 Pa. 372.

Texas.—See *Collins v. Tracy* (1871) 36 Tex. 546.

b. Nominations; recess appointments.

Where an appointment subject to confirmation by the senate is made by a governor during a recess of the senate, either for the purpose of filling an office which has expired or of filling a vacancy caused by death or other cause, it being impossible to have the appointment confirmed in such a case until the next session of the senate, the question arises as to whether such an appointment may be reconsidered and withdrawn by the governor before it is acted upon by the senate.

The question would seem to depend upon whether the act of the governor in naming the person to fill the office is to be regarded as an "appointment" or a "nomination."

Thus, in *Barrett v. Duff* (1923) 114 Kan. 220, 217 Pac. 918, where appointments made by the governor during a recess of the legislature, which appointments could not be confirmed by the senate as required by law until the next session of that body, were revoked by the governor's successor, and other persons were appointed to the offices, such action by him being taken after the senate had convened, and had taken under advisement the confirmation of the persons first appointed to the offices, but before the senate had taken any definite action with regard to such confirmation, and the senate confirmed the first appointees, but, despite this act of the senate, commissions were issued by the governor to the second appointees, it was held, in reliance upon the terms of the statutes which provided that the governor should "appoint" persons to such offices with the advice and consent of the senate, as distinguished from the provision of the Constitution of the United States governing appointments by the President,

which provides that the President shall "nominate" and, by and with the advice and consent of the Senate, shall "appoint" persons to office, that the act of the governor in making the first appointments was final, and exhausted the power of the governor's office in that regard unless and until the appointments were rejected by the senate, and that, therefore, the persons appointed by the first governor were entitled to the offices. In the words of the court, "The power of the governor having been exercised, he had no further control over the respective offices unless and until the appointees had been rejected by the senate." In reaching this result, the court emphasized the difference between a nomination and an appointment, holding that, where the statute relating to appointments by the governor with the consent of the senate provides that the governor shall appoint persons to the office with the consent of the senate, rather than merely nominate persons for consideration by the senate, the appointment is final and conclusive without confirmation. Harvey, J., dissenting from this result, was of the opinion that, in view of the long-established practice existing with regard to recess appointments by the governor by virtue of which the governor had always asked for confirmation of his appointments before issuing a certificate of appointment, and had frequently sent to the senate for confirmation the names of persons other than those whom he had appointed to fill the office during the recess of the senate, the act of the governor in naming persons to fill the office during the recess should not be regarded as a final and irrevocable appointment. Attention was also called in this connection to the constitutional provision governing the appointment of trustees of charitable institutions, in which the act of the governor in naming persons to fill such offices is spoken of as a "nomination;" the dissenting judge holding that this description of the act of the governor as a "nomination" had, by the long-continued practice of the executive and legislative branches

of the government, been adopted and extended to all appointments made by the governor with the consent of the senate.

Likewise, in *McChesney v. Sampson* (1930) 232 Ky. 395, 23 S. W. (2d) 584, the act of a governor in making a recess appointment was held to be not merely a nomination subject to revocation by the governor at any time prior to action thereon by the senate, but a final and irrevocable appointment subject only to rejection by the senate. In support of this result, it was said: "It is argued that appointment to the office consists of two separate acts, one by the governor and one by the senate, and until both have acted there is no appointment such as to bring the incumbent within the protection of the law. Even so, the two powers do not act concurrently, but consecutively, and action once taken and completed by the executive is not subject to reconsideration or recall. . . . The fact that the title to the office, and the tenure of the officer, are yet subject to the action of the senate, does not render incomplete the act of the chief executive in making the appointment. The appointment alone confers upon the appointee for the time being the right to take and hold the office, and constitutes the last act respecting the matter to be performed by the executive power."

But it seems to be the view of the Kentucky court that, if the senate had no jurisdiction over the appointment until a nomination had been submitted to it by the executive, as where it is not within the power of the senate to confirm the nomination independently of a formal submission by the executive, the appointment would not be complete until submitted to the senate. See *McChesney v. Sampson* (1930) 232 Ky. 395, 23 S. W. (2d) 584.

And it has been held that, even admitting that the power of a governor to make recess appointments is exhausted when the appointments are made by him, if the senate does not take any action on the appointments at its next session, this amounts to a

rejection of the appointments, and new appointments may then be made. *Bell v. Sampson* (1930) 232 Ky. 376, 23 S. W. (2d) 575.

In California, it has been held that the nomination may not be withdrawn.

Thus, in *People ex rel. Ryder v. Mizner* (1857) 7 Cal. 519, in holding that an appointment made by a governor to fill an office which had expired during a recess of the legislature was not merely an appointment to fill a vacancy which would expire at the end of the next session of the legislature, but was an appointment for a full term, and that the act of the governor during a subsequent session of the legislature, in appointing another to the office and asking his confirmation by the legislature, was unauthorized and void, it was said that, the power of the executive having been once exercised, he had no further control over the office until the appointee had been rejected by the senate.

And where, under a statute providing that vacancies in office should be filled by the governor during a recess of the senate by granting commissions that should expire whenever the governor and the senate should appoint a person or persons to fill the office, an appointment was made by the governor to fill a vacancy, during the recess of the senate, and a person so appointed accepted the office and entered upon the discharge of its duties, and where, at the next session of the legislature following the appointment, the governor's successor presented the appointee's name to the senate for confirmation, but, before the senate had taken any action thereon, the nomination was withdrawn, and subsequently another was appointed to the office, it has been held that, since the appointment was for a definite and fixed term,—i. e., until another should be appointed by the joint action of the governor and senate,—and the appointment had become complete and fixed by the delivery of the commission, it could not thereafter be revoked, and the withdrawal of the nomination from the senate and the appointment of another to fill the office were without effect. *People ex*

rel. *Wetherbee v. Cazneau* (1862) 20 Cal. 504.

With respect to the distinction between a nomination and an appointment, the California court has said: "Plaintiff contends that 'nominate' and 'appoint' are synonymous terms and mean the same thing, and that therefore when the governor has nominated he has appointed. Doubtless there are some instances where these terms may be used to mean one and the same thing, but by no process of reasoning can it be true that, in nominating to the senate, the governor is appointing the person to the office, because he cannot appoint without the advice and consent of the senate."

... Plaintiff has presented no authority which, in our opinion, tends, even in the slightest degree, to show that the governor has exhausted his discretionary power when he nominates a man for office and sends the name to the senate." *Harrington v. Pardee* (1905) 1 Cal. App. 278, 82 Pac. 83, *infra*, subd. V. c.

But it would seem clear that, where the appointee is not allowed to take office until the confirmation of his appointment, the appointment is not final until that time. Thus, it is said: "In cases where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved, and nominations may be changed at the will of the executive until title to the office is vested." *McChesney v. Sampson* (1930) 232 Ky. 395, 23 S. W. (2d) 534.

c. *Appointments to fill vacancies.*

For cases involving the right to reconsider appointments to fill vacancies which are subject to confirmation by the senate, see *supra*, subd. III. c.

In Texas an appointment of a county treasurer by the governor to fill a vacancy left by the death of the previous incumbent, under a law providing that the governor should appoint the county treasurer, who should hold his office until the next general election, has been held to vest the title to the office in the appointee, and the appointment so made is not subject

to revocation by the governor. *Collins v. Tracy* (1871) 36 Tex. 546.

And in *People ex rel. Andrews v. Lord* (1861) 9 Mich. 227, where a person who had been appointed by the governor to fill a vacancy created by the death of the incumbent in the office after such incumbent's re-election, but before the commencement of his second term, was entitled, by the statute governing the office, to hold office "until a successor is elected and qualified," and the governor had no power of removal except for cause, it was held that the act of the governor in revoking this appointment upon the expiration of the first term, and appointing another to the office upon the theory that the office had again become vacant, was unauthorized.

IV. *Rule as applied to appointments by collective body.*

a. *In general; general rule.*

There has been some question as to whether the general rule that an appointment once made is not subject to reconsideration applies to appointments made by collective bodies, such as boards, commissions, city councils, etc. It is said, with respect to such appointments, that they are more like the exercise of a legislative function than are appointments made by single executives. Upon analysis, however, it would seem that the doubt thrown upon the application of the rule in these cases arises more from a feeling of uncertainty as to the point of time at which appointments by collective bodies become complete and final, rather than from a belief that the rule does not apply in such cases. On the whole, it may be said that the rule with respect to the irrevocability of appointments is the same whether the appointment is made by a collective body or by a single executive.

In the following cases, appointments made by collective bodies were held not subject to reconsideration:

Alabama. — See *State ex rel. Smith v. Justice* (1917) 200 Ala. 483, 76 So. 425.

Colorado. — See *People ex rel. Williams v. Reid* (1887) 11 Colo. 138, 17 Pac. 302.

Connecticut. — *State ex rel. Coogan v. Barbour* (1885) 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65; *State ex rel. Scofield v. Starr* (1906) 73 Conn. 636, 63 Atl. 512.

Indiana. — *Weir v. State* (1884) 96 Ind. 311. See *State ex rel. Sauter v. Richey* (1930) 202 Ind. 116, 172 N. E. 119.

Kentucky. — *Board of Education v. McChesney* (1930) 235 Ky. 692, 32 S. W. (2d) 26.

Maine. — *State v. Phillips* (1887) 79 Me. 506, 11 Atl. 274 (former appeal in (1887; Me.) 10 Atl. 447).

Massachusetts. — See *Putnam v. Langley* (1882) 133 Mass. 204; *Keough v. Holyoke* (1892) 156 Mass. 403, 31 N. E. 387. See *Atty. Gen. v. Dole* (1897) 168 Mass. 562, 47 N. E. 436.

Michigan.—*Speed v. Detroit* (1893) 97 Mich. 198, 56 N. W. 570 (for further proceedings, see *Speed v. Detroit* (1894) 98 Mich. 360, 57 N. W. 406, 22 L.R.A. 842, 39 Am. St. Rep. 555); *Atty. Gen. v. Corliss* (1894) 98 Mich. 372, 57 N. W. 410; *THORNE v. SQUIER* (reported herewith) ante, 126 (rule recognized but held inapplicable); dissenting opinion in *North v. Wagner* (1933) — Mich. —, 249 N. W. 494.

Minnesota. — *State ex rel. Childs v. Wadhams* (1896) 64 Minn. 318, 67 N. W. 64 (confirmation of appointment).

New Jersey. — *Atty. Gen. ex rel. Haight v. Love* (1877) 39 N. J. L. 476, 23 Am. Rep. 234 (affirming (1876) 39 N. J. L. 14); *State ex rel. Whitney v. Van Buskirk* (1878) 40 N. J. L. 463 (confirmation of appointment).

New York. — *Achley's Case* (1856) 4 Abb. Pr. 35 (dictum); *People ex rel. Mosher v. Stowell* (1879) 9 Abb. N. C. 456; *Re Fitzgerald* (1903) 32 N. Y. Supp. 311, affirmed in (1903) 88 App. Div. 434, 84 N. Y. Supp. 1125 (confirmation of appointment); *Casler v. Tanzer* (1929) 134 Misc. 43, 234 N. Y. Supp. 571.

Ohio. — *State ex rel. Calderwood v. Miller* (1900) 62 Ohio St. 436, 57 N. E. 227, 73 Am. St. Rep. 732.

Rhode Island. — See *Richardson's Appeal* (1858) 5 R. I. 606.

Tennessee. — *State ex rel. Pierce v.*

Hardin (1931) 163 Tenn. 471, 43 S. W. (2d) 924; *State ex rel. O'Dell v. Thomas* (unreported case set out in *State v. Hardin*, supra).

Vermont. — See *Mason v. School Dist.* (1843) 20 Vt. 487. See *Chandler v. Bradish* (1851) 23 Vt. 416.

Virginia. — See *Kirkham v. Russell* (1882) 76 Va. 956.

West Virginia. — *Taylor v. Board of Education* (1931) 111 W. Va. 52, 160 S. E. 299.

Wisconsin. — *State ex rel. Burdick v. Tyrrell* (1914) 153 Wis. 425, 149 N. W. 280, Ann. Cas. 1916E. 270.

Canada. — *Tuck v. Victoria* (1892) 2 B. C. 179.

In the case of appointments by collective bodies, an additional reason for not permitting reconsideration is found in the fact that such appointments are likely to be accompanied by a good deal of political manipulation and partisan strife.

Thus, it has been said: "The election of an official by a legislative body is frequently characterized by a bitter, partisan contest, in which much wire pulling and lobbying is resorted to. Until the contest is settled, it incapacitates the legislators for looking after and attending to the many duties devolving upon them. After the contest has been waged and the will of the members expressed, the result should be final. Where, as in this cause, the vote is close, if the legislators are permitted to reconsider the appointment, it affords an opportunity for corrupt bargaining and a resort to coercive tactics which should be discouraged." *State ex rel. Pierce v. Hardin* (1931) 163 Tenn. 471, 43 S. W. (2d) 924, *infra*, IV. c. 1.

And see *Weir v. State* (1884) 96 Ind. 311, in which it is said that "county commissioners, having once exercised the power of selecting an officer, cannot annul the election by electing another person. If it were otherwise, then the board might elect every month, week, or even every secular day of the year; and the statute never contemplated any such a thing as that."

In *State ex rel. Smith v. Justico*

(1917) 200 Ala. 433, 76 So. 423, it was said by way of dictum, in discussing the right of a court of county commissioners to rescind a resolution putting into effect in the county the provision of a state law creating the office of all-time county health officer and providing for appointment to such office by the county board of health upon the acceptance of the provisions of the statute by the court of county commissioners, that, after the appointment of the health officer by the board of health, the board was without further power or authority in respect to the office.

In *State ex rel. Sauter v. Richey* (1930) 202 Ind. 116, 172 N. E. 119, in holding that the act of a board of county commissioners in rescinding an appointment made a few days before and then entering an order appointing the same person to the office was without force or effect, the appointee being held to have taken the office by virtue of the first appointment, it was said that the board was not such a tribunal as could set aside its own orders or judgments.

In *Casler v. Tanzer* (1923) 134 Misc. 48, 234 N. Y. Supp. 571, in denying an application for a temporary restraining order, made by persons claiming the offices of city assessors by reason of the adoption of an amendment to a resolution proposed at a meeting of the city council for the purpose of filling such offices, the application being directed against the taking of further action by the council with respect to the appointment, it was said that, if the applicants had been duly appointed as city assessors, they had nothing to fear from further action of the council; an appointment once validly made being irrevocable.

b. General considerations with respect to rule and basis thereof.

1. In general.

The present division of the annotation is intended to cover a few of the more general considerations which seem to have influenced the courts in holding that an appointment by a collective body is not subject to reconsideration.

2. Appointment distinguished from ordinary business.

In denying the right of a collective body to reconsider its appointments, a distinction has been observed between the exercise of the power of appointment and other business.

Thus, it has been said: "The election of an officer is not an act of an ordinary business character in which a discretion is exercised by the commissioners, but is the exercise of a special statutory authority, and few rules are better settled than that such an authority must be exercised in conformity to the statute conferring it. It cannot, therefore, be justly held that the rules which prevail in respect to the transaction of ordinary county business, or the management of ordinary county affairs, apply to the case of the election of an officer under a statute specially conferring authority to elect the officer at a designated time and for a definite period." *Weir v. State* (1884) 96 Ind. 311, *infra*, V. e.

Likewise, in *State ex rel. Calderwood v. Miller* (1900) 62 Ohio St. 436, 57 N. E. 227, *infra*, IV. c. 1, in discussing the function of a city council in the election of a city clerk, the court states that "the council was engaged in the duty of electing officers, a duty imposed on the members thereof, not on the body as a council. They were not engaged in the deliberative business which is the ordinary work of the council, but in the election of a city officer. They were not acting under parliamentary law, but were casting their votes and making their choice as required by a specific statute. They could make this choice but once. Having done so, they could not reconsider it."

And it has been said that the power to recount ballots is not like the power to reconsider a vote passed in the management of municipal affairs. *Putnam v. Langley* (1882) 133 Mass. 204, *infra*, IV. c. 1.

It would seem, therefore, that the fact that the collective body ordinarily has the power to reconsider resolutions passed by it does not neces-

sarily mean that it has the power to reconsider appointments.

3. Election and appointment distinguished.

In view of the fact that the method taken by collective bodies in choosing persons for office is in some respects more like an election than an appointment, it may be well, in order to keep clearly in mind the question under the discussion in the present annotation, which is concerned solely with appointments and has nothing to do with elections, to note the true difference between an appointment and an election.

The difference has been pointed out in several cases involving the right of a collective body to reconsider an appointment.

As said in *Board of Education v. McChesney* (1930) 235 Ky. 692, 32 S. W. (2d) 26: "Election to office usually refers to a vote of the people, whilst appointment relates to the designation of the officer by some individual or group."

And, with respect to selections by ballot, it has been said: "When an appointment is vested in a legislative body with direction to make its choice by ballot, the appointment can be made only by ballot; but in the manner of taking the ballot, and in all other matters relating to the completion of the choice, the body proceeds as a legislative body having the discretion and powers (subject only to the limitation) belonging to such body. The direction that a legislative body shall proceed by ballot does not change the appointment into an election, as that word is used to express a choice of an officer by the people, or by an indeterminate and changing class of voters." *State ex rel. Scofield v. Starr* (1906) 78 Conn. 636, 63 Atl. 512, *infra*, IV. c. 2.

In a case involving the selection of a city attorney by a common council, under provisions of a charter providing that the council might "elect" a city attorney, it was said that the power of the common council with respect to the appointment was the same whether the term "elect" or "appoint" was used, and that, although the char-

ter used the term "elect," the power was in reality an appointing power. *State ex rel. Burdick v. Tyrrell* (1914) 155 Wis. 425, 149 N. W. 280, Ann. Cas. 1916E, 270, *infra*, IV. c. 1.

For a case dealing with the difference between elections and appointments in connection with the right to reconsider an appointment at any time prior to the issuance of a commission, the right of reconsideration being made to depend upon the question whether the issuance of the commission is essential to complete the appointment, see *Conger v. Gilmer* (1867) 32 Cal. 75, discussed *infra*, V. c.

4. Appointment as executive or legislative function.

Upon the theory that the legislative branch of the government, being created for the purpose of giving expression to the will of the people with respect to problems of policy and legislation, has more freedom in regard to the reconsideration of its acts than has the executive department, the question whether, in making appointments to office, a collective body acts in a legislative or executive capacity, has been considered quite important by the courts in determining whether such a body has the power to reconsider appointments.

As said in the dissenting opinion of Wiest, J., in *North v. Wagner* (1933) — Mich. —, 249 N. W. 494: "Much depends upon whether the exercise of such power was administrative, executive, or legislative. If administrative or executive, and plenary in nature, the exercise thereof was a finality. If legislative, its exercise might, or might not, depending on circumstances, be open to reconsideration."

And, in distinguishing between appointments by an executive and appointments by a legislative body, the Connecticut court has said: "It is manifest that the will of an executive may be expressed in a manner different from that of a court or a legislative body. Wherever the appointing power is vested, the exercise of discretion in the manner of making and completing the appointment may be affected by the particular law by

which it is authorized. The law may direct how an executive may make an appointment, and so it may direct how a legislative body may make an appointment. When this is done, the law controls; but within the limits of the direction, the executive exercises discretion in a manner appropriate to executive action, and the legislative body in a manner appropriate to the action of such body." *State ex rel. Scofield v. Starr* (1906) 78 Conn. 636, 63 Atl. 512, *infra*, IV. c, 2.

It would seem that, under ordinary circumstances, the appointment of officers is an administrative or executive act. 22 R. C. L. 424. And see *State ex rel. Coogan v. Barbour* (1885) 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65, *infra*, IV. c, 1; *McChesney v. Sampson* (1930) 232 Ky. 395, 23 S. W. (2d) 584, *supra*, III. b.

Thus viewed, the appointment is irrevocable, and not subject to reconsideration.

As said in *McChesney v. Sampson* (1930) 232 Ky. 395, 23 S. W. (2d) 584, *supra*, III. b: "In all jurisdictions where appointment to office is regarded as an executive function, as here, an appointment to office once made is incapable of revocation or cancellation by the appointing executive in the absence of a statutory or constitutional power of removal."

Likewise, it has been said that "the exercise of the power of appointment to office is a purely executive act; and when the authority conferred has been exercised, it is final for the term of the appointee." *Achley's Case* (1856) 4 Abb. Pr. (N. Y.) 35.

The question whether the power exercised by a collective body in making appointments is executive or legislative in character seems to have been regarded as an important consideration in the reported case (*THORNE v. SQUIER* (Mich.) ante, 126), and the companion case of *North v. Wagner* (1933) — Mich. —, 249 N. W. 494. The majority of the court seemed to feel that such power of appointment was as much legislative in character as it was executive, but the dissenting judge (see *North v. Wagner* (Mich.) *supra*) was very strongly of the opinion

that the exercise of such power was a purely executive function.

Although stating at the outset of its opinion that the whole question whether the appointive body had the power to rescind its action depended upon whether it was acting in a legislative or executive capacity in making the appointment, it being said that, if the appointment involved the exercise of a legislative function, it would be subject to reconsideration, but that, if it was the exercise of an executive power, then such power would be exhausted by an appointment regularly made, the court in a Tennessee case goes on to hold that an appointment made by a quarterly county court is not subject to rescission or reconsideration by it, although it treats the act of the court as the exercise of a legislative function. *State ex rel. Pierce v. Hardin* (1931) 163 Tenn. 471, 43 S. W. (2d) 924, *infra*, IV. c, 1.

a. Reconsideration at same meeting or at adjourned meeting; finality of ballot; postponement of vote.

1. In general.

For the right to rescind the confirmation of an appointment at the same meeting or at an adjourned meeting, see *infra*, VI.

There would seem to be a conflict of authority upon the question as to whether an appointment made at a meeting of a collective body is subject to reconsideration at the same meeting or at an adjourned meeting.

It will be observed in this connection that it has been held that, at least so far as the question of the right to reconsider a vote is concerned, an adjourned meeting is merely a continuation of the original meeting. *Atty. Gen. v. Simonds* (1873) 111 Mass. 256; *Reed v. Deerfield School* (1900) 176 Mass. 473, 57 N. E. 961. With this thought in mind, the question of the right to reconsider an appointment at an adjourned meeting is treated in the present annotation as being the same as if the motion for reconsideration had been made at the same meeting.

It is the view of one line of authorities that, the proceedings of collective

bodies being deliberative and not administrative in nature, decisions made by such bodies do not become final and irrevocable until the final dissolution of the meeting, and hence that the act of such a body in making an appointment to office is subject to reconsideration at any time before final adjournment of the meeting.

This is the view taken by the Massachusetts court.

The case which appears to have established this view as the Massachusetts rule is *Wood v. Cutter* (1884) 133 Mass. 149, in which it was held that where, at a meeting of a school committee, in pursuance of an order of a town meeting directing the committee to appoint a superintendent of schools, it was voted to proceed to a formal vote for superintendent, and a vote was accordingly taken by ballot, which vote showed a majority for one candidate, but the committee then voted to reconsider the vote if it could be legally done, and at an adjourned meeting the vote was reconsidered and another appointed to the office, the person appointed at the adjourned meeting was entitled to the office.

The view is also supported by the case of *Baker v. Cushman* (1879) 127 Mass. 105, discussed *infra*, IV. c. 2, although in that case there appears to have been some question as to the validity of the alleged appointment.

The suggestion was made in the *Wood Case* that, where the law prescribed that the vote should be taken by ballot, a reconsideration of the vote might be considered as destroying the secrecy intended to be secured through the use of the ballot. But this suggestion appears to have been definitely rejected by the Massachusetts court in the later case of *Reed v. Deerfield School* (Mass.) *infra*, in which the court noted that in the *Wood Case* there was no statute requiring the voting to be by ballot, whereas in the case before it there was such a statute, but held that this was not sufficient to require a different result. And also see *Baker v. Cushman* (1879) 127 Mass. 105, *infra*, IV. c. 2, in which the statute required the voting to be by ballot.

In *Reed v. Deerfield School* (1900) 176 Mass. 473, 57 N. E. 961, where, at a meeting of the school committees of three towns, in order to correct the inequality in the voting power arising from the fact that the committee of one of the towns was composed of nine members while the committees from the other two towns were composed of only three members each, it was agreed that the vote of the members of the committee from the first town should count as only a three-sevenths vote, two of the members of that committee apparently being absent, and a person was elected to the office upon a ballot taken under this scheme, but, objections having been made to this fractional system of voting, the meeting was adjourned without declaring this person elected, and at a later adjourned meeting the vote taken at the original meeting was rescinded and another elected to the office, it was held that the person chosen at the original meeting should have been declared elected by the chairman of that meeting. After reaching this result, however, the court went on to hold that, although there had been a valid and effectual appointment made at the first meeting, this appointment, under the general Massachusetts rule, was subject to rescission at the same or an adjourned meeting, and that, therefore, the appointee chosen at the first meeting was not entitled to the office.

Of course, it is clear that where, after the announcement of the result of a ballot taken for the purpose of electing a public official, a motion is immediately adopted to recount the votes, the person announced as elected on the recount is the one elected to the office. *Putnam v. Langley* (1882) 123 Mass. 204. In this case it was suggested that, if the motion was not made immediately after the announcement of the result of the election, but other business was taken up and the question of the election was treated as closed, the election might be considered as final, and any attempt to depose the officer at that meeting would be as ineffectual as if made at a subsequent meeting. But in *Wood*

v. Cutter (1834) 133 Mass. 149, it is said by Holmes, J., with reference to this suggestion, that it plainly had reference only to the facts of the case before the court.

But it would seem that the right to reconsider a ballot appointing an officer might depend upon whether the body making the appointment was a fluctuating body, like a town meeting, or a fixed body with a definite membership. See *Wood v. Cutter* (1834) 138 Mass. 149.

The theory of the Massachusetts court in holding that a ballot taken for the purpose of appointing an officer may be reconsidered by the appointive body at the same meeting or at an adjourned meeting seems to be that the ballot must be considered as having been taken subject to the implied condition that it might be reconsidered. *Ibid.*

The view that an appointment made at a meeting of a collective body is subject to reconsideration at the same meeting or at an adjourned meeting is also the view taken by the New Jersey court.

Thus, in *State v. Foster* (1823) 7 N. J. L. 101, where, after a second ballot had been taken by a joint meeting of the legislative council and general assembly for the purpose of electing a county clerk, although such ballot showed a majority in favor of one of the candidates, the chairman of the meeting declared that there had been no election or appointment, and, upon his proposal, the meeting decided to take another ballot, and, after this third ballot had been taken, the vote being the same as on the second ballot, the same procedure was followed, and a fourth ballot was taken, it was held that the person receiving the majority on the last ballot was entitled to the office. In rejecting the contention that the legislative power with respect to the appointment was exhausted after the first ballot upon which one of the candidates received a majority, the court said: "All deliberative assemblies, during their session, have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result

only which is done. In this case, so long as the joint meeting were in session, they had a right to reconsider any question which had been before them, or any vote which they had made." The opinion was also expressed that the court, having reserved to itself the right to revise its proceedings during the term, could hardly deny this right to the legislature. It appears from the facts of this case that the last ballot had been taken on the same day as the prior ballot but after an adjournment of the meeting, but this fact is not mentioned in the court's opinion. For a criticism of this case, see *State ex rel. Coogan v. Barbour* (1885) 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65, in which the Connecticut court states that the *Foster* Case was hastily decided and manifestly not well considered.

And see the statement made by the Arkansas court in *Allen v. Morton* (1910) 94 Ark. 405, 127 S. W. 450, discussed *infra*, IV. c. 2, to the effect that "the appointment does not become final until the meeting at which it was made terminates, and until then it is subject to reconsideration by the board, and can be set aside, and another made, as often as they see fit."

Although the view taken by the Massachusetts and New Jersey courts, upholding the right of a collective body to reconsider appointments at the same meeting or at an adjourned meeting, would seem to be quite reasonable, especially considering the nature of the proceedings before such bodies and the wide discretion usually accorded them in the manner of determining and expressing their will, there is considerable authority for the opposite view.

Thus, in *State ex rel. Calderwood v. Miller* (1900) 62 Ohio St. 436, 57 N. E. 227, where, upon a ballot being taken by a city council composed of eight members for the purpose of electing a city clerk, one of the candidates received a plurality of four votes, but, some question being raised with respect to the votes, two of the members were allowed to change their vote, thereby bringing about a tie vote, and the mayor then cast his vote

in favor of one of the other candidates, there being some dispute under the facts as to whether the mayor had declared the person receiving the plurality on the first ballot elected, it was held that, after the vote of the members of the council had been cast and one of the candidates had received a plurality of such votes, the election was complete and final, and any subsequent action taken by the council could not affect such election. This was held to be true, even admitting that there had been no formal statement by the presiding officer declaring the candidate elected. As said by the court: "The vote having been cast, and the result having been announced to the council by the clerk, by which it was apparent the relator had received a plurality of the votes cast, the function of the council was discharged. . . . The election was complete. The formality of a declaration by the presiding officer of the council could neither add to nor detract from the thing which had already been done. The right of the relator to qualify and be inducted into the office was fixed *eo instante*."

And in *State ex rel. Coogan v. Barbour* (1885) 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65, where, upon a motion being made before a joint convention meeting which had met for the purpose of making certain appointments, that "the convention proceed to ballot for prosecuting attorney," a ballot was taken, on which one of the candidates received a clear majority, but, although no error or mistake appeared in the ballot, a resolution declaring such candidate to be elected was defeated, and the convention, after adopting a resolution declaring the first ballot null and void, then proceeded by resolution to appoint another person, it was held that the candidate receiving a majority of the votes taken on the first ballot was entitled to the office. This result was reached upon the ground that, by electing to proceed by ballot rather than by resolution, the convention evidently contemplated that the ballot should not be merely an informal one, but should be the final expression of

the convention's will on the question; and that, having once acted, its power was exhausted and it could not rescind its vote and declare another elected. *Park, Ch. J.*, dissenting from this result, was of the opinion that, in the light of the later proceedings of the convention in entertaining a motion to declare the first candidate elected and, after this had been defeated, proceeding to elect another by resolution, the members of the convention had regarded the first ballot as merely an informal expression of opinion, and had intended that the appointment should turn on the vote on the subsequent resolution; but that, even if the ballot should be considered as having been intended to be final, it was within the power of the convention to rescind its action by a later vote at the same meeting. And see *State ex rel. Cole v. Chapman* (1878) 44 Conn. 595, discussed *infra*, IV. c, 2, in which it was said that, if the candidate selected on the first ballot had been duly and legally elected, the power of the council would have been exhausted.

Likewise, in *State v. Phillips* (1887) 79 Me. 506, 11 Atl. 274 (former appeal in (1887; Me.) 10 Atl. 447), where a board of aldermen, after electing an assessor by ballot as required by statute and declaring the result of the election, adjourned until the next day, and at the adjourned meeting the appointment was revoked and another person appointed, it was held that, having once exercised the power of appointment in the manner designated by the statute, the board's power in the matter was exhausted and it could not rescind the appointment.

And in *State ex rel. Pierce v. Hardin* (1931) 163 Tenn. 471, 43 S. W. (2d) 924, where, upon a ballot being taken by a quarterly county court for the purpose of electing a county superintendent, it was found that one of the candidates had a plurality, and, after this result had been announced by the clerk, the court proceeded to the transaction of other business, and subsequently took a noon recess, during which recess the person elected county superintendent qualified as

such by executing a bond and taking the oath of office, but, upon a motion made in the afternoon session to reconsider the election of the county superintendent, the election was rescinded and another appointed to the office, it was held that it was not within the power of the county court to revoke its decision in this manner. It was the court's view that the ballot taken at the morning session, having resulted in a clear plurality for one of the candidates, completely exhausted the power of the court, and that any subsequent action taken by it could not affect this ballot. The case of *Donnelly v. Fritts* (1929) 159 Tenn. 605, 21 S. W. (2d) 619, *infra*, IV. e., is distinguished upon the ground that the question before the court in that case was whether the action of the quarterly county court in taking jurisdiction of contest proceedings brought before it as a judicial tribunal, and in declaring invalid an appointment made by it while acting in a legislative capacity, was subject to judicial review; whereas, in the instant case the only question was whether an appointment by the quarterly county court acting in a legislative capacity could be rescinded by it while still acting in that capacity.

And see *Tuck v. Victoria* (1892) 2 B. C. 179, *infra*, V. e. in which, after stating that the various things to be done after the taking of a ballot were merely consequent upon and could not be any part of the election itself, the court said: "I think that the election is complete so far as the individual voters are concerned, as soon as all the ballots are thrown into the box, and I think it is complete so far as the council as a body are concerned, so soon as the result of the poll is declared."

And in the case of an appointment which had been deferred until the next regular meeting of the appointive body, such a meeting being considered as practically the same for the purpose of reconsideration as an adjourned meeting, it has been held that the appointment was not subject to reconsideration at the deferred meeting.

Thus, in *State ex rel. Burdick v. Tyrrell* (1914) 153 Wis. 425, 149 N. E. 280, Ann. Cas. 1916E, 270, where, although one of the candidates for the office of city attorney, upon an election by the common council of the city, had received a majority on three of the four formal ballots taken, the majority necessary to an election being held by the court to be merely a majority of a quorum and not a majority of the personnel of the council, the council deferred the election to its next regular meeting, and, although in the meantime the candidate receiving the majority at the first meeting had filed his oath of office and qualified for the office, the council, at the subsequent meeting, voted to rescind its former action, and then proceeded to elect another to the office, it was held that the person elected at the first meeting was entitled to office, although he had never received a certificate of election and the mayor had never declared him elected. It was the court's view that, the ballot taken at the first meeting having been entirely regular and in accordance with the rules of proceeding adopted by the council for this election and the person receiving the majority on that ballot having qualified for the office, the appointment was complete and not subject to revocation by the council. In the words of the court: "After the election of relator, acceptance of the office and qualification by him, the council had no power to reconsider and elect another." It was said in this case that it is not the view taken by the presiding officer or the members of the body with respect to the conclusiveness of their vote that is the determining factor, but rather what is actually done by them.

The rule denying the right of a collective body to reconsider an appointment made by ballot where there is no error or irregularity in the ballot has been well expressed as follows: "When a legislative body expresses its will by ballot, its act is not complete before the result of the ballot is ascertained and made known. When this is done, and it appears clearly from the announcement of the state

of the vote that the number of ballots requisite to an appointment has been lawfully given for one person, and no further action is taken, the will of the body is finally expressed and the appointment is complete. It is not lawful afterward, and without any reason, to revoke such an appointment and appoint another person." *State ex rel. Scofield v. Starr* (1906) 78 Conn. 636, 63 Atl. 512, discussed *infra*, IV. c. 2, citing *State ex rel. Coogan v. Barbour* (1885) 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65, *supra*.

The view has been expressed that it is necessary, in order to complete an election by ballot, to announce the result of the ballot. Thus, it has been said that "when a legislative body expresses its will by ballot, its act is not complete before the result of the ballot is ascertained and made known." *State ex rel. Scofield v. Starr* (1906) 78 Conn. 636, 63 Atl. 512, discussed *infra*, IV. c. 2. And see *Tuck v. Victoria* (1892) 2 B. C. 179, *supra*. But for a contrary view, see *State ex rel. Calderwood v. Miller*, 62 Ohio St. 436, 57 N. E. 227, *supra*.

2. Defective or doubtful ballot.

Where a ballot taken by a collective body for the purpose of electing a person to office is defective or irregular, or where there is some question in the minds of the members as to its regularity, there would seem to be no question but that the appointive body should be permitted to take another ballot and that an appointment made on such questionable ballot should not be considered as final and irrevocable. This seems to be the universally recognized rule.

Thus, in *State ex rel. Scofield v. Starr* (1906) 78 Conn. 636, 63 Atl. 512, where, upon a ballot being taken by a council convened for the purpose of electing a city surveyor, there was one more vote than there were members voting, one of the votes being a blank, and, after this fact had been called to the attention of the council by the presiding officer, the council took three more ballots, it was held, against the objection raised by the candidate receiving the plurality on

the first ballot that the blank vote was merely a blank piece of paper which had accidentally attached itself to the back of one of the regular ballots, and had been innocently cast into the ballot box by the alderman voting that ballot, that the presence of the blank in connection with the fact that there were more votes cast than there were members voting raised a sufficient doubt with respect to the regularity of the ballot to justify the council in disregarding the ballot and taking a further vote; and that the candidate elected on the last ballot was entitled to the office. The court said: "Upon principle it seems to us clear that the common council, upon discovering that more ballots, including one blank ballot, had been cast than there were persons voting, had the power to exercise its discretion whether to make an investigation then and there, which might require each member to declare how he voted, or to assume that the evident irregularity was harmless, or to exclude all suspicion of fraud by allowing each member to again cast his ballot; that in pursuing the latter course the council reasonably exercised its power as a legislative body in expressing its will by ballot; that this course was properly taken by each member participating in another ballot; and that having thus exercised its discretion, the process of appointing or electing a city surveyor by ballot was not completed until the result of the ballot appointing the respondent was ascertained." The court did not seem to feel that this result was contrary to the result reached in *State ex rel. Coogan v. Barbour* (1885) 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65, *supra*, as it cites that case in support of the general rule, admitted by it to be sound, that, after the will of the legislative body has been finally expressed, the appointment cannot be revoked.

And in *State ex rel. Cole v. Chapman* (1878) 44 Conn. 595, where, at a meeting for the election of a city attorney at which forty-five members of the council were present, the first ballot showed twenty-two votes for each of the candidates and one blank vote,

and, upon being informed by the tellers that the ballot had resulted in a tie without being told of the blank vote, the mayor then cast the deciding vote in favor of one of the candidates, but the council, refusing to accept the declaration of the mayor that the first ballot had resulted in a tie, took a second ballot by yeas and nays at which the other candidate was elected, it was held that, the first ballot having been ineffective to elect either one of the candidates by reason of the fact that there were an odd number of members present, and therefore a tie vote within the meaning of the statute permitting the mayor to cast the deciding vote in case of a tie was impossible, it was within the power of the council to rescind its vote on the first ballot and proceed to take a second ballot, although it was said that, if the candidate elected on the first ballot had been duly and legally elected, the power of the council would have been exhausted.

Likewise, in *Allen v. Morton* (1910) 94 Ark. 405, 127 S. W. 450, where, upon a meeting of the board of trustees of the University of Arkansas for the purpose of electing a treasurer of the university, the first ballot contained a vote without a name on it, and, although one of the candidates for the office had a majority of the votes on such ballot even considering the blank vote, the board proceeded to take a second ballot, which resulted in a tie, and the governor of the state as president of the board then cast his vote in favor of another candidate, such candidate then being declared elected, the election of such candidate was upheld, against the objection of the candidate having the majority on the first ballot that the board had no power to reconsider its action and take a second ballot.

In Massachusetts, where an appointment made by a collective body is not considered to be complete and irrevocable until the final dissolution of the meeting, it would seem that, a fortiori, the appointment is subject to reconsideration where there is a question as to the regularity of the ballot.

So, in *Atty. Gen. v. Simonds* (1873)

111 Mass. 256, where, upon a ballot taken for the election of a moderator for a town meeting, no check list was used as required by law, but the person elected was sworn in and acted as moderator of the meeting, and a ballot was then taken for the purpose of electing selectmen, on which ballot the check list was used, after which the meeting was adjourned to meet at a later date, and at the adjourned meeting it was decided that, because of the irregularity in the selection of the moderator at the former meeting, the election of the selectmen at that meeting would be disregarded and a new ballot taken, it was held that it was within the power of the meeting to treat the first election as void, and that this was true even though the selectmen elected at the first meeting had in the meantime taken the oath of office. With regard to the authority of the meeting thus to declare the first election void, it was the court's view that the fact that the election was rescinded at an adjourned meeting instead of at the meeting originally called was immaterial, a regular and proper adjournment being regarded as a continuation of the same meeting.

And in *Baker v. Cushman* (1879) 127 Mass. 105, where the result of the first ballot taken by a city council for the purpose of electing a city clerk showed a plurality in favor of one candidate, but also disclosed that there had been one more vote cast than there were members voting, and the council, after declaring this first ballot void, proceeded to take another ballot, it was held that the candidate elected on the second ballot was entitled to the office. As said by the court: "It was within the lawful power of the convention, at the same meeting, and before the result of the election had been declared, to treat the proceedings already had as irregular and invalid, and to vote anew."

Likewise, in *Keough v. Holyoke*, (1892) 156 Mass. 403, 31 N. E. 387, where, upon a ballot being taken by a city council for the purpose of electing a collector of taxes, there was a plurality in favor of one of the candidates, but there was one scattering

vote, and, after examining this scattering vote and finding it to be illegible, the mayor directed another ballot to be taken, which was done without any objection being raised thereto, and the person selected on this ballot was declared elected by the mayor. It was held that this person had been duly appointed to the office, so that the council could not remove him at a later meeting and appoint the person receiving the plurality on the first ballot. In support of this result, the court said: "Without considering whether there is any absolute rule of law as to what should be done with a vote of this kind, it is plain that the mayor's decision on the facts was a reasonable one, and that it was for the tellers in the first instance, and then for the mayor, to make the decision. If the name on the vote could not be made out with reasonable certainty, it ought not to have been counted for any person; if the vote was cast by a member of the convention as a vote for a real and not a fictitious person, it should have been counted in ascertaining the whole number of votes cast. The convention, by proceeding to another ballot, in which all the members voted, assented to the decision of the mayor, and the petitioner, having been elected on that ballot, and having been duly declared elected, and the convention then having been dissolved without taking any action affecting this declared result, the petitioner must be held to have been duly elected to the office."

There is also dictum supporting the rule that an appointment by ballot is subject to reconsideration where there is some question as to the regularity of the ballot, in *State v. Phillips* (1887) 79 Me. 506, 11 Atl. 274 (former appeal in (1887; Me.) 10 Atl. 447), discussed supra, IV. c. 1, in which it was said that it was within the power of a board of aldermen to set aside an appointment for an irregularity or illegality in the ballot at any time before the result of the ballot was declared; and in *State ex rel. Burdick v. Tyrrell* (1914) 158 Wis. 425, 149 N. W. 230, Ann. Cas. 1916E, 270, discussed supra, IV. c. 1, in which

the court recognized that if there was mistake or fraud in the taking of the ballot, the ballot might be rescinded.

And see *Tuck v. Victoria* (1892) 2 B. C. 179, *infra*, V. e, in which the court refused to state what would be the effect of an appointment by ballot where there was a mistake in the ballot.

Upon analysis, the right of a collective body to reconsider an appointment where there is a defect or irregularity in the ballot would seem to depend not so much upon the question of whether an appointment made at a meeting of a collective body may be rescinded at the same meeting or at an adjourned meeting, but rather upon the question of the power of such a body to correct errors in its proceeding.

As said in *State ex rel. Scofield v. Starr* (1906) 78 Conn. 636, 83 Atl. 512, "The decisive question was not whether an appointment under the first ballot would have been valid if no further steps had been taken after the announcement of the state of vote upon that ballot, but whether the council had the power, upon that announcement, to take another ballot."

d. Rules of order providing for reconsideration.

For cases involving the confirmation of appointment, see *infra*, subd. VI.

In view of the fact that the manner in which a collective body is to function and express its will must be left largely to its own discretion, and the general concession that it is within the power of such a body to adopt all necessary rules for the proper conduct of its meetings, there would seem to be no question but that such a body may adopt a rule with respect to the reconsideration of matters passed upon by it.

With respect to the right to attack the validity of rules of order providing for reconsideration, attention is called to the annotation in 76 L. ed. U. S. 967, entitled "Power of court to pass upon rules of legislative bodies."

As illustrative of rules of order per-

mitting reconsideration. see *Roberts, Rules of Order*, § 27.

And for a case illustrating the judicial application of *Roberts, Rules of Order*, see *People ex rel. MacMahon v. Davis* (1918) 284 Ill. 439, 120 N. E. 326, 2 A.L.R. 1650, discussed *infra*, subd. VI. c. in which, in holding that the fact that the appointees had assumed the duties of the office did not give them any additional rights where there was a motion pending to reconsider the confirmation of their appointment, the court pointed out that, under *Roberts's Rules of Order*, which had been adopted as the rules governing the appointive body, the effect of a motion to reconsider is to suspend all action that the original motion would have required until the reconsideration is acted upon, attention likewise being given, in connection with the effect of a motion to lay the motion for reconsideration on the table, to the provision in *Roberts's Rules of Order* with respect to motions to lay on the table.

Where the rules governing a collective body at the time of the appointment of an officer provide for the reconsideration of matters passed upon by it, it is generally held that the appointment is subject to reconsideration upon the conditions and within the time provided for in such rules.

Thus, in the reported case (*THORNE v. SQUIER* (Mich.) ante, 126) and in the companion case of *North v. Wagner* (1932) — Mich. —, 249 N. W. 494, it was held that where a commission about to go out of office elected a person to fill a city office, but, upon a motion made by one of the members of the original commission, proper notice having been given by the commissioner of his intent to make such motion, the incoming commission revoked the appointment and appointed another, such reconsideration was held to be proper, where the rule by which the proceedings of the commission were governed provided that a motion to reconsider any vote should not be in order after one regular meeting of the commission had intervened between the decision and the motion for reconsideration, but that it should

be in order for any commissioner of the prevailing side to move for a reconsideration during that period, provided that he should file a notice of his intention so to move within forty-eight hours after the motion to be reconsidered was passed. This result was held not to be affected by the fact that there had been another meeting of the commission intervening between the time of the appointment and the time of the meeting at which the appointment was rescinded, where such meeting was merely for the purpose of canvassing the vote following a city election, and could not be considered as a regular meeting of the commission within the meaning of its rules. Vigorous dissent from this result was expressed by two of the judges (see *North v. Wagner* (Mich.) *supra*).

And the rescission of an appointment made by a board of supervisors on the next day following the appointment has been held to be entirely proper, where it was a rule of the board that a motion for reconsideration might be made by any member on the same day or on the next day following the decision proposed to be reconsidered. *People ex rel. Birch v. Mills* (1884) 32 Hun (N. Y.) 459.

For further authority, see the division of the annotation dealing with the right of a legislative body under its rules of order to revoke its confirmation of an appointment, *infra*, subd. VI.

The theory upon which it is held that an appointment is subject to reconsideration where the rules by which the appointing body is governed provide for reconsideration seems to be that the appointment is made subject to the condition that it may be revoked at any time within the period provided for reconsideration. *THORNE v. SQUIER* (Mich.) (reported herewith) ante, 126.

And to the same effect, see *People ex rel. Birch v. Mills* (1884) 32 Hun (N. Y.) 459, in which it was said: "The procedure was in entire accordance with the rules, and any appointment would be subject to them. They are a law to the supervisors and to all

persons dealing with them. All contracts implied from a resolution are subject to the right to change it by another resolution passed in accordance with the rules of the board."

As said in *Atty. Gen. v. Oakman* (1901) 126 Mich. 717, 86 N. W. 151, 86 Am. St. Rep. 574, *infra*, subd. VI. b, if the vote of a deliberative body upon the question of an appointment or the confirmation of an appointment is subject to reconsideration under the rules of order governing the deliberative body or under the usual parliamentary rules with respect to reconsideration, the appointment is not complete beyond recall until the power to reconsider has been cut off by the lapse of time.

With respect to the proper attitude to be taken by the judiciary in regard to rules of order adopted for the government of legislative bodies, it has been aptly said: "If it be said that the powers of the county court are ministerial, judicial, and legislative, and that, in the election of a county superintendent by the justices, legislative powers were exercised, and in determining this contest its judicial power is alone invoked, we reply, if this be conceded, that in the absence of statutory limitation, the justices, as a legislative body, can adopt their own methods, not in conflict with the law of the land, of expressing their legislative choice, and if they adopt a method of expressing their will, and under this method, as construed by judicial rules, do express their will, but they decide that they have not, and proceed under their method until they do reach a choice acceptable to their legislative judgment, then this legislative judgment, if not violative of the law, cannot be reviewed and set aside by the courts. In this aspect of the question it involves an application of the rules of parliamentary law to the facts more than the rules and principles of law in its usual application to the decision of disputed rights." *Leonard v. Haynes* (1884) 14 Lea (Tenn.) 447, discussed *infra*, subd. IV. e. And to the same effect, see *Donnelly v. Fritts* (1929) 159 Tenn. 605, 21 S. W. (2d) 619.

In *Plantz v. Rensselaer County* (1924) 122 Misc. 576, 204 N. Y. Supp. 27, the defeat of a motion to reconsider a vote by which certain officers were appointed by a board of supervisors was held not to exhaust the powers of the board and prevent the board from taking further action in the matter except by unanimous consent, under a rule governing the reconsideration of motions which provided that "a motion to reconsider, being put and lost, shall not be renewed, nor shall any subject be a second time reconsidered without unanimous consent," where the appointment to which the motion for reconsideration by the board had been directed was a nullity by reason of the fact that the appointee had received only a majority of the votes cast, and not a majority of the total members of the board as required by law. In reaching this result, the court pointed out that, in order to have a reconsideration within the meaning of the rules governing motions for reconsideration, it is necessary to have a valid and effective decision which can be made the subject of the reconsideration, and, if the decision of the board to which the motion for reconsideration is directed is a mere nullity, there is nothing to be reconsidered. In the words of the court: "The rule governing motions for reconsideration refers to the reconsideration of a decision of the board, and it must be held to apply to a decision which has actually been made, and which is lawful and effective, and which expresses the performance of a duty or the exercise of a power." A distinction is also noted between a reconsideration after the defeat of a resolution involving matter with which the board may or may not concern itself at its own discretion and a reconsideration following a failure to act with respect to a mandatory duty.

For the question whether the rules of an appointive body with respect to reconsideration apply to the summary removal of an officer, see *Ex parte Richards* (1873) L. R. 3 Q. B.

Div. (Eng.) 368, discussed at length in subd. I. b. supra.

e. Contest proceedings before appointive body.

An unusual situation exists in Tennessee with respect to the office of county superintendent of schools. In that state the office of county superintendent is filled through an election by the quarterly county court. Under the theory adopted by the Tennessee court, that, in the absence of any special statute with respect to the contest of elections, the contest is to be heard before the body by whom the officer is inducted into the office, it has been held that this quarterly county court is the proper body before which to bring contest proceedings in the case of a dispute in the election of a county superintendent. *Leonard v. Haynes* (1884) 14 Lea (Tenn.) 447, as explained in *Johnson v. Brice* (1903) 112 Tenn. 59, 83 S. W. 791; *Donnelly v. Fritts* (1929) 159 Tenn. 605, 21 S. W. (2d) 619. Thus is presented the anomalous situation of an appointive body being the judge of the validity of its own appointment.

In a recent Tennessee case, however, the act of the quarterly county court in reviewing the validity of its own appointment and determining the rights of the parties in contest proceedings under this rule has been held to be merely a reconsideration of its former action, rather than a judicial review of such action. Thus viewed, it is held that the county court, acting in accordance with its rules of procedure, has the power to reconsider an appointment in contest proceedings brought before it. *Donnelly v. Fritts* (1929) 159 Tenn. 605, 21 S. W. (2d) 619. The view taken by the court is expressed as follows: "The hearing of this contest by the quarterly county court at its April, 1929, term really involved a determination by that body as to whether proper rules of procedure had been followed in the election of the county superintendent at the previous January term. If the justices concluded that their former procedure was irregular, not in accordance with parliamentary practice or their own methods of transacting busi-

ness, it was within their province to reconsider their former action. The legislative judgment of the quarterly county court upon a matter of this character 'not in conflict with the law of the land,' as said in *Leonard v. Haynes*, may not be reviewed by the courts. The case before us is to be distinguished from cases in which the quarterly county court has acted illegally and beyond its authority. Such action as that can, of course, be reviewed in courts upon proper procedure. This case is merely one in which the justices have declared that action appearing to have been taken by them formerly was irregular, and not an expression of their will, and in which they proceeded by a method within their competency to declare their real intent."

For another Tennessee case dealing with the right of the quarterly county court to rescind an appointment of a county superintendent, but in which the county court was not acting in its judicial capacity in reconsidering the appointment, see *State ex rel. Pierce v. Hardin* (1931) 163 Tenn. 471, 43 S. W. (2d) 924, discussed supra, subd. IV. c. 1.

V. Rule considered with respect to the finality of the appointment.

a. In general.

There would seem to be no question but that an appointment is subject to reconsideration at any time before it is finally completed. As said in *Board of Education v. McChesney* (1930) 235 Ky. 692, 32 S. W. (2d) 26, "An appointment to office may be revoked, of course, at any time before the act becomes final." It thus becomes important, in determining whether an appointment may be reconsidered, to ascertain at what stage the appointment is finally completed.

It should be observed, however, that it is not intended in the present division of the annotation to take up the general question of when an appointment becomes final and complete. If an attempt were made to present all of the authorities on this question, it would be necessary to extend the discussion to questions other than the

right of the appointive power to reconsider an appointment. For example, the question of the finality of an appointment arises in almost all cases where mandamus is sought to compel the completion of an appointment; likewise, in cases dealing with the question of the point of time at which the liability of the sureties on the officer's bond attaches, and in many other cases. The cases discussed in the present division of the annotation, therefore, should be regarded rather as illustrative of the general principles with respect to the finality of appointments, than as an exhaustive collection of cases on such question.

With respect to the general rule governing the finality of appointments, it has been said that "it is completed when the last act of the appointing authority has been accomplished." *Board of Education v. McChesney* (1930) 235 Ky. 692, 32 S. W. (2d) 26. To the same effect, see *Marbury v. Madison* (1803) 1 Cranch (U. S.) 137, 2 L. ed. 60.

For the finality of recess appointments, see *supra*, subd. III. b.

For the finality of an appointment by ballot, see *supra*, subd. IV.

b. Notice and acceptance of appointment.

In *State ex rel. Whitney v. Van Buskirk* (1878) 40 N. J. L. 463, discussed *infra*, subd. VI. c, the confirmation of a nomination made by a mayor to a board of councilmen was held not subject to reconsideration although no notice had been given to the appointee of the appointment.

In *Taylor v. Board of Education* (1931) 111 W. Va. 52, 160 S. E. 299, where an order was entered at a meeting of a board of education appointing a certain person as teacher for the following school year, and the next day a form of contract supplied by the state department for use in the employment of teachers was signed by the officers of the board, but a request made by the appointee a few days later that she be allowed to sign such contract was refused, and subsequently, after a change in the personnel of the board, the appointment was

revoked, it was held that the appointment was final without an acceptance by the appointee, and that the attempted revocation was unauthorized.

The question whether the appointive body loses its power of reconsideration by communicating the fact of the appointment to the appointee was raised, but not decided, in *Wood v. Cutter* (1884) 133 Mass. 149, *supra*, subd. IV. c. 1.

And the court in *Allen v. Morton* (1910) 94 Ark. 405, 127 S. W. 450, *supra*, subd. IV. c. 2, declined to express any opinion as to whether the board appointing the officer could deprive itself of the power of reconsidering the appointment at the same meeting, by communicating the fact of appointment to the appointee and by the acceptance of the appointment by him.

For the right of a common council to rescind the confirmation of an appointment after the appointee had performed every act required of him to indicate his acceptance of the office, see *Re Fitzgerald* (1903) 82 N. Y. Supp. 811 (affirmed in (1903) 88 App. Div. 434, 84 N. Y. Supp. 1125), discussed *infra*, subd. VI. c.

c. Issuance of commission; signing appointment.

The question whether an appointment has become final and complete so as to preclude reconsideration has arisen in a number of cases in connection with the issuance of a commission or the execution of a writing evidencing the appointment.

In the famous case of *Marbury v. Madison* (1803) 1 Cranch (U. S.) 137, 2 L. ed. 60, an appointment by the President of the United States, under the power conferred upon him by the Constitution to nominate, and, by and with the advice and consent of the Senate, to appoint, all officers of the United States, and, by another article of the Constitution, to commission all officers of the United States, it being provided by an act of Congress that the Secretary of State should keep the seal of the United States and should affix such seal to all civil commissions, was held to be final and irrevocable after the commission had been signed

and the seal affixed to it by the Secretary of State, although the commission had not been delivered to the appointee.

But, where the law provides that every officer elected or appointed to fill a vacancy shall be commissioned or receive a certificate of election or appointment, and no commission or certificate is issued to one appointed to fill a vacancy, the appointment may be reconsidered and another appointed. *Conger v. Gilmer* (1867) 32 Cal. 75.

So, in accordance with the statement in *Marbury v. Madison* (U. S.) *supra*, to the effect that the final act of the appointment is the signing of the commission, it was held in *Harrington v. Pardee* (1905) 1 Cal. App. 278, 32 Pac. 33, where a person had been appointed to an office by the governor and the appointment confirmed by the senate, but no commission had ever been issued and the successor to the governor refused to issue such commission, that the appointment had never been completed. The court in this case said: "The appointment is not made until the commission is issued, and issuing the same is the last act, and in issuing the commission of the governor is performing an executive and not a ministerial act, and is, therefore, acting under his discretionary powers, and may or may not issue the commission, although the senate may have advised it and consented that he should make the appointment."

But in *Hoke v. Field* (1873) 10 Bush (Ky.) 144, 10 Am. Rep. 53, an appointment by a judge of a county court, which was evidenced by open and unequivocal acts and statements of the judge and by the act of the clerk of the court in inducting the appointee into office, was held to be final and irrevocable, although there was no valid written evidence of the appointment.

Of course, where no commission is required for the office, the finality of the appointment does not depend upon the issuance of a commission.

Thus, in *Draper v. State* (1911) 175 Ala. 547, 57 So. 772, Ann. Cas. 1914D.

301, upon the theory that the statute providing that all state officers appointed by the governor to fill vacancies should be commissioned did not apply to city commissioners, and that no commission was required in the case of such officers, it was held that the appointment of a person by the governor to fill a vacancy in the office of city commissioner was complete and irrevocable after the act of appointment, although the appointee never received a commission. Two judges, however, dissented from this result upon the ground that the office of city commissioner was a state office within the contemplation of the statute and therefore an office which required a commission, and that, even if not considered as a state office, the statute creating the office should be considered as having been passed by the legislature subject to the general practice of the governor under the other statute of issuing commissions in all cases where appointments were made to fill vacancies.

A distinction should be noted between cases where the issuance of the commission is an essential part of the appointment and cases where it is simply the exercise of a ministerial function.

Thus, where the appointive power is vested in a body other than the governor, as where the office is to be filled through an election by the people, and the function of the governor in issuing a commission to the person appointed or elected is purely ministerial, and he has no discretion with respect to the issuance of the commission, it would seem clear that, after the governor has once performed this duty by the issuance of a commission, his power is exhausted and the commission cannot be revoked by him. *Ewing v. Thompson* (1862) 43 Pa. 372. As the court said: "The power of the governor to revoke a commission once issued to an officer, not removable at the pleasure of the governor, may well be denied. Even where he has the power of appointment of such an officer, an appointment once made is irrevocable. Much more, it would seem, is a commission

issued by him incapable of being recalled or invalidated by himself, when the appointing power is located elsewhere, and when his act, in issuing the commission, is not discretionary with him, but is only the performance of a ministerial duty."

And where, in pursuance of an appointment regularly and validly made by the common council of a city, a person qualified for an office by giving bond and taking the oath, although the appointment had not been signed by the mayor, it has been held that the appointment was final and not subject to rescission by the council, where the duty of the mayor in respect to signing appointments was purely ministerial. *People ex rel. Mosher v. Stowell* (1879) 9 Abb. N. C. (N. Y.) 456.

With respect to the necessity of a commission or certificate to complete an appointment, a distinction has been noted between commission or certificate issued after an election of an officer by the people and commission or certificate issued after an appointment of an officer by an executive or other board. In the former case, it is said that the right of a person to the office arises from the vote of the people, and does not depend upon the issuance of a commission; while, in the latter case, the issuance of the commission is an essential part of the appointment. *Conger v. Gilmer* (1867) 32 Cal. 76. It was said in this case, with respect to the appointment of officers by boards consisting of several members, that the mere fact that it is necessary to take a vote in order to arrive at some decision with respect to the appointment does not make the appointment an "election" not requiring a commission or certificate for its consummation, but that the action of the board in such a case is as much an "appointment" as the action of a governor or other single executive in similar cases.

For the right of a governor to rescind an appointment made during a recess of the legislature where a commission has issued, the appointment being subject to confirmation by the senate, see *People ex rel. Wetherbee*

v. Cazneau (1862) 20 Cal. 504, discussed supra, *supra*, III. b.

d. Qualification; approval of bond, etc.

In Michigan, where a person appointed by the mayor to the office of city counselor accepts the office and takes the oath and files a bond with the common council as required by law, which bond appears to be sufficient and entirely regular, it has been held that the mayor is without power to revoke the appointment prior to the approval of the bond. *Speed v. Detroit* (1893) 97 Mich. 198, 56 N. W. 570 (for further proceedings, see *Speed v. Detroit* (1894) 98 Mich. 360, 57 N. W. 406, 22 L.R.A. 842, 39 Am. St. Rep. 555), and *Atty. Gen. v. Corliss* (1894) 98 Mich. 372, 57 N. W. 410.

And in *Atty. Gen. v. Love* (1877) 39 N. J. L. 476, 23 Am. Rep. 234 (affirming (1876) 39 N. J. L. 14), where, upon being appointed to the office of city collector a few days before the expiration of the term of office of the majority on the appointive board, the appointee was inducted into office and entered upon the duties thereof, it was held that this appointment was final, and not subject to rescission by the incoming board, although the board had not submitted the officer's bond to the mayor for his approval or veto. The view was expressed that the failure of the board to perfect the appointment by submitting the bond to the mayor, being an act entirely outside the control of the appointee, should not be held to affect his rights.

But where three of the judges of a court of common pleas signed and delivered a certificate of appointment designating a certain person as clerk of that court, directing the acting clerk to enter such appointment on the minutes of the court, and the court then adjourned until the following Monday, and, dissent being expressed by two of the judges to the entry of the appointment on the minutes of the court on the following Monday, the clerk refused to enter the appointment, and the same judges subsequently refused to approve of the bond offered by the appointee, it has been held that the appointment was never completed and hence was

subject to rescission by the court. *State ex rel. Goodin v. Este* (1885) 7 Ohio, pt. 1, p. 134. It was the court's opinion in this case that, if the appointment had been entered on the minutes of the court and the appointee had qualified by taking the oath of office and giving bond, and the bond had been approved by the court, the court then could not have interfered with the office; but that, the approval of the bond being an essential part of the appointment, the appointment was subject to rescission at any time until the bond was approved.

It appears from the statement of facts in the reported case (*THORNE v. SQUIER* (Mich.) ante, 126) and in the companion case of *North v. Wagner* (1933) — Mich. —, 249 N. W. 494, that the appointees in those cases had qualified and entered upon the discharge of the duties of the office, although this fact was not stressed by the court.

For the right to rescind the confirmation of an appointment after the appointee has filed his bond and qualified for the office, see the following cases discussed in subd. VI. b, c, *infra*: *United States v. Smith* (1932) 286 U. S. 6, 76 L. ed. 954, 52 S. Ct. 475; *State ex rel. Whitney v. Van Buskirk* (1878) 40 N. J. L. 463, and *Re Fitzgerald* (1903) 32 N. Y. Supp. 811 (affirmed in (1903) 38 App. Div. 434, 34 N. Y. Supp. 1125).

And for the right to reconsider an election by ballot at a later meeting, the election having been deferred until the next meeting, where the person receiving the majority of votes on the ballot taken at the first meeting files his oath and qualifies for the office prior to the later meeting, see *State ex rel. Bardick v. Tyrreil* (1914) 153 Wis. 425, 149 N. W. 230, Ann. Cas. 1916E, 270, discussed *supra*, subd. IV. c, 1.

As to whether an appointment made at a morning session may be reconsidered at the afternoon session, where the appointee executes a bond and takes the oath of office during the noon recess, see *State ex rel. Pierce v. Hardin* (1931) 163 Tenn. 471, 43 S. W. (2d) 924, *supra*, subd. IV. c, 1.

c. Miscellaneous

In a Kentucky case, in holding ineffectual and invalid an attempt made by a board of education about two months after the appointment of a county superintendent, but prior to the beginning of the superintendent's term, to rescind the appointment, the court said: "What remains to be done to complete the occupation of the office must be done by the appointee, and not by the appointing power. The office then has a duly selected person authorized to assume it, and, in the absence of some new circumstances such as failure to qualify or refusal to accept the office, there is no power to put another in the position. *Board of Education v. McChesney* (1930) 235 Ky. 692, 32 S. W. (2d) 26.

In *Tuck v. Victoria* (1892) 2 B. C. 179, where, upon a ballot being taken by a city council for the purpose of electing a city officer, it appeared that one of the candidates had received a clear majority and the result of the vote was announced by the clerk, it was held that the appointment was final and complete, and not subject to rescission by the council at a later meeting, although the presiding officer had never declared such person elected, the minutes of the meeting had never been signed as required by law, no sealed instrument of appointment had been executed, the appointee had never given any bond or other security and had not filed the declaration as to faithful performance of the duties of the office as required by law, and there had never been any formal installation of the appointee into office.

The fact that, in order to complete an election by the people, it is necessary that there should be a return of the result, does not make a return or something analogous to it a constituent element of an appointment, so as to permit a rescission at any time before the return or other equivalent act is effected. *Ibid*.

In *Weir v. State* (1884) 96 Ind. 311, where a board of county commissioners acting under the authority of a statute providing that such board should annually elect a secretary for

the county board of health elected a person to this office and entered an order declaring such election on its records, it was held that the board could not, on the day following such election, rescind its action and elect another to the office.

See *State ex rel. Childs v. Wadhams* (1896) 64 Minn. 318, 67 N. W. 64, discussed *infra*, subd. VI. c, in which the common council of a city was held to be without power to reconsider its confirmation of an appointment where the appointment had been promulgated and publicly proclaimed.

VI. Right to reconsider confirmation of appointment.

a. In general.

The present division of the annotation supersedes an annotation in 2 A.L.R. 1657.

Some question has been raised as to whether greater latitude should not be allowed a collective body in the matter of reconsideration where it seeks to rescind a confirmation of an appointment than where it seeks to rescind an appointment made directly by it.

Thus, in distinguishing between the function of appointing to office and the function of confirming appointments, the Illinois court has said: "It is insisted that the council has no power to reconsider an election of officers by it; that the confirmation of an appointment is virtually an election to office; that the same rule applies to confirmations as to elections, and that the weight of judicial authority denies to deliberative assemblies the power to reconsider the election of an officer which it was authorized to make. This is not, however, the case of an election,—a choice between two or more candidates. The council does not, in any sense, choose the appointee. The question before it is the approval of an executive act of the mayor. Its action is discretionary and deliberative." *People ex rel. MacMahon v. Davis* (1918) 284 Ill. 439, 120 N. E. 326, 2 A.L.R. 1650.

And the view has been expressed, based upon the alleged difference in nature between the act of nomination

and the act of confirmation, it being argued that the former is the exercise of a purely executive function, while the latter is more in the nature of a legislative act; that cases upholding the right to rescind the confirmation of an appointment are not a majority in support of the right to rescind an appointment directly made. Dissenting opinion of Wiest, J., in *North v. Wagner* (1933) — Mich. —, 249 N. W. 494.

From a review of the cases, however, it would seem that, as a general rule, the confirmation of an appointment is just as binding upon the body making it as a direct appointment. See cases cited in the next two subdivisions of the annotation.

b. Confirmation by legislature.

The proceedings of a legislature being almost always governed by fixed rules of order, among which are usually found rules for the reconsideration of matters previously voted on, the question of the right of the legislature to rescind the confirmation of an appointment is dependent largely upon the construction and effect to be given to such rules.

For the right to attack the validity of rules of order with respect to reconsideration, see the annotation in 76 L. ed. U. S. 967.

The view has been expressed that the constitutional right of the senate to adopt rules with respect to the reconsideration of resolutions passed by it extends only to cases where the senate is acting in a legislative capacity, and does not embrace cases, such as the confirmation of appointments, where the senate acts in an executive capacity. Dissenting opinion of Ethridge in *Witherspoon v. State* (1925) 138 Miss. 310, 103 So. 134. But this view was definitely rejected by the majority of the court in that case.

Likewise, in *Atty. Gen. v. Oakman* (1901) 126 Mich. 717, 86 S. W. 151, in holding that a state senate, acting under a rule adopted by it permitting motion for reconsideration to be made on the same day the vote is taken or within the next two days of actual session of the senate thereafter, might

rescind the confirmation of an appointment at the same session before any action based upon the confirmation had been taken, the court rejected the contention that, in consenting to an appointment by the governor, the legislature is performing an executive rather than a legislative duty, and that the rules governing the acts of the legislature in its legislative capacity, including the rule with respect to reconsideration, have no application to such a case.

But where notice of the confirmation has been sent to the executive, and he has completed the appointment, and the appointee has qualified and entered upon the discharge of the duties of the office, it has been held that the confirmation cannot be reconsidered, even though the rules of the senate provide for reconsideration.

Thus, in *United States v. Smith* (1932) 236 U. S. 6, 76 L. e. 54, 52 S. Ct. 475, where, after consenting to a nomination made by the President, the Senate ordered that the resolution and confirmation should be forwarded to the President, in accordance with which order the secretary of the Senate notified the President of the confirmation, the communication being delivered by the official messenger of the Senate, and, upon receiving the notice of confirmation, the President signed and delivered a commission to the officer, and the officer immediately took the oath of office and entered upon the discharge of the duties of the office, but, at its next session, the Senate voted to reconsider the confirmation, and, after the President had refused the request of the Senate to return the resolution of confirmation to it upon the ground that he had already issued a commission, the Senate placed the nomination on its calendar and then proceeded to reject it, acting under the rules of the Senate with respect to reconsideration, which provide that a motion for reconsideration may be made on either of the next two days of actual executive session of the Senate, "but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration

of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate," and that "nominations confirmed or rejected by the Senate shall not be returned by the secretary to the President until the expiration of the time limited for making the motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate," it was held that the Senate had no power to reconsider the confirmation. In reaching this result, the court relies to a large extent upon the history of the rules of the Senate with respect to reconsideration and the practical construction put upon those rules by the Senate and the Executive. It is also pointed out that to permit the Senate to reconsider the confirmation after it had notified the President would render practically nugatory the proviso, added to the rule directing the secretary not to notify the President until the expiration of the time limited for making a motion to reconsider, that such notification should not be given "unless otherwise ordered by the Senate." In support of the result reached by it, the court said: "It is essential to the orderly conduct of public business that formality be observed in the relations between different branches of the government charged with concurrent duties; and that each branch be able to rely upon definite and formal notice of action by another. The construction urged by the Senate would prevent the President from proceeding in any case upon notification of advice and consent, without first determining through unofficial channels whether the resolution had been forwarded in compliance with an order of immediate notification or by the secretary in the ordinary course of business; for the resolution itself bears only the date of its adoption. If the President determined that the resolution had been sent within the time limited for making a motion to reconsider, he would have then to inform himself when that period ex-

pired. If the motion were made, he would be put upon notice of it by receipt of a request to return the resolution. But under the view urged by the Senate, that reconsideration may proceed even though the resolution be not returned, he would receive no formal advice as to the disposition of the motion, save in the case of a final vote of rejection or confirmation. The uncertainty and confusion which would be engendered by such a construction repel its adoption."

But a different result has been reached where no notice of the confirmation was sent to the executive. *Witherspoon v. State* (1925) 133 Miss. 310, 103 So. 134. In that case a state senate, upon receiving a nomination made by the governor to the office of levee commissioner, confirmed the appointment at an executive session, but no order was made directing notice to be sent to the governor of the confirmation, and at a subsequent session of the senate and within the time permitted by the rules of the senate for reconsideration, which rules were substantially the same as the rules governing the Senate of the United States and involved in the case of *United States v. Smith* (U. S.) *supra*, the governor making the appointment having in the meantime been succeeded by another in the governor's office, the senate voted to reconsider the confirmation and consented to the withdrawal of the appointee's name by the new governor. It was held that, the senate having acted in entire accordance with its rules, which under the Constitution of the state it had the power to adopt, the rescission of the confirmation was proper. This result is expressed by the court as follows: "Of course, . . . when the senate confirms an appointment made by the governor, it is without power thereafter to revoke the confirmation, but under the rules of the senate which the Constitution authorized it to adopt, no vote on the confirmation of an appointment to office is final, and consequently there is no such confirmation until a motion to reconsider an affirmative vote thereon has been

disposed of adversely, or the time for the making thereof has expired without such a motion being made."

c. Confirmation by local body.

In the case of the confirmation of appointments by local bodies, such as the confirmation by a city council of an appointment by a mayor, it is generally held that, after the will of the confirming body has once been expressed and the appointment is finally completed, the confirmation is not subject to reconsideration.

Thus, in *State ex rel. Childs v. Wadhams* (1896) 64 Minn. 318, 67 N. W. 64, where an appointment by a mayor to the office of city assessor was confirmed by the common council, the appointment thereafter being duly entered of record and promulgated as required by law, but the common council, upon a motion being made by one of its members at a subsequent meeting to reconsider the vote of confirmation, upon the ground that such member had voted for confirmation by mistake, rescinded its former vote of confirmation and rejected the appointee, it was held that, the appointing power having been fully exercised by the confirmation and nothing further being necessary to complete the appointment, the attempted rescission of the confirmation was unauthorized and of no effect.

And where an appointment made by a mayor to fill a vacancy in the office of city clerk has been confirmed by the common council, and the appointee has filed his oath and bond and performed every act required of him to indicate his acceptance of the office, it has been held that it is not within the power of the council to rescind its former action and reject the nomination at a subsequent meeting. *Re Fitzgerald* (1903) 82 N. Y. Supp. 811 (affirmed in (1903) 88 App. Div. 434, 84 N. Y. Supp. 1125). It was the court's view in this case that the appointment could not be revoked even by the mayor and council acting together.

So, in *State ex rel. Whitney v. Van Buskirk* (1878) 40 N. J. L. 463, where, upon the tender of the resignation of

the chief of police of a city and the nomination by the mayor of a person to fill the vacancy, the board of councilmen accepted the resignation and confirmed the nomination, but at a subsequent meeting rescinded their vote, refusing to accept the resignation and withdrawing the confirmation of the nomination, but the appointee, with the consent of the mayor, took the oath of office and entered upon the duties of the office, it was held that the act of the councilmen in attempting to rescind the vote taken by them at their first meeting was unauthorized and of no effect. It was said with respect to the right of the councilmen to withdraw their acceptance of the resignation, that, the acceptance of the resignation being a matter to be disposed of by the person or body in whom was vested the power of appointment, no action could be taken by the councilmen with respect to it without the consent of the mayor, part of the appointive power being vested in him; and it is said in a later part of the opinion, that the same considerations apply to the attempted reconsideration of the nomination.

But where the rules of order governing the proceedings of the local body provide for reconsideration, a different result is reached.

Thus, in *People ex rel. MacMahon v. Davis* (1918) 284 Ill. 439, 120 N. E. 326, 2 A.L.R. 1650, where a motion was made immediately after the confirmation of certain appointments by a city council to reconsider such confirmation, and it was voted to lay such motion on the table, and the question of reconsideration was taken up at the next regular meeting of the council and the vote of confirmation rescinded, the action of the council being in accordance with the rules adopted by it providing that a vote or question might be reconsidered at any time during the same meeting or at the first regular meeting held there-

after, it was held that the rescission of the confirmation was proper. In reaching this result, the court followed *Atty. Gen. v. Oakman* (1901) 126 Mich. 717, 86 S. W. 151, 86 Am. St. Rep. 574, *supra*. The act of the appointees in assuming the offices on the day following their appointment was held not to give them any additional right with respect to the offices, in view of the fact that the motion to reconsider the vote of confirmation was pending before the council at the time they took over the offices. With respect to the applicability of rules of order to the confirmation of appointments, the court said: "No good reason is apparent why the council may not establish rules in such cases for the government of its own procedure in arriving at its final judgment, as well as in other cases. Orderly procedure requires some rules for the proper despatch of business and deliberation in its conduct. The confirmation of executive appointments should be deliberately considered, and the rules applicable to ordinary questions to secure such deliberation may well be applied."

It is obvious, of course, that, where the office is not for any fixed or definite term but is dependent upon public necessity and economic conditions, as in the case of deputies, consent to the appointment may be withdrawn at any time. *Griggs v. Weston County* (1895) 5 Wyo. 274, 40 Pac. 304.

See the quotation given as dictum and stated to be well-settled law, in *Schulte v. Jefferson* (1925) 221 Mo. App. 369, 273 S. W. 170, to the effect that, "where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken."

P. M. Dwyer.

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Quasi in rem. Type of jurisdiction of a court based on a person's interest in property within the jurisdiction of the court. There must be a connection involving minimum contact between the property and the subject matter of the action for a state to exercise quasi in rem jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2589, 53 L.Ed.2d 683. "Quasi in rem proceedings" is generally defined as affecting only interest of particular persons in specific property and is distinguished from proceedings in rem which determine interests in specific property as against the whole world. *Avery v. Bender*, 124 Vt. 309, 204 A.2d 314, 317. See also **Jurisdiction**.

Quasi judicial. A term applied to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.

Quasi judicial act. A judicial act performed by one not a judge. *State Tax Commission of Utah v. Katsis*, 90 Utah 406, 62 P.2d 120, 123.

Quasi-traditio /kwéysay tradish(ly)ow/. Lat. In civil law, a term used to designate that a person is in the use of the property of another, which the latter suffers and does not oppose. It also signifies the act by which the right of property is ceded in a thing to a person who is in possession of it; as, if I loan a boat to Paul, and deliver it to him, and afterwards I sell him the boat, it is not requisite that he should deliver the boat to me to be again delivered to him: there is a quasi-tradition or delivery.

Quater cousin. See **Cousin**.

Quatuor pedibus currit /kwóduwor pédabás káhrat/. Lat. It runs upon four feet; it runs upon all fours. See **All-fours**.

Queen /kwíyn/. A worthless woman; a strumpet. Obsolete.

Queen. A woman who possesses the sovereignty and royal power in a country under a monarchical form of government. The wife of a king.

Queen regnant. In English law, a queen who holds the crown in her own right; as the first Queen Mary, Queen Elizabeth, Queen Anne, and Queen Victoria.

For the titles and descriptions of various officers in the English legal system, called "Queen's Advocate," "Queen's Coroner," "Queen's Counsel," "Queen's Proctor," "Queen's Remembrancer," etc., during the reign of a female sovereign, see terms under **King** and also the following titles.

Queen's bench. The English court of king's bench is so called during the reign of a queen. See **King's bench**.

Queen's counsel. See **King's counsel**.

Queen's evidence. See **King's evidence**.

Queen's prison. A jail which used to be appropriated to the debtors and criminals confined under process or by authority of the superior courts at Westminster, the high court of admiralty, and also to persons imprisoned under the bankrupt law.

Queen's proctor. See **King's proctor**.

Que estate /kwíy astéyt/. L. Fr. Whose estate. A term used in old pleading, particularly in claiming prescription, by which it was alleged that the plaintiff and those former owners whose estate he had had immemorially exercised the right claimed. This was called "prescribing in a que estate."

Que est le mesme /kwíy èy la mém/. L. Fr. Which is the same. A term used in actions of trespass, etc. See **Que est eadem**.

Quemadmodum ad questionem facti non respondent iudices, ita ad questionem juris non respondent iuratores /kwemadmodam ad kweshchiyównam fəktay nòn raspòndant jùwdasiyz, áyda ad kweshchiyównam jùras nòn raspòndant jùratóriyz/. In the same manner that judges do not answer to questions of fact, so jurors do not answer to questions of law.

Quem reditum reddit /kwém rédədam rédat/. L. Lat. An old English writ which lay where a rent-charge or other rent which was not rent service was granted by fine holding of the grantor. If the tenant would not attorn, then the grantee might have had this writ.

Querela /kwəriylə/. Lat. An action preferred in any court of justice. The plaintiff was called "querens," or complainant and his brief, complaint, or declaration was called "querela."

Querela coram rege a concilio discutienda et terminanda /kwəriylə kóram riyiy èy kansil(i)yow dskkshiyénda èt tármanénda/. A writ by which one is called to justify a complaint of a trespass made to the king himself, before the king and his council.

Querela inofficiosi testamenti /kwəriylə inəfishiyówsay tēstamentay/. Lat. In the civil law, a species of action allowed to a child who had been unjustly disinherited, to set aside the will, founded on the presumption of law, in such cases, that the parent was not in his right mind.

Querens /kwíran(d)z/. Lat. A plaintiff; complainant; inquirer.

Querulous /kwēhr(y)əlas/. Apt to find fault; habitually complaining; disposed to murmur. Expressing, or suggestive of complaint; fretful; whining.

Quæsta /kwēsta/. A quest; an inquest, inquisition, or inquiry, upon the oaths of an impaneled jury.

Question. A subject or point of investigation, examination or debate; theme of inquiry; problem; matter to be inquired into, as subject matter of civil or criminal discovery. A point on which the parties are not agreed, and which is submitted to the decision of a judge and jury. See also **Issue**.

An interrogation put to a witness, for the purpose of having him declare the truth of certain facts as far as he knows them; e.g. direct or cross examination of witness at trial. See also **Discovery**; **Interrogation**.

Categorical question. One inviting a distinct and positive statement of fact; one which can be answered by "yes" or "no." In the plural, a series of questions, covering a particular subject-matter, arranged in a systematic and consecutive order.



quarter notes

§ Scots law : a wrong not arising out of a contract, implied under public policy rather than on account of any deliberately wrongful conduct or intention
quasi-depositum \k'wɔːzi-'deɪzɪtəm/ *n* : a deposit or bailment implied in law from another's personal property by chance or mistake and deemed to be a bailee in order to do justice between the parties and to prevent unjust enrichment : a constructive or quasi bailment
quasi- easement \n'kwɔːzi-'eɪsmənt/ *n* : APPARENT EASEMENT
quasi ex contractu \k'wɔːzi-'ekstrək'trɒkt(ə)l(y)u/ *adv* (or *adj*) [L] : as if from or by contract — compare QUASI CONTRACT
quasi in rem \n'kwɔːzi-'rem/ *adv* (or *adj*) [L] : as if against a thing ; as if against a theme (as a right, status, property) : proceedings and judgments are *quasi in rem* when they are in a court having no jurisdiction over the person of the defendant, not seeking to adjudicate a right, title, or status as against all in the world, but seeking to apply specific property within the power of the court insofar as that property is available in satisfaction of a personal action or claim against the defendant) — compare IN PERSONAM, IN REM
quasi-judicial \k'wɔːzi-'dʒʊdiəl/ *adj* 1 : having a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations and to make decisions arrived at and enforced after the general manner of procedures in courts (*quasi-judicial bodies* such as the National Labor Relations Board — *Atlantic*) 2 : essentially judicial in character but not within the judicial power or function nor belonging to the judiciary as constitutionally defined (*quasi-judicial functions*) (some method of quasi-judicial review is desirable — *Harvard Law Rev.*) — **quasi-judicially** \k'wɔːzi-'dʒʊdiəl/ *adv*
quasi-legislative \k'wɔːzi-'leɪslətɪv/ *adj* 1 : having a partly legislative character by possession of the right to make rules and regulations having the force of law (the Interstate Commerce Commission is a *quasi-legislative agency*) 2 : essentially legislative in character but not within the legislative power or function or belonging to the legislative branch of government as constitutionally defined (*quasi-legislative powers*) (*quasi-legislative authority*)
qua-al-mo-do \k'kwɔːlz-'mɒ(d)o/ *adv*, -*isə-* \n -s *usu cap* [L *quasi modo* as it just now; fr. part of the opening words of the infant for that day (based on 1 Pet 2:2), *quasi modo geniti infantes* as newborn babes] : LOW SUNDAY
quasi-optical \prə'nauŋ əs 'kwɔːzi-ɒptɪkəl/ *adj* : resembling light in its properties but consisting of ultrashort herman waves
quasi-partner \n'kwɔːzi-'pɑːtnər/ *n* : NOMINAL PARTNER
quasi-public \k'wɔːzi-'pʌblɪk/ *adj* : essentially public (as in services rendered, functions performed, or source of income received) although under private ownership or control ; affected with a public interest (*quasi-public enterprises like railroads*)
quasi-supplary substitution \k'wɔːzi-'sʌpləri sʌbs'tɪtjuːʃən/ *n*, Roman law : substitution of another heir upon the incapacity of an insane heir first named to take an inheritance
quasi rent \n'kwɔːzi-'rent/ *n* : revenue in excess of cost received from a service other than land use
quasi-reorganization \k'wɔːzi-'riːɡənəzaɪʃən/ *n* : a corporate procedure whereby recapitalization is achieved by the elimination of the existing deficit and the establishment of a new earned surplus account for future earnings only and without resort to the legal formalities of a complete reorganization
quasi-synthetic \n'kwɔːzi-'sɪnθetɪk/ *adj* : COMBUSTIONAL ARC
quasi-trust \n'kwɔːzi-'trʌst/ *n* : IMPERFECT TRUST
quassia \k'kwɔːsiə/ *n* -es [perh. irreg. fr. *oquassa*] : OQUASSA
quassia var of QVASSI
quassia \k'kwɔːʃɪə/ *n*, -*isə-* \n [NL, fr. *Quassi*, 18th cent., Surinam Negro slave who discovered the medicinal value of Surinam quassia + NL -*a*] 1 *cap* : a genus of shrubs or trees (family Simarubaceae) having pinnate leaves with winged petioles and large racemose scarlet flowers 2 -s : a drug consisting of the heartwood of various tropical trees of the family Simarubaceae used in medicine as a bitter tonic and as a remedy for roundworms in children, as an insecticide, and in brewing as a substitute for hops — see JAMAICA QUASSIA, SURINAM QUASSIA
quassian \k'kwɔːʃɪən/ *n* -s [ISV *quassia* (fr. NL *Quassia*) + -*ia*] : the bitter crystalline principle of quassia
quat \kwɔːt/ *n*, ME *quāt* : QUATED : QUATTED : QUATTING : QUATS [ME *quāt*, fr. MF *quāte* to beat, fr. (assumed) *coacire* to press together — more at DECATING] *v*, dial chiefly Eng 1 : beat down : SQUASH 2 : OLUT, SATIATE ~ *v*, chiefly dial : SQUAT
quat \kwɔːt/ *adj* [ME, fr. past part. of *quaten*] chiefly dial : pressed close : SQUAT (the rest lay so ~ and close that they could not be approached — John Bunyan)
quat \kwɔːt/ *Scot* var of QUIT
quat \kwɔːt/ *n* -s (origin unknown) 1 dial chiefly Eng : an eruption of the skin (as a pimple, boil, sty) 2 chiefly dial : UPGRADE, WHIPPERSNAPPER
quat var of KAT
quat abbr [L *quattuor*] four
qua-tens \k'kwɔːtəns/, -ten-/ *prep* [L, how far, to what extent, fr. *qua* where, as, insofar as + *tensus* as far as, up to; akin to L *tendere* to stretch — more at *QUA*, THIN] : in the quality or capacity of : as
quaternary \k'kwɔːtənəri/ (ISV, fr. L *quater* four times) : TETRA- — esp. in names of organic compounds to denote the quadrupling of a radical or molecule (*quaterphenyl*) (*quaterthiazole*)
quatercentenary \k'kwɔːd-z(r)-, -widh-+/ *n* [L *quater* four times + E *centenary*] : a four-hundred anniversary
quaternary \k'kwɔːd-r-, -nəri/, k'wɔːtɜːnrɪ-/ *n* -es [ME, fr. L *quaternarius*, *quadr-*, consisting of four each, fr. *quaterni* four each (fr. *quater* four times) + *-arius* -ary] 1 *m* : a group of four b : a member of a fourth group 2 *usu cap* : the Quaternary period or system of rocks
quaternary \kwɔːt/ *adj* [L *quaternarius* consisting of four each] 1 : consisting of four parts or components : by fours or in sets of four (a ~ compound) 2 *m* : fourth in order b *usu cap* : of or relating to the geological period from the end of the Tertiary to the present time c *esp* : GEOLOGIC TIME : able to be characterized by replacement in the fourth degree : as a ~ carbonized fossil carbon atoms in organic radicals (a ~ carbon atom) b : consisting of or containing an atom (~ nitrogen) united by four bonds to carbon atoms in organic radicals (~ ammonium [R-N]⁽⁺⁾ ~ salts)
quaternary ammonium compound *see* quaternary *n* -es : any of a large class of strong bases and their salts that may be regarded as compounds of ammonium in which all four hydrogen atoms are replaced by organic radicals and that in many cases are used as surface-active agents, as disinfectants and germicides, and as drugs — compare CATIONIC DETERGENT, METHONIUM
quaternary silver *n* : silver containing three alloying elements and used for coinage (former British coinage of *quaternary silver* containing 50 percent silver, 40 percent copper, 5 percent nickel, and 5 percent zinc)
quaternary \k'kwɔːtənəri/, k'wɔːtɜːnrɪ-/ *adj* (prob. fr. assumed NL *quaternarius*, fr. L *quaterni* four each + *-arius* -ary) : composed of or arranged in sets of four (~ leaves)
qua-tre-nai-on \k'kwɔːtɜːnrɪ-ən-, wɔːt-/ *n* -s (NE *quaternion*, fr. LL *quaternion-*, *quaternion*, fr. L *quaterni* four each (fr. *quater* four times) + *-lon-*, *-lo-lon-*; akin to L *quattuor* four — more at FOUR) 1 : a set of four parts, things, or persons : TETRAD (delivered him to four ~s of soldiers — Acus 12:4 (AV)) (the

REGULAR

or principle. Antonym of "casual" or "occasional." *Palte v. Industrial Commission*, 79 Utah 47, 7 P.2d 284, 290.

As to regular Clergy; Deposit; Election; Indorsement; Meeting; Navigation; Process; Session, and Term, see those titles.

Regular and established place of business. Under Judicial Code, § 48 (28 U.S.C.A. §§ 1400, 1694), permitting patent infringement suits to be brought in the district in which defendant committed acts of infringement and has a regular and established place of business, a "regular" place of business is one where business is carried on regularly, and not temporarily, or for some special work or particular transaction, while an "established" place of business must be a permanent place of business, and a "regular and established place of business" is one where the same business in kind, if not in degree, as that done at the home office or principal place of business, is carried on. A foreign corporation may have a "regular and established place of business" although business therein is merely securing orders and forwarding them to the home office. *Shelton v. Schwartz*, C.C.A. Ill., 131 F.2d 805, 808.

Regular course of business. This phrase within worker's compensation acts excluding from their benefits person whose employment is not in regular course of business of employer, refers to habitual or regular occupation that party is engaged in with view of winning livelihood or some gain, excluding incidental or occasional operations arising out of transaction of that business; to normal operations which constitute business.

Term used in connection with books and records kept by a business and which are admissible in evidence if the court finds as a preliminary matter that the entries therein were made in good faith, before the action was commenced, and that such records are part of the customary operation of the business.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, is not excluded by the hearsay rule, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Fed.Evid.R. 803(6).

Term is also descriptive of sales which are ordinarily made by a business in contrast to a bulk sale.

Regular entries. Entries made in books of account in regular course of business. See also Regular course of business.

Regulariter non valet pactum de re mea non alienanda (régylérádar nön völet päktüm diy riý miýä nön éyliýänändä). It is a rule that a compact not to alienate my property is not binding.

Regularly (régylärlüy). At fixed and certain intervals, regular in point of time. In accordance with some consistent or periodical rule or practice.

Regular on its face. Process is "regular on its face" when it proceeds from a court, officer, or body having authority of law to issue process of that nature, is legal in form and contains nothing to notify fairly apprise any one that it is issued without authority.

Regulate. To fix, establish, or control; to adjust rule, method, or established mode; to direct by or restriction; to subject to governing principle laws. The power of Congress to regulate commerce is the power to enact all appropriate legislation for protection or advancement; to adopt measures to promote its growth and insure its safety; to protect, control, and restrain. *Virginian Ry. Co. System Federation No. 40, Railway Employees' Department of American Federation of Labor*, C.C. Va., 84 F.2d 641, 650. It is also power to prescribe rule by which commerce is to be governed, and embraces prohibitory regulations. *United States v. Eby*, 312 U.S. 100, 657, 61 S.Ct. 451, 456, 85 L.Ed. 6. **Regulate** means to govern or direct according to or to bring under control of constituted authority. Limit and prohibit, to arrange in proper order, and control that which already exists. *Farmington R.R. Co. v. Town Plan and Zoning Commission of Town of Farmington*, 25 Conn.Sup. 125, 197 A.2d 653, 6.

Regulation. The act of regulating; a rule or order prescribed for management or government; a regulating principle; a precept. Rule of order prescribed by superior or competent authority relating to acts of those under its control. Regulation is rule or order having force of law issued by executive authority of government. *State ex rel. Villines v. Freeman*, 103 Ohio 370 P.2d 307, 309. See Regulations.

Regulation A. This SEC regulation covers exempted from registration filing requirements for certain securities offerings under a stated amount. Securities Act of 1933, 15 U.S.C.A. § 77c(b).

Regulation Z. Regulations of Federal Reserve Board which implement provisions of Federal Truth-in-Lending Act. See Truth-in-Lending Act.

Regulation charge. Charge exacted for privilege or condition precedent to carrying on business. See also Privilege (Privilege tax).

Regulation of an executive department. The general rules relating to the subject on which a department acts, made by the head of the department under some act of Congress conferring power to make such regulations, and thereby give to them the force of law. *State ex rel. Kaser v. Leonard*, 164 Or. 579, 102 P.2d 197.

Regulations. Such are issued by various governmental departments to carry out the intent of the law. Agencies issue regulations to guide the activity of those regulated by the agency and of their own employees and to ensure uniform application of the law. Regulations are not the work of the legislature and do not have the effect of law in theory. In practice, however, because of the intricacies of judicial review of administrative action, regulations can have an important effect in determining the outcome of cases involving regulatory activity. United States Government regulations appear first in the *Federal Register*.

[illegible]

regardant, fr. *OF* *regarder*, *regardonneur*, fr. *reg-* + *garder*, *guarder* → *toward* → *more at OUTWARD* **archaic** & **AWAY**
regardant *n* [ME *regarder*, fr. *MF regarder*, fr. *OF regarder*, *regarder*, *regardneur*, v.] **archaic** : **AWAY**
reg-u-lar /ˈrɛɡjʊlə/, *n*, *pl* **reg-u-lar-s** /-lɛz/ 1. *regula* straight-edge, rule 1: an architectural band or fillet esp. when one of a series beneath the taenia in a Doric architrave of which each corresponds to a triglyph above and has a row of six guttae on its lower side 2: **RULE** (the authoritative ~ for community life)
reg-u-lar-i-ble /ˈrɛɡjʊləbəl/ *adj* [*regula* + *-able*] : capable of being regulated
reg-u-lar-i-ty /ˈrɛɡjʊləriti/ *n* [*regula* + *-ity*] : a substance or agent that regulates something (a plant growth)
reg-u-lar /ˈrɛɡjʊlə/, *adj* [*regula*, *adj* (ME *regular*, fr. *MF*, fr. *LL* *regula* canonical, regular), combining a set of rules, fr. *LL* *regula* of or belonging to a bar, fr. *regula* straightedge, rule + *-us* -ar ~ *more at RULE*] 1: belonging to a Christian monastic order or community : living under or relating to a monastic rule (the ~ clergy) — opposed to *secular* 2: *a* : formed, built, arranged, or ordered according to some established rule, law, principle, or type : harmonious in form, structure, or arrangement : **SYMMETRICAL** (~ *verse*) (a man with ~ features) (a disciplined ~ landscape) *b* (1) : both equilateral and equiangular (a ~ polygon) (2) : having faces that are congruent regular polygons and all the polyhedral angles congruent (a ~ polyhedron) *c* of a flower : having petals in each whorl which are symmetrical with respect to form : **ACTINOMORPHIC** (contrast *irregular*) *d* : having or constituting an isometric system (~ crystals) 3: *a* : steady or uniform in course, practice, or occurrence : not subject to unexplained or irrational variation : steadily pursued : **ORDINARY**, **METHODICAL** (~ *habits*) *b* (1) : returning, recurring, or received at stated, fixed, or uniform intervals (a ~ income) (in the ~ course of events) (2) : functioning at proper intervals — used esp. of the bowels 4: *a* : constituted, selected, conducted, made, or otherwise handled in conformity with established or prescribed usages, rules, or discipline (a ~ meeting) (a ~ election) *b* : **NORMAL**, **STANDARD**, **CORRECT** : as (1) : undeviating in conformance to a standard set (as by convention, established authority, or a particular group) (2) : being such without any doubt : **THOROUGH**, **CERTAIN**, **DEFINITE** (a ~ sounder) (3) *clergy* : like other good fellows in views and ways 6 (1) : conforming to the normal or usual manner of infection (— *English* nouns take -y or -es plurals) (2) : **WAX** 8a *d* of a postage stamp : issued without restriction for the payment of all types of postage (the list included stamps of the ~ issue as well as airmails, special deliveries, and commemorative) 8 *a* : of, relating to, or constituting the regular army of a state (a ~ soldier) *b* : constituting or made up of individuals properly recognized as legitimate combatants in war 8 *usw* *cap* : of, relating to, or belonging to the Regular Baptists 7 : of, relating to, or being a transaction on a stock exchange requiring delivery of the securities involved on the third full business day after purchase
reg-u-lar /ˈrɛɡjʊlə/, *adj* [*regula*, *adj* (ME *regular*, fr. *MF*, fr. *LL* *regula* canonical, regular), combining a set of rules, fr. *LL* *regula* of or belonging to a bar, fr. *regula* straightedge, rule + *-us* -ar ~ *more at RULE*] 1: belonging to a Christian monastic order or community : living under or relating to a monastic rule (the ~ clergy) — opposed to *secular* 2: *a* : formed, built, arranged, or ordered according to some established rule, law, principle, or type : harmonious in form, structure, or arrangement : **SYMMETRICAL** (~ *verse*) (a man with ~ features) (a disciplined ~ landscape) *b* (1) : both equilateral and equiangular (a ~ polygon) (2) : having faces that are congruent regular polygons and all the polyhedral angles congruent (a ~ polyhedron) *c* of a flower : having petals in each whorl which are symmetrical with respect to form : **ACTINOMORPHIC** (contrast *irregular*) *d* : having or constituting an isometric system (~ crystals) 3: *a* : steady or uniform in course, practice, or occurrence : not subject to unexplained or irrational variation : steadily pursued : **ORDINARY**, **METHODICAL** (~ *habits*) *b* (1) : returning, recurring, or received at stated, fixed, or uniform intervals (a ~ income) (in the ~ course of events) (2) : functioning at proper intervals — used esp. of the bowels 4: *a* : constituted, selected, conducted, made, or otherwise handled in conformity with established or prescribed usages, rules, or discipline (a ~ meeting) (a ~ election) *b* : **NORMAL**, **STANDARD**, **CORRECT** : as (1) : undeviating in conformance to a standard set (as by convention, established authority, or a particular group) (2) : being such without any doubt : **THOROUGH**, **CERTAIN**, **DEFINITE** (a ~ sounder) (3) *clergy* : like other good fellows in views and ways 6 (1) : conforming to the normal or usual manner of infection (— *English* nouns take -y or -es plurals) (2) : **WAX** 8a *d* of a postage stamp : issued without restriction for the payment of all types of postage (the list included stamps of the ~ issue as well as airmails, special deliveries, and commemorative) 8 *a* : of, relating to, or constituting the regular army of a state (a ~ soldier) *b* : constituting or made up of individuals properly recognized as legitimate combatants in war 8 *usw* *cap* : of, relating to, or belonging to the Regular Baptists 7 : of, relating to, or being a transaction on a stock exchange requiring delivery of the securities involved on the third full business day after purchase
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a strophes and six antistrophes of identical and an epode of corresponding form
regular pattern *n*: a pattern in which symmetry is attained by decrease in number of normally irregular parts — compare
regular pyramid *n*: a pyramid whose base is a regular polygon and whose vertex is at the perpendicular to the base through its center
regular reflection *n*: reflection such that the angle of reflection of the light is equal to the angle of incidence and on the opposite side of the normal to the point of incidence
regularly *adv*: in accordance with; regularly
regular sequence *n*: a sequence possessing a limit; a convergent sequence
regular solid *n*: any of five regular polyhedrons: a regular tetrahedron, hexahedron, octahedron, dodecahedron, oricosahedron
regular year *n*: a common year of 365 days or a leap year of 366 days in the Jewish calendar — see YEAR table
reg-ul-a-ble /ˈrɛɡjələbel/, -līb-, -lēz-/ *adj.*: capable of being regulated
reg-u-late /ˈrɛɡjəl-, -ləd-/ *v.t.* [L. regulare] 1. to regulate; to govern, fr. L. regula straightedge, rule — more n. AULE) 1. to govern or direct according to rule (laws which ~ the succession of seasons); 2. to bring under the control of law or constituted authority; make regulations for or concerning (~ the industries of a country) 2. to reduce to order, method, or uniformity; REGULARIZE (~ one's habits) b. to discipline 3. to fix the time, amount, degree, or rate of (as by adjusting, rectifying) (~ the pressure of a tire); also c. to adjust so as to work accurately or regularly (~ a clock) — vi.: to make regulations
regulated company *n*: a mercantile association holding by government charter exclusive trading rights with specified lands and combining freedom for the individual to trade on his own capital with regulations limiting trade in order to keep up prices
regulating box *n*: a rheostat for regulating the electric current passing through the field-magnet coils (of a dynamo)
regulating station *n*: a military command agency that controls all movements of personnel and supplies into and out of a territory
regulate /ˈrɛɡjəl-, -ləd-/ *v.t.* [L. regulare + -low] 1. act of regulating or the condition of being regulated (the ~ of her mind) (business suffering from excessive ~) 2. an authoritative person or thing dealing with details of organization, especially performance, efficiency, and efficiency (an ~ employee) 3. to set standards or order having the force of laws (to ~ the behavior of a government unit) 4. to coordinate or subordinate legislation issued by a state or group with the authority and subject of the word of parliament, congress, presidential orders, statutory orders (7) : the issued by the president of the U.S. or by an authorized subordinate — called also executive order (8) : an administrative order issued by an executive department or a regulatory commission of the U.S. government to carry out a policy 9. to put in order (the legislative enactment) 10. the percentage variation in some characteristic quantity (in voltage) as a machine or apparatus becomes loaded; also : the ratio of deviation of such a quantity at rated load to its normal value at no load 4. redistribution of material (as in an embryo) to restore a damaged or lost part independent of new tissue growth — compare REGENERATION b. the mechanism by which an early embryo maintains essentially normal development in the face of abnormal conditions 0. DETERMINATION SYN SEE LAW
regulation /ˈrɛɡjəleɪʃən/ *adj.*: prescribed by or being in accord with regulations (the ~ cap of a nurse); broadly: USUAL, CUSTOMARY (the ~ accompaniments of a Thanksgiving dinner)
reg-u-la-tive /ˈrɛɡjələtɪv-, -lə-, -tī-/ *adv.* 1. tending to regulate; having regulation (as an inv. ca. statute) 2. in directing or regulating in the manner of rule to be followed or an end to be attained — compare REGULATORY PRINCIPLE b. constituting in Kantianism the ideas of reason (as First Cause) that arise in the mind because ideal knowledge requires the conception of the totality of conditions for anything given as conditioned — contrasted with CONJUNCTIVE 3. capable of regulation; involving progressive determination and restriction of initially isotropic material — used of a developing zygote or its state; compare MOSAIC
regulative /ˈrɛɡjələtɪv-/ *adj.*: something (as a principle or enactment) that has regulative force
reg-u-la-tively /ˈrɛɡjələtɪvli/ *adv.*: in a regulative manner; so as to be regulative
regulative principle *n*: a rule or principle of procedure: as a. a principle underlying syllogistic inference or in accordance with which logical inference is drawn b. a rule of procedure to which there is no alternative if the desired end is to be secured although it cannot itself assure attainment
reg-u-la-to-r /ˈrɛɡjələtər/, -lət-/ *n.* 1. one that regulates: as a (1) : one of a board of seven appointed by King James II in 1687 with powers to appoint and remove officers and freemen at their discretion for the purpose of influencing the election of members of Parliament (2) usu cap : a member of any of various associations of the poorer people in No. Carolina existing from 1767 to 1771, formed to resist official extortion, refusing to pay taxes, and committing many deeds of violence (3) : a member of any of various bands or volunteer committees in the U.S. formed in newly occupied or settled regions before the establishment of local government to preserve order, prevent crime, and administer justice b (1) : a person who regulates mechanisms (as clocks) or conditions (as of traffic) (2) : a worker who hangs or bolts up ship plates on the frame of a ship 0 (1) : an automatic device for maintaining the current, voltage, speed, or other characteristic of a machine, transformer, or comparable device at a specified value or for adjusting these quantities at will (2) : a lever or index in a watch for altering the effective length of the hairspring to make it 1 watch go faster or slower (3) : an accurate master clock used for timing watches and clocks — compare ASTRONOMICAL CLOCK (4) : GOVERNOR 4b (5) : a sliding door for controlling ventilation in a mine 161 : a balance valve for controlling the admission of steam to the steam chest in a locomotive (7) : a reducing valve or steam-regulating device (8) Brit : a throttle on a locomotive 0 (1) : a substance added in a reaction to regulate the amount of another substance formed (2) : GROWTH REGULATOR (3) : PLANT REGULATOR
regulator pin *n*: either of two short upright thin cylindrical pins that are fitted in a watch regulator bearing or banking the hairspring in such a manner that moving the regulator into a position in which the pins touch the hairspring closer to its center shortens the spring and causes the watch to run faster
reg-u-la-to-ry /ˈrɛɡjələtəri-, -ri-/ *adv.* 1. of or relating to regulation; making or concerned with the making of regulations; REGULATIVE (~ measures) (a local ~ body) 2. subsequent regulation; device that are considered dangerous and may be shipped only under stipulated conditions of packaging, labeling, and handling
reg-u-lize /ˈrɛɡjəlaɪz-/ *v.t.* [prob. fr. (assumed) NL regulatus, fr. ML regulus = L. straight rod] 1. to regulate; to

Am. Rep. 103].” The court also quoted as follows from the opinion of Mr. Justice Christiancy in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Dec. 103: “As to this mode of appointment being the exercise of a power essentially executive in its nature, it is sufficient to say that executive power cannot always be defined by any fixed standard, in the abstract. What would come within the executive power in our form of government, would fall within the legislative in another, and vice versa. The question here is, whether, under our constitution, it is executive or legislative; and as the constitution has not confided the appointment of these or the like officers to the executive authorities, and has left it to the legislative discretion whether to create such officers, and how they shall be filled, it cannot be truly said that such an appointment is any

more in the nature of the exercise of an executive than of a legislative power.”

We believe that the appointment of the defendant was not complete and beyond recall until the power to reconsider had been cut off by the time stipulated in rule 28, that reconsideration was proper, and plaintiff was thereafter elected to the office.

The order of ouster is hereby affirmed, but without costs to either party.

Clark, Potter, Sharpe, and Fead, JJ., concur with Butzel, J.

Wiest, J., dissenting:

For the reasons stated by me in *Walter P. North v. John A. Wagner* (Mich.) 249 N. W. 494, I dissent.

McDonald, Ch. J., concurs with Wiest, J.

ANNOTATION.

Reconsideration of appointment, or confirmation of appointment, to office. [Officers, § 324.]

- I. Introductory; how problem arises:
 - a. In general; statement of problem, 133.
 - b. Officers removable at will, 133.
- II. General rule; application of rule generally:
 - a. In general, 135.
 - b. Change in personnel of appointive power, 136.
 - c. Power to add new members, 138.
- III. Rule as applied to appointments by single executive:
 - a. In general, 138.
 - b. Nominations; recess appointments, 139.
 - c. Appointments to fill vacancies, 141.
- IV. Rule as applied to appointments by collective body:
 - a. In general; general rule, 141.
 - b. General considerations with respect to rule and basis thereof:
 1. In general, 143.
 2. Appointment distinguished from ordinary business, 143.
 3. Election and appointment distinguished, 144.
 4. Appointment as executive or legislative function, 144.
 - c. Reconsideration at same meeting or at adjourned meeting; finality of ballot; postponement of vote:
 1. In general, 145.
 2. Defective or doubtful ballot, 150.
 - d. Rules of order providing for reconsideration, 152.
 - e. Contest proceedings before appointive body, 155.
- V. Rule considered with respect to the finality of the appointment:
 - a. In general, 155.
 - b. Notice and acceptance of appointment, 156.

V.—continued.

- c. Issuance of commission; signing appointment, 156.
- d. Qualification; approval of bond, etc., 153.
- e. Miscellaneous.

VI. Right to reconsider confirmation of appointment:

- a. In general, 160.
- b. Confirmation by legislature, 160.
- c. Confirmation by local body, 162.

Division VI. of this annotation supersedes the annotation in 2 A.L.R. 1657.

I. Introductory; how problem arises.

a. In general; statement of problem.

It is only natural that a person or collective body in whom a power of appointment has been vested should occasionally experience a change of heart with respect to the wisdom of their selection, and desire to reconsider the appointment. It is with this question of the power of an appointive body to reconsider its action and revoke the appointment that the present annotation is concerned.

It should be observed that the annotation is not concerned with cases involving the removal of officers from office. Since the reconsideration and revocation of an appointment in effect produce the same result as a removal, the two classes of cases are very closely allied and occasionally confused in the decisions. There is, however, a clear distinction between a reconsideration and a removal. In the case of a reconsideration, the action of the appointive power in revoking the appointment is taken at a time, usually within a brief period after the appointment, such that, even though it has no power of removal, the appointive power may well feel that its will has not been finally expressed, and that the matter is still within its control. In the case of a removal, it is admitted that the title to the office has vested in the appointee and that he rightfully holds the office, but it is sought to have this title to the office forfeited and the appointee ousted therefrom. As stated above, the present annotation is concerned only with the first class of cases.

b. Officers removable at will.

For the general question of when

an officer is removable at will or pleasure, see 22 R. C. L. 562.

Where the appointive body is vested with the power to remove the appointee at will, without the necessity of preferring charges against him or of giving him an opportunity to be heard, the question under discussion in the present annotation ordinarily would not arise, since, in such a case, the appointive body could accomplish the desired result without resorting to its right of reconsideration.

It is possible, however, for the question of the right of reconsideration to arise even though the appointive body has the power of removing the officer at will, as in *Tuck v. Victoria* (1892) 2 B. C. 179, discussed at length *infra*, subd. V. e, where the appointive body, instead of taking the natural course open to it of summarily removing the officer, denies the validity of the action taken by it and seeks to rescind the appointment. And see *Re Fitzgerald* (1903) 32 N. Y. Supp. 811 (affirmed in (1903) 33 App. Div. 434, 84 N. Y. Supp. 1125) *infra*, subd. VI. c, in which it was said, in connection with a resolution of a common council attempting to rescind the council's confirmation of an appointment made by the mayor, that the rescinding resolution could not be given effect as a removal of the officer from office even though the council, under the city charter, had the power summarily to remove the officer.

Attention is also called in this connection to *Reg. v. Thomas* (1838) 3 Ad. & El. 183, 112 Eng. Reprint, 307, a case involving the rescission of an appointment of a town clerk who had never received any communication of his appointment and had never given the security required by law for the office, in which it was held that it was

doubtful whether the power vested in the council to remove the clerk at will could be exercised with respect to such an appointee if the appointment had never actually been carried into effect, there being no one to remove in such a case, but that there could be no question that, under the circumstances, the council might rescind the appointment.

Also, where there are certain restrictions upon the right of a board or commission to rescind resolutions passed by it, although it is within the power of the board or commission to remove the appointee at its own pleasure, the question may arise as to whether the restrictions on the right to rescind apply to removals.

Thus, in *Ex parte Richards* (1873) L. R. 3 Q. B. Div. (Eng.) 368, the removal of a clerk by a local board through a resolution passed by the board to that effect was held to be an independent resolution, and not a rescission of the former resolution appointing the clerk, so that the board was not bound to follow its by-law providing that "no resolution of the local board shall be altered or rescinded unless one month's notice be given by the clerk to each member of the board, setting forth the proposed alteration, or unless there be at least as many members present at such meeting as were present at the meeting when this resolution was adopted." With respect to this by-law of the board, it was said: "When it is said that no resolution shall be altered or rescinded unless a month's notice is given, and it is rescinded by a meeting consisting of a certain number of members, I think the provision must be intended to apply to some subsisting rule or order of the board as to some of the substantive matters within their jurisdiction. It cannot be meant that a resolution to appoint a man to an office is altered or rescinded within the meaning of these words by his dismissal from office. The resolution to dismiss is a fresh and independent resolution, and not a rescission of the former resolution."

It should be noted, also, that there are very strong practical considerations against the granting of relief to one who has been ousted from office through the act of the appointive body in rescinding the resolution of appointment, merely upon the ground that the appointive body was without power to rescind the resolution, where the officer is removable at the pleasure of the appointing power; since, in such a case, even though the appointive power is forced to reinstate the officer, it may immediately remove him under its power of removal. This argument was mentioned and relied on in *Ex parte Richards* (Eng.) *supra*. It was also mentioned in *Tuck v. Victoria* (B. C.) *supra*, in connection with the defendant's contention that the remedy should have been by mandamus instead of an action for the wrongful dismissal.

It will be observed that the above considerations with respect to the reconsideration of an appointment where the appointee is removable at will might well arise in connection with the appointment and removal of deputies, such officers being ordinarily removable at the will of their superiors. For a case involving the reconsideration of an appointment of a deputy, see *Edmunds v. Barton* (1865) 31 N. Y. 495. And see *Griggs v. Weston County* (1895) 5 Wyo. 274, 40 Pac. 304, in which it was said, with respect to the power of a board of county commissioners over the office of deputy county clerk after it had consented to the appointment of a deputy by the clerk, that it might withdraw its consent to the creation of the office and remove the appointee at any time, where the statute governing the office of deputy did not provide for any fixed or definite term.

In view of the general rule that in the case of an office for which no definite term is fixed the officer holds at the pleasure of the appointing power (see 22 R. C. L. 562), it would seem that appointments to such offices would stand upon the same footing with respect to reconsideration as other appointments to hold at will.

Charles H. BURKE and Harry D. Witt,
Plaintiffs,

v.

Ronald SCHMIDT and Elvern Varilek,
Defendants.

No. 11001.

Supreme Court of South Dakota.

Argued Sept. 24, 1971.

Decided Oct. 27, 1971.

Original action in the nature of quo warranto to determine rights of two members of the Board of Regents. The Supreme Court, Biegelmeier, P. J., held that where outgoing Governor's letters appointing two new board members was received January 2 by Secretary of State, new Governor who took office on January 5 filed two letters on January 11 with the Secretary stating he was withdrawing the prior appointments, but the Secretary in forwarding the appointments to state Senate did not include the January 11 letters or mention that such letters had been filed, old board members, whose positions were to be filled by the appointees, were entitled to be seated as members of the Board to hold office until their successors were appointed, confirmed by the Senate, and duly qualified.

Judgment accordingly.

Winans, J., dissented and filed opinion.

1. States ⇨43, 46

Office of Governor is continuing one, irrespective of person who occupies it, and succeeding Governor has same power over appointment as predecessor Governor would have had if he had continued in office.

2. States ⇨46

Tests as to whether Governor may withdraw "appointment" or "nomination" prior to approval by legislative body does not depend on nomenclature used but rather

on whether Governor's action is final and complete and places appointee or nominee in office without further action. Const. art. 14, § 3; SDCL 13-49-1, 13-49-3, 13-49-5.

3. Colleges and Universities ⇨7

Member of Board of Regents, after his term of office expires, can act as regent until new appointee, if any, is confirmed by state Senate, takes the oath as such and becomes vested with the office of regent; if by oversight or some other reason no appointments are made, or if made are not confirmed, members whose terms had expired would remain in office. SDCL 13-49-3, 13-49-4.

4. States ⇨46

State Senate may take official notice of facts relative to appointments of persons to office requiring its confirmation and is bound to take notice of complete official record thereof.

5. Quo Warranto ⇨29

Board of Regents members, who appeared at one or more meetings of the Board in January and February stating that they were to continue their membership on the Board and who were refused recognition by the Board which voted to seat third persons, claiming to be successor members, at one meeting and refused to reconsider its action at later meeting, could not be charged with laches and unreasonable delay in commencing action in nature of quo warranto to determine whether they were still board members, were not estopped from asserting their cause of action and did not abandon their right to board membership.

6. Colleges and Universities ⇨7

Where outgoing Governor's letters appointing two new members to the Board of Regents were received January 2 by Secretary of State, new Governor who took office on January 5 filed two letters on January 11 with the Secretary stating he was withdrawing the prior appointments,

but the Secretary in forwarding the appointments to state Senate did not include the January 11 letters or mention that such letters had been filed, old board members, whose positions were to be filled by the appointees, were entitled to be seated as members of the Board to hold office until their successors were appointed, confirmed by the Senate and duly qualified. SDCL 13-49-3, 13-49-5.

David A. Gerdes, Pierre, argued the cause for plaintiffs. Martens, Goldsmith, May, Porter & Adam, Pierre, on the briefs.

Steven L. Jorgensen, Sioux Falls, argued the cause for defendants. Willy, Pruitt, Matthews & Jorgensen, Sioux Falls, on the briefs.

William J. Srstka, Jr., Asst. Atty. Gen., Pierre, argued the cause and filed a brief on behalf of Gordon J. Mydland, Atty. Gen., as amicus curiae.

ORIGINAL ACTION

BIEGELMEIER, Presiding Judge.

This is an original action in the nature of quo warranto to determine the rights of two members of the Board of Regents.¹ From the stipulated facts it appears plaintiffs were appointed members of the State Board of Regents by Governor Nils A. Boe after his inauguration January 5, 1965. Plaintiff Burke filed his oath of office on January 13, 1965, and plaintiff Witt on January 15, 1965. Their predecessors having ceased to act, plaintiffs attended Board

meetings and acted as Regents at four meetings prior to February 9th when they were confirmed by the Senate on February 9, 1965. On previous occasions since 1950 Regents commenced their duties after filing their oaths and before Senate confirmation; however, in none of these instances was that conduct disputed.

By a letter to the Secretary of State dated December 30, 1970, Governor Farrar informed her he had appointed defendant Schmidt as a member of the Board to succeed plaintiff Burke and by similar letter dated January 2, 1971, that he had appointed defendant Varilek as such member to succeed plaintiff Witt. The letters, which the Secretary of State received January 2, 1971, authorized her to issue commissions accordingly. Their oaths of office were also filed with her on January 2, 1971. The letters, signed by the Governor, and the certificates, signed by the Governor and the Secretary of State on the date last mentioned, stated the appointments were to be effective January 1, 1971, and continue for six years until January 1, 1977, or until their successors shall have qualified. "subject to confirmation of the State Senate."

On November 3, 1970, Richard F. Kneip was elected Governor, and on Tuesday, January 5, 1971, at 12 o'clock m. he took the constitutional oath of office as Governor.²

On January 11, 1971, Governor Kneip signed and filed with the Secretary of State two letters in which he stated he was withdrawing the "recommended" appoint-

stitution of the United States and of this state, and faithfully to discharge the duties of his office, naming it". It may be of interest as to the effect these sections have on constitutional provisions. Article IV, § 1, fixes the term of the Governor at two years, and Article XXVI, § 10, provides the first Governor elected in 1880 shall hold office until the first Tuesday after the first Monday in January 1891 at 12 m. or until his successor is elected and qualified.

1. SDCL 21-28.

2. SDCL 3-1-2 provides in part, "all state officers shall qualify and enter upon the duties of their office on the first Monday of January succeeding their election or within twenty days thereafter." In 1971 the first Monday was January 4, 1971. SDCL 3-1-5 requires: "Every person elected or appointed to any civil office shall, before entering upon the duties thereof, qualify by taking an oath or affirmation to support the Con-

ments of defendants Schmidt and Varilek as members of the Board of Regents.

Except for sessions called on extraordinary occasions (Art. IV, § 4, not applicable here), legislative sessions are provided for in Art. III, § 7, S.D.Const., as follows:

"The Legislature shall meet at the seat of government on the first Tuesday after the first Monday of January at 12 o'clock m. in the year 1963 and in the year 1964 and each even-numbered year thereafter, and on the first Tuesday after the third Monday of January at 12 o'clock m. in the year 1965 and each odd-numbered year thereafter, and at no other time except as provided by this Constitution."

Pursuant thereto the Senate met on January 19, 1971, for its first session. After showing certificates by the Secretary of State of the filing of oaths of senators-elect and other constitutional officers, the Senate Journal shows another certificate dated January 19, 1971, which includes copies of the letters of Governor Farrar relating to the appointments of defendants.³ The original letters were addressed solely to the Secretary of State; the Senate Journal shows letters addressed to the President and members of the Senate. These appointments were confirmed in executive session the same day. The Secretary of State did not include in her certificate copies of the January 11, 1971 letters of Governor Kneip withdrawing the Farrar appointments of defendants nor mention that such letters had been filed in her office.

[1] The office of the Governor is a continuing one, irrespective of the person who occupies it, and a succeeding Governor has the same power over an appointment as the predecessor Governor would have had if he continued in office. *State ex rel. Kriebs v. Halladay*, 52 S.D. 497, 219 N.W.

3. It certifies to copies of letters of appointment of defendants. They are not exact copies of the letters of Governor Farrar which are part of the Stipulation of facts. The Senate Journal then shows

125. This seems to be the general rule. Annot. 89 A.L.R. 132 at 136 et seq. Therefore, we may approach this question as if Governor Farrar had made the withdrawal.

Relevant provisions of our Constitution and statutes applicable to Regents are next set out. Article XIV, § 3 of the South Dakota Constitution provides:

"educational institutions that may be sustained either wholly or in part by the state shall be under the control of a board of five members appointed by the Governor and confirmed by the senate under such rules and restrictions as the Legislature shall provide. The Legislature may increase the number of members to nine."

SDCL 13-49-1 states:

"The control of the public, post-secondary educational institutions of the state * * * shall be vested in a board of seven members, designated as the board of regents. The board members shall be appointed by the Governor, by and with the consent of the senate."

SDCL 13-49-3 reads:

"The term of office of each regent shall be for six years from and after the first day of January immediately preceding his appointment and confirmation, and until his successor is duly qualified, unless sooner removed. The expiration of all terms shall occur on the first day of January of each odd-numbered year * * *."

There is some divergence of opinion respecting the right of an appointing executive to withdraw or recall appointments made by him which are subject to subsequent approval by a legislative body. These two views were discussed by the court in *McBride v. Osborn*, 1942, 59 Ariz. 321, 127 P.2d 134, where it wrote:

that before election of any officers some permanent rules of the Senate were adopted which changed prior rules, including those with reference to confirmation by the Senate.

"The governor cancelled the appointment of petitioner and withdrew his name from the senate upon the theory that he had the right to do so any time before action by that body, while the petitioner's position is that by appointing him and submitting his name to the senate for confirmation, the governor exhausted his power in that respect and could do nothing more concerning it unless and until it was rejected by that body. Several decisions are cited by petitioner in support of this proposition (citing cases). An examination of these authorities, however, and others of the same tenor, discloses that the appointment in each case had the effect of vesting the appointee with the office, and it is clear that to have held the governor, or other appointing power, could cancel an appointment and withdraw the name of appointee from the consideration of the senate, would have given the governor, or other appointing power, the right to remove from office when that right did not exist under the law, except after a hearing and for cause. If appointment by the governor had had the effect of placing petitioner in the office of industrial commissioner and authorizing him to perform its functions, there could be no question but that the proposition that the governor had exhausted his power in making the appointment and could not withdraw it would apply. But we are unable to see wherein this could have any application at all where the appointment does not have the effect of vesting the appointee with the office.

4. Art. XIV, § 3, S.D.Const., SDCL 13-49-1 and 13-49-3 use the words appointed or appointment, while SDCL 13-49-5 uses the word nominate in describing the act, as did the original 1897 Session Law, Ch. 58, § 3, while § 2 thereof used the term nomination. From Senate Journals it appears Governors used the term nominate up to 1965 and the term appoint thereafter. The use of both of these terms is persuasive that some reason other than the nomenclature used should be the basis of decision—our con-

* * * And this is true, whether sending the name to the senate for confirmation be treated merely as a nomination or as an appointment, because in neither instance would the act of the governor alone entitle his appointee to the office. The approval of the senate is just as necessary as the action of the executive to complete the appointment and give the appointee any right whatever to take over the office and discharge its duties."

[2] It is sometimes claimed, as defendants here claim, that if the action of the Governor is deemed an "appointment" the Governor may not withdraw it, but if it is a "nomination" the Governor may withdraw it. We do not believe the nomenclature⁴ used ought to be that test, but rather whether the action of the executive is final and complete and places the appointee in office without further action.⁵ Our court in *State ex rel. Kriebs v. Halladay*, 52 S.D. 497, 219 N.W. 125, embraced that view when it wrote:

"In this case the appointment of Halladay remained in force⁶ until it was acted upon by the Senate. On January 7th, while it was still in force, the Senate confirmed it. The appointment thereupon became complete, Halladay qualified-
* * *". (Emphasis supplied)

[3] We have not overlooked that part of SDCL 13-49-3, supra, which fixes the term of office of a Regent as six years from and after the first day of January immediately preceding his appointment and confirmation and until his successor is

clusion of finality therefore is preferable and we conclude sound.

5. Many appointments fall in this category. Illustrative of these are vacancies in offices of the District County, Circuit and Supreme Courts, SDCL 3-4-3 and Art. V, § 37, S.D.Const.; and in the Legislature, Art. III, § 10.

6. This means only that it remained in force as an appointment upon which the Senate is authorized to act.

duly qualified, which defendants contend indicates their appointments vested them with the office of Regents. It clearly was a practical decision to fix the time a Regent's appointment terminated by setting a date from which the six-year term would commence. As is apparent, six years could not elapse as a later than January 1st confirmation would always shorten it. It is not necessary to determine in this proceeding when the appointee becomes clothed with de facto authority of a Regent so as to bind the Board or the State as to contracts made within its powers, though it seems logical the Regent whose six-year term may have expired is authorized to act as such until his successor has "duly qualified". The Governor may withhold a new appointment until the first day of February of the odd-numbered year (SDCL 13-49-3) and up to that time the former Regent may act as such. It would also seem logical that he could do so until the new appointee, if any, was confirmed by the Senate and then took the oath as such and became vested with the office of Regent, and, if by oversight or some other reason, no appointments were made or, if made and not confirmed, those members whose "terms" had expired would remain in office.

Our conclusion is further supported by the wording of SDCL 13-49-4 which provides in case a member of the Board shall die, resign, remove from the state, etc., the Governor shall fill the vacancy by suitable and prompt appointment, with the specific clause that "*such appointee shall be clothed with full authority as a regent, but this term of service shall expire with the next legislative session, unless sooner confirmed by the senate.*" The portion of this clause which we have emphasized does not appear in any of the statutes with reference to the appointments now before the court. The addition of this special clause indicates it was deemed necessary to invest

this authority in the appointee in place of the cloak of confirmation.

In re Advisory Opinion to Governor, 1971, Fla., 247 So.2d 428, concludes the Governor may recall an appointment prior to confirmation by the Senate, as

"the only appointments over which the Senate has confirmation jurisdiction are those submitted by you and those made by your predecessor and not recalled by you. Upon your recalling any of the appointments the confirmation jurisdiction of the Senate ceases".

As indicated above, the courts are divided on this question. *McChesney v. Sampson*, 232 Ky. 395, 23 S.W.2d 584, holding the Governor could not withdraw the appointment for the reason it concluded the appointee was fully placed in office by the appointment. See also *State ex rel. Todd v. Essling*, 1964, 268 Minn. 151, 128 N.W.2d 307; *State ex rel. Johnson v. Hagemeister*, 161 Neb. 475, 73 N.W.2d 625, which quoted from *McBride v. Osborn*, *supra*, that "when the (Senate) has acted favorably * * * the appointment is final and complete"; *State ex rel. Reynolds v. Smith*, 22 Wis.2d 516, 126 N.W.2d 215, and *Thorne v. Squier*, 264 Mich. 98, 249 N.W. 497, 89 A.L.R. 126 with Annot. at 132.

Defendants claim that it is the duty of the Governor, not the Secretary of State, to communicate appointments to the Senate; that Governor Farrar officially transmitted defendants' appointments to the "Legislature" and Governor Kneip did not formally notify the Senate of the withdrawal. The record is that Governor Farrar read a message and Governor Kneip took the oath of office as Governor in the Rotunda of the Capitol Building all on January 5, 1971, at 12 m. Whether former Governor Farrar was then Governor may be uncertain,⁷ but, passing that question,

7. On November 9, 1970, Governor-elect Kneip took oath as Governor, which oath

was filed with the Secretary of State on November 9, 1970.

neither the message⁸ nor defendants' appointments were then formally read or "officially" given to the Senate, as defendants claim, until January 19, 1971. This was the first date the Senate could legally meet. Art. III, § 7, S.D.Const., *supra*.

[4] Before that, on January 11, 1971, Governor Kneip had officially withdrawn the defendants' appointments by filing letters to that effect with the Secretary of State. That is the place appointments are required to be filed. SDCL 3-4-6 and 1-8-1.⁹ As the Legislature was not in session until January 19, 1971, the office of the Secretary of State was the only place to file any of the appointments. We are therefore concerned with an appointment made prior to the time it was forwarded to the Senate. At the time the Secretary of State forwarded the Governor Farrar appointments to the Senate the Kneip withdrawals were in the same official files as the Farrar appointments. If it was her duty to forward the message and appointments to the Senate, it was her duty to forward all of the official communications pertaining to the appointments. Her duty was an administrative one and she

was not authorized to make a decision as to their legal effect. See *State ex rel. Cooney v. Morrison*, 61 S.D. 339, 249 N.W. 318. This apparent oversight cannot result in the award of office to one person over that of another claimant. The Senate could take official notice of the facts relative to the appointments of persons to an office requiring its confirmation, *State ex rel. Kneip v. Halladay*, *supra*, and were bound to take notice of the complete official record thereof.

[5] Claim is made plaintiffs are chargeable with laches and unreasonable delay in commencing their action; that they are estopped from asserting their cause of action and have abandoned their right to the offices. The evidence shows plaintiffs appeared at one or more meetings of the Regents in January and February 1971, and made statements they were there "to continue (their) membership on the Board". The Board, however, refused to recognize them as such and voted to seat defendants as members at one meeting and refused to reconsider its action at a later meeting. That record is the reverse of abandonment, as plaintiffs affirmatively asserted their rights as members. It was not necessary that they continue to attend every meeting

8. Our search has found the following mention of messages by the Governor to the Legislature:

Art. IV, § 4, S.D.Const., directs that "The Governor * * * shall, at the commencement of each session, communicate to the Legislature by message, information of the condition of the state, and shall recommend such measures as he shall deem expedient."

Art. IV, §§ 9 and 10 of our Constitution outlines the procedure for the Governor to approve a bill passed by the Legislature or object to it and refuse or fail to sign it or some part of it.

SDCL 4-7-12 states "the outgoing Governor shall deliver the budget report to the Legislature with his message * * *"

SDCL 3-8-1.10 provides "The Governor may include, in the budget next transmitted by him to the Legislature * * * his own recommendations with respect to the rates of pay which he deems advisable," etc.

9. SDCL 1-8-1: "It is the duty of the secretary of state:

(1) To keep a register of official acts of the Governor to which attestation over his signature and the great seal is required;

(2) To affix the great seal, with his attestation, to all commissions, pardons, and other public instruments to which the signature of the Governor is required * * *.

(4) To receive, file, and keep on file any document * * * which the law requires to be filed in his office."

In addition to the letters appointing defendants as Regents, the Governor signed and the Secretary of State attested and affixed the seal of the State to "commissions" as Regents issued to defendants.

in view of the two votes and one member's statement the "issue is dead." No grounds for estoppel appear nor do we view there was unreasonable delay or laches.

The questions of vacancies and of the right of plaintiffs to remain in office until their successors are duly qualified requires discussion of SDCL 13-49-5. That section provides:

"The Governor shall not have power to fill any vacancies caused by the refusal of the senate to confirm, nor vacancies caused by his own neglect to nominate to the senate in time for confirmation."

The Senate did not refuse to confirm the appointments it considered; it voted to confirm them, though as we conclude defendants' appointments had previously been withdrawn; therefore, that phrase does not apply to the situation here presented. Nor were the vacancies caused by Governor Kneip's neglect to nominate to the Senate within the "time for confirmation" as SDCL 13-49-3 allowed the Governor until February 1, 1971, to make the appointments and the Senate had on January 19, 1971, the first day of its session, confirmed defendants' appointments. It would have been an idle act for the Governor to have called on the Senate to confirm the appointments or nominations of plaintiffs as it had confirmed others for the offices involved. It is a maxim the law does not require idle acts. *Magowan v. Groneweg*, 16 S.D. 29, 91 N.W. 335.

[6] A judgment will be entered declaring plaintiffs are entitled to be seated as members of the Board to hold office until their successors shall be appointed, confirmed by the Senate and duly qualified.

HANSON and WOLLMAN, JJ., concur.

WINANS, J., dissents.

WINANS, Judge (dissenting).

I am in dissent. The reason for my dissent will be as tersely stated as I know how to write. The Governor of this state upon the expiration of the terms of appointment

of the plaintiffs to the Board of Regents, except for their holdover rights, appointed each of the defendants to the Board of Regents for a term of six years, such term to be effective January 1, 1971 and to continue until January 1, 1977 or until their successors were appointed and qualified, subject to the confirmation of the state Senate. All of the appointive procedures provided for by the laws of this state and the Constitution were explicitly followed without any deviation. Each of the defendants took the oath of office required by statute which oaths were properly filed as required by law. The appointments were confirmed by the Senate, also an act provided for by law. After the appointments and the filing of the oaths and before the confirmation the Governor attempted by a letter addressed to the Secretary of State to withdraw the appointments which act is nowhere authorized by any law, statute or constitution of this state. When the Governor exercised his power of appointment and the defendants by filing their oaths accepted the appointments, the appointive act was complete, and as provided by law they took their offices. The only authority that could terminate their right to these offices was the Senate. They saw fit to confirm the appointments.

State ex rel. Kriebs v. Halladay, 52 S.D. 497, 219 N.W. 125, cited in the majority opinion, is not authority for the position taken by the majority opinion. Even the very quote as shown in the opinion admits that the appointment of Halladay remained in force until it was acted on by the Senate. The Halladay case does not hold the appointment could be revoked, once made, and after the oath had been properly taken and filed. Halladay's appointment was confirmed by the Senate and the appointment became complete.

I quote introductory comments to the annotations found in 39 A.L.R. 135, as follows:

"At first sight, it would seem entirely reasonable and in accord with public policy to allow the appointive power the privilege of reconsideration. From the point of view of the one appointed to the

office, however, to permit such reconsideration, after the power of appointment has been completely and finally exercised in the manner prescribed by law and the title to the office has become fixed, is to take from him a vested right. Also, from the point of view of stability and certainty in the administration of public affairs, it is desirable that there should be some point of time at which an appointment to office becomes finally and irrevocably fixed. As said in the famous case of *Marbury v. Madison* (1803) 1 Cranch (U.S.) 137, 2 L.Ed. 60: 'Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised.'

Although there are circumstances under which an appointment to office may be reconsidered and revoked, it may be stated as a general rule that an appointment once made is irrevocable and not subject to reconsideration. This view represents the great weight of authority."

1 and 2 from the Syllabus of *Barrett v. Duff* fully supported by the text, 1923, 114 Kan. 220, 217 P. 918, states:

"1. * * * The executive power of the Governor is a continuing power, never ending, and not broken by succession.

2. * * * Where the appointment to an office is vested in the Governor, with the advice and consent of the Senate, and the term of the incumbent expires during a recess of the Legislature, and the Governor appoints a successor to the office, held, that the appointment vests in the appointee a right to hold for his full term, subject only to be defeated by nonconcurrence or rejection of the Senate."

In *State ex rel. Todd v. Essling*, 1964, 268 Minn. 151, 128 N.W.2d 307, at page 311, it is stated,

"It appears well settled since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60, that with respect to an office having a fixed term where the appointee is not removable at will, when the executive power of appointment has been completely exercised, the authority of the executive to remove or rescind the appointment ceases. This rule is founded upon the principle that where the appointing authority has done everything he is required to do to make a valid and complete appointment, he has fully exercised and exhausted his power over the appointee and a recall of the appointment would operate as a removal from office in violation of the appointee's right to continue in office subject only to a rejection by the senate or removal for cause."

Other authority can be given for the position I take but inasmuch as this is only a dissent and the law will become fixed and determined as stated by the majority, I refrain from further comment.

There is another statement in the majority opinion on which I must comment briefly. The majority opinion, after quoting SDCL 13-49-5 and 13-49-3, states: "It would have been an idle act for the Governor to have called on the Senate to confirm the appointments or nominations of plaintiffs as it had confirmed others for the offices involved." The opinion, however, holds this confirmation was not valid because the Governor had exercised what the opinion holds was his right of withdrawal of the appointments of the defendants prior to the act of confirmation. It seems to me under the majority holding the Governor had a right to submit to the Senate for confirmation such appointments as he desired and withdraw them and resubmit all before the act of confirmation. Under my theory which holds the Senate had the right to confirm, as the Governor had no right to withdraw the appointments once made, it would have been an idle act for him to submit appointments. Furthermore, under the majority opinion herein the Governor could have created a vacancy and

time he wished, as is plainly shown by the stipulation of facts before this Court to the following effect:

"That in the event Burke and Witt were called to testify before a referee, they would testify that on or about January 11, 1971, at the request of Governor Kneip, they conferred with the Governor in his office at the State Capitol, that they were advised by the Governor that he was withdrawing the appointments of Schmidt and Varilek, and he wanted Burke and Witt to continue to serve as Regents, that he could not assure them how long he wished them to serve but he wished them to serve for at least one year until the Master Plan, then under consideration by the Board, had been determined, and that in accord with his practice with department heads that they leave letters of resignation, annexed hereto as Exhibits S and T, with the Governor, they so did."

I would hold that the defendants, Schmidt and Varilek, are the duly appointed, qualified, confirmed and legally acting members of the Board of Regents from January 2, 1971, the date they qualified.



STATE of South Dakota, Plaintiff-Respondent.

v.

Denver KINDVALL, Defendant-Appellant.

No. 10811.

Supreme Court of South Dakota.

Nov. 4, 1971.

Defendant was convicted in the Circuit Court of Miner County, George W. Wuest, J., of murder, and he appealed. The Supreme Court, Rentto, Associate Judge, held, inter alia, that though sole ex-

pert witness at murder trial testified he had been unable to determine whether defendant knew right from wrong at the time of the killing, his testimony that it was possible for people with defendant's schizophrenic condition, paranoid type, to know the difference between right and wrong, together with evidence as to the killing, testimony of persons who had contact with defendant the following afternoon, and testimony as to defendant's activities the previous evening, was sufficient to warrant finding of sanity.

Affirmed.

1. Criminal Law Ⓒ331

While the state must prove beyond reasonable doubt that accused was mentally capable of the criminal intent required to constitute the crime charged, it is not necessary for the state in the first instance, in its case in chief, to prove the sanity of the accused; as sanity and criminal responsibility are rebuttably presumed, evidence of the contrary is required to make an issue.

2. Homicide Ⓒ237

Though sole expert witness at murder trial testified he had been unable to determine whether defendant knew right from wrong at the time of the killing, his testimony that it was possible for people with defendant's schizophrenic condition, paranoid type, to know the difference between right and wrong, together with evidence as to the killing, testimony of persons who had contact with defendant the following afternoon, and testimony as to defendant's activities the previous evening, was sufficient to warrant finding of sanity. SDCL 22-3-1(4).

3. Criminal Law Ⓒ570(1)

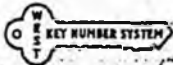
In addition to the opinion evidence of experts and laymen, a defendant's mental condition at the time of the crime may be proved by circumstantial evidence, including the acts, conduct and declarations of the defendant, both prior and subsequent to

field v. State, 160 So.2d 706 (Fla.1964), text 710.

Having considered the record and evidence in accord with the mandate of Fla. Stat. § 924.32(2), F.S.A., we conclude that the conviction was justified, supported by the evidence and free from error. The conviction is affirmed.

It is so ordered.

ROBERTS, C. J., ERVIN, BOYD and DREW (Retired), JJ., and MASON and HALL, Circuit Judges, concur.



In re **ADVISORY OPINION TO**
the GOVERNOR.

No. 41069.

Supreme Court of Florida.

May 7, 1971.

Questions were propounded by the governor to the Justices of the Supreme Court relating to the nature and effect of ad interim appointments made by governor's predecessor which were pending before the state senate. The Justices of the Supreme Court were of the opinion that the governor has no right to remove an appointee during the ad interim term except for good cause, but the governor does have executive power to initiate new appointments for the unexpired term and submit the same to the state senate during its regular session, and that the governor has power to request the state senate to return certificates of ad interim appointments or other evidence of such appoint-

ments pending before the senate, and to make his own appointments for the unexpired terms and send them to the senate for confirmation.

Questions answered.

1. States ⇐51

In relation to the term of office of an ad interim appointment, should the state senate reject the appointment and commissioning of the appointee, the office forthwith becomes vacant, and if the senate fails to act on the appointment and commission during the session in which it is required to act, the appointee serves only until last day of the legislative session which takes no action on the appointment. F.S.A. § 112.071(1) (c).

2. States ⇐46, 52

Governor has no right to remove an appointee during the ad interim term except for good cause, but the governor does have executive power to initiate new appointments for the unexpired term and submit the same to the state senate during its regular session. F.S.A.Const. art. 4, § 1(c, f); F.S.A. §§ 112.071, 114.04.

3. States ⇐46

Governor has power to request the state senate to return certificates of ad interim appointments or other evidence of such appointments pending before the senate, and to make his own appointments for the unexpired terms and send them to the senate for confirmation. F.S.A.Const. art. 4, § 1(c, f); F.S.A. § 114.04.

Edgar M. Dunn, Jr., Gen. Counsel for Governor Reubin O'D. Askew.

S. Curtis Kiser, Dunedin, for respondent.

SUPREME COURT OF FLORIDA
TALLAHASSEE
32304

as provided in section 112.071.
(Emphasis added)

May 7, 1971

Honorable Reubin O'D. Askew
Governor of Florida
The Capitol
Tallahassee, Florida 32304

Dear Governor:

We have the honor to acknowledge your communication of April 26, 1971, requesting our opinion upon a question affecting your executive powers and duties as authorized by Section 1(c) of Article IV, Florida Constitution [F.S.A.].

Omitting the formal parts, your letter reads as follows:

"It is my constitutional duty to fill by appointment vacancies in certain state and county offices. Section 1(f) of Article IV of the Florida Constitution provides, in part:

"(f) When not otherwise provided for in the constitution, the governor shall fill by appointment any vacancy in a state or county office *for the remainder of the term* of an appointive office.
* * * (Emphasis added)

"In 1970, the Florida Legislature enacted Chapter 70-395 [70-385], Laws of Florida, which provides in part:

"114.04 Filling vacancies.—In all such cases, and in all other cases in which a vacancy may occur, if the office be a state, district, or county office (other than a member or officer of the legislature), the governor shall fill such office by appointment, and the person so appointed shall be entitled to take and hold such office until the same shall be filled by an election as provided by law. *In cases requiring the confirmation or advice and consent of the senate, the person so appointed may hold such of-*

"In 1970, the Legislature enacted Chapter 70-439, Laws of Florida, which provides in part:

"(1) Whenever an office created by the legislature or provided for by the constitution is or becomes vacant and when the appointment is required by the constitution or statute to be confirmed by the state senate and such office is to be filled by the governor the following procedure shall be followed, unless the state constitution requires otherwise:

* * * * *

"(b) If a vacancy occurs when the senate is not in session or in other than regular session, the governor shall notify the department of state of the said appointment, whereupon the department shall prepare and countersign a commission for the term of the vacancy and deliver the same to the governor for his signature and delivery to the appointee. However, said appointment and commission shall be dependent upon the approval by the senate at its next ensuing regular session. The department of state shall then forthwith notify the secretary of the senate of the appointment made by the governor, and the secretary of the senate shall so advise the president, president pro tem and each member of the senate.

"(c) Should the senate reject said appointment and commissioning of the appointee, the said office shall forthwith become vacant. In such event, the appointee whose appointment is rejected by the senate shall not be eligible for appointment between the time of such rejection and the beginning date of the next ensuing regular session of the legislature. If the senate fails to act on said appointment and commission during the session in which it is required to act, the appointee shall serve only until the last day of the legislative session

which takes no action on said appointment. If the senate does confirm the appointment, the appointee shall serve for the full term for which the office was created.

* * * * *

"(2) The length of term of the office shall be as set forth in the statute, subject to the limitations of the state constitution. If the statute does not specify whether an appointment made between sessions of the legislature shall be for the full term thereof, said appointment shall be for the full term of the office created if the senate confirms the said appointment." (Section 112.071-1970 Supp. to F.S. (1969) [F.S.A.])

"The then Governor of the State of Florida, the Honorable Claude R. Kirk, Jr., took action to appoint persons to vacancies in certain state and county offices. These appointments have been processed in accordance with the procedures set forth in the above-quoted statutes. I am advised that the Department of State has notified the Secretary of the Senate of appointments made by former Governor Kirk, but that the Senate has not confirmed or advised and consented to any of such appointments.

"For the purpose of this request, please assume that the appointments now pending before the State Senate relate to: (a) offices which are appointed state or county offices within the meaning of Article IV, Section 1(f), Florida Constitution, (b) offices which require appointment by the Governor and the confirmation of or advice and consent to such appointment by the Florida Senate, (c) offices which have a fixed term, (d) offices which became vacant when the Senate was not in regular session.

"In view of the provisions of the Constitution, laws and facts which I have heretofore related, I am in doubt as to the nature and effect of the ad interim appointments which were made by my predecessor and which are now pending

before the Florida Senate. I, therefore, have the honor to request your written opinion on the following questions:

"1. What is the term of office of these ad interim appointments?

"2. If your answer is that the ad interim appointments are made only until the last day of the legislative session which takes no action on such appointments, do I have the executive power to avoid or ignore such executive appointments and would I have the executive power to initiate new appointments and submit the same to the Florida Senate during this regular session?

"3. If your answer is that I have the executive power to initiate new appointments, do I have the power to request the State Senate to return these certificates of ad interim appointments or other evidence of such appointments now pending before that body?"

Our advisory reported in 229 So.2d 229 (Fla.1969) did not relate to appointments requiring the confirmation or advice and consent of the Senate, and therefore not involved here.

Prior to its amendment by Ch. 70-395 [70-385], Laws of Florida, Fla.Stat. § 114-04, F.S.A., reads as follows:

"Filling vacancies.—In all such cases, and in all other cases in which a vacancy may occur, if the office be a state, district or county office (other than a member or officer of the legislature), the governor shall fill such office by appointment, and the person so appointed shall be entitled to take and hold such office until the same shall be filled by an election as provided by law, and in cases requiring the confirmation or the advice and consent of the senate, the person so appointed may hold until the end of the next ensuing session of the senate unless an appointment be sooner made and confirmed and consented to by the senate." (Emphasis supplied)

When a vacancy occurs in an office which must be filled through appointment by the Executive and confirmation by the Senate, two terms arise: The ad interim term runs from the date of the first appointment until the end of the next ensuing session of the Senate unless confirmation is sooner made by the Senate of an appointee for the unexpired portion; the next term is the *unexpired term* of the office which begins upon appointment by the Governor and confirmation by the Senate.

The advisory reported in 147 Fla. 157, 2 So.2d 378 (1941) discusses an ad interim appointment and a subsequent appointment for confirmation by the Senate. We there

"When an ad interim appointment of a Circuit Judge is legally made by the Governor to hold until the end of the next session of the Senate, it is the duty of the Governor to submit to the Senate at its next session an appointment of a Circuit Judge for confirmation to fill such office under Sections 43 and 45, Article V of the Constitution, for the term contemplated by the Constitution. The ad interim appointment and the subsequent appointment for confirmation by the Senate may be by succeeding Governors. *In the latter case the incumbent Governor makes an appointment, and does not merely transmit to the Senate for confirmation the name of the Judge who had been appointed ad interim.*" (Emphasis supplied)

In State ex rel. Wynn v. Squarcia, 66 So.2d 263 (Fla.1953), original quo warranto proceedings, the respondent Squarcia was appointed after the Senate adjourned in 1951. During the 1953 session of the Legislature a successor governor appointed relator Wynn to the office for the remainder of the term. Wynn's appointment was submitted to the Senate and confirmed. Both relator Wynn and respondent Squarcia claimed title to the office. Respondent Squarcia contended that the Senate neither confirmed nor rejected

his appointment, since it was not given an opportunity to do so by the successor governor, and he therefore had a lawful right to continue in the office in the absence of a rejection by the Senate. He further contended that no vacancy existed at the time the successor governor appointed Wynn, so the subsequent confirmation by the Senate was void. These contentions were not sustained, this Court saying:

"[T]he provisions of Section 7 of Article IV that a commission to fill a vacancy shall be 'for the unexpired term' may not be applied in the instant case, since Section 114.04, Florida Statutes, specifically provides a 'mode * * * for filling such vacancy', to wit: '* * * in cases requiring the confirmation or the advice and consent of the senate, the person so appointed may hold until the end of the next ensuing session of the senate unless an appointment be sooner made and confirmed and consented to by the senate.'

"Since then, the Governor was not exercising his *original* power of appointment under Section 33.03, but was proceeding under the powers granted by Article IV, Section 7, as limited by Section 114.04, supra, he was authorized to appoint only in the manner specified therein, to wit: his appointment was required to be limited 'until the end of the next ensuing session of the senate unless an appointment be sooner made and confirmed and consented to by the senate.'

"As illustrative of the application of the rule as to the exercise of the Governor's power to fill vacancies in offices requiring the confirmation of the Senate, at a time when the Senate is not in session, see the following cases: Simon-ton v. State ex rel. Turman, 44 Fla. 289, 31 So. 821 (as to county solicitors); In re Advisory Opinion to Governor, 45 Fla. 154, 34 So. 571 (as to circuit judges and judges of criminal courts of record);

In re Advisory Opinion to Governor, 137 Fla. 298, 188 So. 218, 219 (as to county solicitors); In re Advisory Opinion to Governor, 147 Fla. 148, 2 So.2d 372 (as to assistant state attorneys); Advisory Opinion to Governor, 147 Fla. 157, 2 So.2d 378 (as to newly created offices of circuit judges in Dade County.)

"For the reasons stated, it must be held that the commission of the respondent was properly limited, as provided by Section 114.04, *supra*; that upon the appointment by the Governor and confirmation of the relator as Judge of the Civil Court of Record of Dade County, the respondent's *ad interim* appointment terminated and expired; and that the relator is entitled to the title and emoluments of the office and to exercise the duties thereof."

In the advisory reported in 171 So.2d 539 (Fla.1965), this Court said:

"In the event of a vacancy at a time when the state Senate is not in session, it is your executive power and duty to fill the vacancy by appointment, and for an *ad interim* term only, expiring not later than the last day of the next ensuing session of the state Senate. In Advisory Opinion to Governor (Martin) reported in 93 Fla. 1024, 113 So. 115, the Justices said:

"In an advisory opinion to the Governor, printed in 45 Fla. at page 154, and reported also in 34 So. at page 571, the Justices of this court expressed the view that, when a vacancy occurs in the office of a circuit judge during the recess of the Senate, the Governor properly fills such vacancy by appointment to hold no longer than the end of the next ensuing session of the Senate, and when such next ensuing session of the Senate convenes it is the duty of the Governor to submit appointees to fill such vacancies to the Senate for confirmation *for the unexpired term.*" (Italics supplied)

"In the exercise of freedom of choice the Governor is not required to send to the

Senate the name of the ad interim incumbent but may, if he deems it in the best interest of the public welfare, send the name of a new appointee for the unexpired portion of each of the cycles." (Emphasis supplied)

Under our decisions prior to the 1970 amendments, it is clear that the incumbent Governor was not required to submit the name of the *ad interim* appointee. He had a right to make his own appointment and transmit the name of his appointee to the Senate for confirmation.

Chapter 70-385, Laws of Florida, amended Fla.Stat. § 114.04, F.S.A., so that the following words in old § 114.04,

"[I]n cases requiring the confirmation or the advice and consent of the senate, the person so appointed may hold until the end of the next ensuing session of the senate unless an appointment be sooner made and confirmed and consented to by the senate,"

were changed to read,

"In cases requiring the confirmation or advice and consent of the senate, the person so appointed may hold such office as provided in § 112.071."

Fla.Stat. § 112.071, F.S.A., referred to above, was enacted by Chapter 70-439. Subsection (1) of this statute states the legislative intent in these words:

"(1) Whenever an office created by the legislature or provided for by the constitution is or becomes vacant and when the appointment is required by the constitution or statute to be confirmed by the state senate and such office is to be filled by the governor *the following procedure shall be followed*, unless the state constitution requires otherwise." (Emphasis supplied)

Clearly, it was the intent of the Legislature to establish a procedure and not to change the substantive law relative to *ad interim* appointments.

Subsection (1) (b), of Chapter 70-439, quoted in your request (Fla.Stat. § 112.071 (1) (b)) prescribes the procedure to be followed if a vacancy occurs when the Senate is not in session. The Department of State issues the commission for the "term of the vacancy," but the "appointment and commission shall be dependent upon the approval by the Senate at its next ensuing regular session." This conforms with the substantive law expressed in our prior decisions.

When a vacancy occurs while the Senate is in session and the appointee must be confirmed by the Senate, the commission given prior to confirmation is for the "ad interim term" and, upon confirmation by the Senate, the commission is for the "unexpired term." The "unexpired term" is a completely new and different term from the "ad interim term." Although, under the statute, an officer duly appointed for the ad interim term cannot be removed during such term except for good cause, the name of any other qualified person to fill the unexpired term may be submitted to the Senate for confirmation. Until confirmed by the Senate, the Governor may recall any name and substitute another.

The Chief Executive, selected by the people, is charged with the responsibility of completing the program he presented to the electorate while seeking the office. It is important that he be allowed to exercise a freedom of choice in selecting those appointees whom he feels are qualified, as the people look to him for leadership in the operation of their government. Compare *State ex rel. Investment Corporation of South Florida v. Harrison*, 247 So.2d 713 (Case No. 40,869) (opinion filed April 14, 1971).

[1] In answer to your first question as to the term of office of an ad interim appointment, should the Senate reject the appointment and commissioning of the appointee, the office forthwith becomes vacant. If the Senate fails to act on the appointment and commission during the ses-

sion in which it is required to act, the appointee serves only until the last day of the legislative session which takes no action on the appointment. See Fla.Stat. § 112.071(1) (c), F.S.A.

[2] In answer to your second question, you have no right to remove an appointee during the *ad interim term* except for good cause. However, you have the executive power to initiate new appointments for the unexpired term and submit the same to the Florida Senate during this regular session. Upon your doing so, the only appointments over which the Senate has confirmation jurisdiction are those submitted by you and those made by your predecessor and not recalled by you. Upon your recalling any of the appointments the confirmation jurisdiction of the Senate ceases and that body is under a lawful obligation to return them to you.

In answer to your third question, you have the power to request the State Senate to return the certificates of ad interim appointments or other evidence of such appointments now pending before that body, and to make your own appointments for the unexpired terms and send them to the Senate for confirmation.

In summary, we have advised you that you have the power to fill a vacancy by appointment in accordance with law, and, if such appointment is made when the Senate is not in session, the maximum term that it can be made for is the last day of the next ensuing session of the State Senate, or until a successor is appointed by you and confirmed by the next ensuing session of the State Senate, whichever condition occurs first; that the appointments by your predecessor expire on the last day of this session of the State Senate, or when a successor shall be appointed and confirmed by the State Senate, whichever condition occurs first, and any language in a commission purported to extend an appointment beyond such date is ineffectual and void; that in making appointments you will not be required to submit for con-

firmation the names of the incumbents holding office under ad interim appointments.

Respectfully yours,

B. K. ROBERTS,
Chief Justice

RICHARD W. ERVIN
VASSAR B. CARLTON
JAMES C. ADKINS, Jr.
JOSEPH A. BOYD, Jr.
DAVID L. McCAIN
HAL P. DEKLE
Justices



THE FLORIDA BAR, Petitioner. [E]

Leon S. HELLER, Respondent.

No. 39983.

Supreme Court of Florida.

May 5, 1971.

Proceeding on complaint from the Florida bar which charged respondent with unauthorized practice of law. The Supreme Court held that activities of respondent, who was not a member of the bar, in searching public records for lands and money which may have been abandoned, or unclaimed, by true owners, locating missing heirs and offering to recover funds, upon agreement to share the proceeds of the recovery, constituted unauthorized practice of law and respondent would be enjoined from offering, proposing or soliciting any other person, firm or corporation, having, or appearing to have any claim, or interest, in or to lands, properties or monies in Florida, or engaging in any transaction by which respondent is to recover lands, properties or monies for another for com-

pensation without aid of a licensed member of the bar.

Order in accordance with opinion.

Attorney and Client ☞ 11(6)

Activities of respondent, who was not a member of the bar, in searching public records for lands and money which may have been abandoned, or unclaimed, by true owners, locating missing heirs and offering to recover funds, upon agreement to share the proceeds of the recovery, constituted unauthorized practice of law.

A. Ward Wagner, Jr., West Palm Beach, and Richard C. McFarlain, Tallahassee, for The Florida Bar, petitioner.

Leon S. Heller, in pro. per.

PER CURIAM.

This cause is before us on the Petition of the Florida Bar charging respondent with the unauthorized practice of law, this Court's order to show cause, Respondent's response thereto, and the report of the referee, which report is as follows:

"TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF FLORIDA:

"Pursuant to the Order dated October 13, 1970, appointing me Referee in this cause, a hearing was had before me on the 5th day of February, 1971, as reported in the Court Reporter's transcript herewith transmitted to you, including such exhibits as were filed in evidence.

"The evidence heard by me and thus transmitted to you supports the following conclusions:

"The Respondent, LEON S. HELLER, is a man 79 years of age who resides in Fort Lauderdale. He claims to have an office in Lake Worth, Florida, and in several other cities in Florida. His activities extend throughout many coun-

PETITION OF COM'N ON GOVERNORSHIP OF CAL. Cal. 1357

Cite as, Cal., 603 P.2d 1357

160 Cal.Rptr. 760

In re the Petition of the COMMISSION ON the GOVERNORSHIP OF CALIFORNIA.

Edmund G. BROWN, Jr., as Governor,
etc., et al., Petitioners,

v.

Mike CURB, as Lieutenant Governor,
etc., et al., Respondents.

S.F. 24021, S.F. 24029.

Supreme Court of California,
In Bank.

Dec. 27, 1979.

The Commission on the Governorship filed a petition concerning authority of Lieutenant Governor to act while the Governor was out of state. Combined therewith was a petition by the Governor and his appointee to judgeship on Court of Appeal seeking writ of mandate, prohibition and declaratory relief. The Supreme Court, Manuel, J., held that: (1) although dispute as to Governor's absence was a matter with respect to which the Commission had exclusive standing, once the question was properly raised, the court could concurrently consider issue presented by the Governor's petition; (2) Lieutenant Governor may act on the Governor's physical absence from the state; (3) Lieutenant Governor's appointment of presiding justice of Court of Appeal during Governor's absence was valid; and (4) on his return the Governor had authority to withdraw the appointment until the confirmation of appointment became effective by action of Commission on Judicial Appointments.

Peremptory writ of mandate issued.

Newman, J., filed concurring opinion.

1. States 42

Absence from the state is a "temporary disability" within meaning of constitutional

ner (1979) 24 Cal.3d 514, 542, 156 Cal.Rptr. 450, 467, 596 P.2d 328, 345.

ute amendments to the bill,² indeed was to relegate the employer to (1) complaints to the police, and (2) his common law remedies—even when those recourses might, under the equity precedents, technically be regarded as "inadequate".

It is disappointing that the Supreme Court of California, after more than half a century and notwithstanding the recent, plausibly incompatible, California legislative history, now appends this decision to the judicial history that Messrs. Frankfurt-er and Greene in 1930 assailed so graphically and devastatingly in their book *The Labor Injunction*. My opinion is that the court thus appears needlessly regressive. (Cf. Christ, *Is the Norris Act Constitutional?* (1932) 19 Va.L.Rev. 51; Shatz, *Picketing Injunctions in California* (1977) 28 Hast.L.J. 801, 836: "It would be anomalous indeed to conclude that the legislature, after reciting a litany of complaints as to the present injunction practice, enacted a statute which codified the status quo. The broader 'union' interpretation receives some further support from what little legislative history there is." Also cf. *Wilson & Co. v. Birl* (3d Cir. 1938) 105 F.2d 948 and *Alliance Auto Service v. Cohen* (1941) 341 Pa. 283, 19 A.2d 152.)

I concur in the majority's disposition of this proceeding (Part 4 of Justice Tobriner's opinion). I have stated my separate views, though, because I do not believe that the superior court has been correctly instructed regarding its proposed new proceeding.



2. For comment on "the final, hectic days of that legislative session" and the likely impact on last-minute amendments see *People v. Tan-*

provision that the lieutenant governor shall act as governor during the impeachment, absence from the state, etc., of the governor. West's Ann.Const. art. 5, § 10.

See publication Words and Phrases for other judicial constructions and definitions.

2. Courts ⇐208

Any dispute as to the governor's absence from the state for purpose of determining authority of lieutenant governor to act as governor is a matter with respect to which the Commission on the Governorship has exclusive standing before the Supreme Court. West's Ann.Const. art. 5, § 10; West's Ann.Gov.Code, §§ 12070-12076.

3. Courts ⇐208

Once issue with respect to power of lieutenant governor to act in absence of the governor is properly raised by Commission on the Governorship, the Supreme Court is not prevented from concurrently considering pleadings and arguments from interested persons on matters within the scope of the Commission's questions, and hence, filing of Commission's petition concerning power of lieutenant governor to act during governor's out-of-state trip permitted the court concurrently to consider similar and related issues presented by the governor's petition. West's Ann.Const. art. 5, § 10; West's Ann.Gov.Code, §§ 12070-12076.

4. Constitutional Law ⇐69

Courts ⇐208

Since Supreme Court's jurisdiction to determine authority of lieutenant governor to act as governor is exclusive, it transcends the procedural limitations on appellate courts imposed by Article VI, sections 10 and 11 and, hence, granting of relief, declaratory or otherwise, that ordinarily would be available only from trial courts may be appropriate; however, the limitation on rendering advisory opinions applies. West's Ann.Const. art. 3, § 3; art. 5, § 10; art. 6, §§ 10, 11; West's Ann.Gov.Code, §§ 12070-12076.

5. States ⇐42

Prior petition to Supreme Court by Commission on the Governorship is not a prerequisite to conferring of gubernatorial powers on the lieutenant governor in the governor's absence from the state. West's Ann.Const. art. 5, § 10; West's Ann.Gov.Code, §§ 12070-12076.

6. States ⇐42

The lieutenant governor, like any public officer with executive duties, must apply and, if necessary, interpret the law prescribing those duties as found in the Constitution, legislation, and authoritative decisions. West's Ann.Const. art. 5, § 10.

7. States ⇐42

Words "absence from the State," as used in constitutional provision that the lieutenant governor shall act as governor during governor's absence from the state does not mean effective absence but means physical nonpresence. West's Ann.Const. art. 5, § 10.

See publication Words and Phrases for other judicial constructions and definitions.

8. States ⇐42

Since a physically absent governor cannot act, the overriding purpose of avoiding the hiatus in the availability of executive powers requires that, during the absence, the sole entire power to act as governor be transferred to a lieutenant governor who is physically within the state. West's Ann.Const. art. 5, § 10; West's Ann.Gov.Code, §§ 12002, 12058; West's Ann.Evid.Code, § 452(c).

9. States ⇐42

Fact that in the past 16 years more than 1,400 gubernatorial actions have been taken by lieutenant governors or other acting governors during the governor's absence was evidence of a settled contemporaneous construction entitled to great weight in construing constitutional provision that the lieutenant governor shall act as governor.

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PETITION OF COM'N ON GOVERNORSHIP OF CAL. Cal. 1359

Cite as, Cal., 603 P.2d 1357

nor during governor's absence from the state. West's Ann.Const. art. 5, § 10.

10. Judges ⇐3

States ⇐42

As acting Governor, the Lieutenant Governor is free to act on whatever matters he determines need attention during the Governor's absence; hence, Lieutenant Governor's appointment of presiding justice of Court of Appeal while Governor was out of state was valid. West's Ann.Const. art. 5, § 10.

11. Officers and Public Employees ⇐13

Uncompleted appointments are subject to withdrawal.

12. Judges ⇐3

Transmittal of an appointment to the Commission on Judicial Appointments completes the gubernatorial action necessary to an appellate judicial appointment. West's Ann.Gov.Code, §§ 1340(d), 68121; West's Ann.Const. art. 6, § 16(d).

13. Judges ⇐3

Even though submission for confirmation by Commission on Judicial Appointments completes the gubernatorial action necessary for an appointment to an appellate judgeship, it does not complete the appointive process or confer even an interim right to assume office. West's Ann.Gov. Code, §§ 1340(d), 68121; West's Ann.Const. art. 6, § 16(d).

14. Judges ⇐3

Although Lieutenant Governor had authority to appoint presiding justice of Court of Appeal while the Governor was out of state, the Governor, on his return, had authority to withdraw the appointment until the appointment became effective on confirmation by Commission on Judicial Appointments. West's Ann.Gov.Code, §§ 1340(d), 68121; West's Ann.Const. art. 5, § 10; art. 6, § 16(d).

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Gibson, Dunn & Crutcher and Theodore B. Olson, Los Angeles, for respondent Curb in No. 24021.

No appearance for other respondents in No. 24021.

Ernest Duncan, Alhambra, as amicus curiae on behalf of respondents in No. 24021.

MANUEL, Justice.

In these consolidated cases we examine the gubernatorial powers of the Lieutenant Governor during the Governor's absence from the state and the powers of the Governor to rescind or revoke prior acts of the Lieutenant Governor. The dispute involves the Lieutenant Governor's appointment of a presiding justice of the Court of Appeal while the Governor was out of the state and the Governor's withdrawal of that appointment and substitution of his own appointee after his return to the state. As hereafter developed, we conclude that the Lieutenant Governor has authority to exercise all gubernatorial powers of appointment while the Governor is physically absent from the state and that the Governor has authority to withdraw the appointment until the confirmation of appointment becomes effective.

Article V, section 10 of the Constitution provides in pertinent part: ". . . The Lieutenant Governor shall act as Governor during the impeachment, absence from the State, or other temporary disability of the Governor or of a Governor-elect who fails to take office." The section also declares that this court shall have "exclusive jurisdiction to determine all questions arising under this section," and confers exclusive standing to raise questions of temporary

disability on "a body provided by statute."¹ Legislation creating the Commission on the Governorship (Commission) as the body having such standing (Gov.Code, §§ 12070-12076) took effect concurrently with adoption of article V, section 10 on November 8, 1966.

The salient facts are undisputed: Governor Edmund G. Brown, Jr., left California for Washington, D.C., at 10 a. m. on March 26, 1979, and returned on March 28, 1979, at 2:11 a. m., 40 hours later. On March 27, the executive assistant to Lieutenant Governor Mike Curb informed the Governor's secretary of the Lieutenant Governor's intention to appoint Judge Armand Arabian to the vacant presiding justiceship on the Court of Appeal. The executive assistant was advised that the Governor intended to appoint Justice Bernard S. Jefferson to the vacancy and that Justice Jefferson's name had already been submitted to the State Bar for evaluation. On the same date, the Lieutenant Governor appointed Judge Arabian as Presiding Justice for the Court of Appeal, Second Appellate District, Division One. On March 28, the Governor withdrew the appointment of Judge Arabian previously submitted by the Lieutenant Governor and appointed Justice Jefferson to the vacancy and at the same time appointed Judge Arleigh M. Woods as Associate Justice to fill the vacancy created by appointment of Justice Jefferson as Presiding Justice.

On May 7, 1979, Governor Brown and Justice Jefferson filed with this court a

petition for writs of mandate and prohibition and for declaratory relief. Named respondents were Lieutenant Governor Curb, Judge Arabian, and the Commission on Judicial Appointments (the body with responsibility for confirming gubernatorial appointments of Court of Appeal justices).²

The Governor's petition prays that we direct the Commission on Judicial Appointments to act on the Jefferson appointment and that we declare that (1) no gubernatorial powers devolve on the Lieutenant Governor unless this court, on petition of the Commission, has first determined the existence of a temporary disability of the Governor, (2) the Arabian appointment is invalid because on March 27, the Governor "was not effectively 'absent from the state' within the meaning of article V, section 10, of the California Constitution," and (3) the Governor's withdrawal of the Arabian appointment prior to its confirmation was effective, leaving the Jefferson appointment the only one properly before the Commission on Judicial Appointments.

On May 21, 1979, the Commission filed a "Petition for Determination of Questions under section 10 of Article V of the California Constitution." The Commission states the constitutional (art. V, § 10) and statutory authority for its petition (Gov.Code, § 12070, et seq.),³ recites the controversy over the conflicting appointments to a single vacancy on the Court of Appeal, urges

1. Article V, section 10 provides in full: "The Lieutenant Governor shall become Governor when a vacancy occurs in the office of Governor. [¶] The Lieutenant Governor shall act as Governor during the impeachment, absence from the State, or other temporary disability of the Governor or of a Governor-elect who fails to take office. [¶] The Legislature shall provide an order of precedence after the Lieutenant Governor for succession to the office of Governor and for the temporary exercise of the Governor's functions. [¶] The Supreme Court has exclusive jurisdiction to determine all questions arising under this section. [¶] Standing to raise questions of vacancy or temporary disability is vested exclusively in a body provided by statute."

2. Article VI, section 16, subdivision (d) of the Constitution provides that an appointment by

the Governor to fill a vacancy in a Court of Appeal "is effective when confirmed by the Commission on Judicial Appointments." The Commission on Judicial Appointments consists of the Chief Justice, the Attorney General, and, when the appointment to be considered is to a Court of Appeal vacancy, the senior presiding justice of the affected Court of Appeal. (Art. VI, § 7.)

3. The Commission, which consists of the President Pro Tem. of the Senate, the Speaker of the Assembly, the President of the University of California, the Chancellor of the California State Colleges, and the Director of Finance (Gov.Code, § 12070), "shall have exclusive authority to petition the Supreme Court to decide any questions relating to the existence of a temporary disability of the Governor" (Gov.

the importance of "the question of the power of the Lieutenant Governor to act as Governor during the physical absence of the Governor from the state," and prays that this court "determine when the Governor is absent from the state within the meaning of Section 10 of article V of the California Constitution and, in so doing, set forth standards which may be applied to facts and circumstances which may foreseeably arise in the future."

We deal first with our jurisdiction and the standing of petitioners to invoke it. Our exclusive jurisdiction to determine all questions arising under article V, section 10 is clear and unambiguous. The final sentence in the section states, however, that "[s]tanding to raise questions of vacancy or temporary disability is vested exclusively in a body provided by statute," namely, the Commission. As submitted to the Assembly by the Constitution Revision Commission, section 10 of article V provided for determining questions of vacancy and disability, but did not specify how or by whom the questions could be raised. The provision for exclusive standing in a statutory body was added to the draft on the floor of the Assembly (1 Assem.J. (1966, First Ex.Sess.) pp. 631, 705) at the request of the Office of the Governor, apparently for the purpose of forestalling frivolous or harassing attacks on the validity of gubernatorial actions.

[1-3] It is obvious that absence from the state is a temporary disability within the meaning of article V, section 10,⁴ and that any dispute as to the Governor's absence from the state is a matter with respect to which the Commission has exclusive standing before us. Once the question is properly raised, however, nothing in the section's wording or aims prevents us from concurrently considering pleadings and arguments

Code, § 12072). Section 12073 provides for exclusive jurisdiction with regard to questions relating to termination of the temporary disability of the Governor.

4. If that were not so, section 10 would not include the phrase "or other temporary disability

from interested persons on matters within the scope of the Commission's question.

For purposes of establishing our present jurisdiction, therefore, we need not consider whether the questions raised by the Governor's petition concern "vacancy or temporary disability," as to which the constitutional provision accords him no standing; the filing of the Commission's petition effects its standing to invoke our jurisdiction and permits us concurrently to consider the issues presented by the Governor's petition.

[4] Because our jurisdiction is exclusive it transcends the procedural limitations on appellate courts imposed by article VI, sections 10 and 11. Granting of relief, declaratory or otherwise, that ordinarily would be available only from trial courts may be appropriate here. We are not persuaded by the Commission's petition, however, that article V, section 10 calls on us to give advisory opinions. The petition alleges that "the question of the power of the Lieutenant Governor to act as Governor during the physical absence of the Governor from the state encompasses the entire spectrum of executive power" and prays that in "determin[ing] when the Governor is absent from the state within the meaning of [art. V, § 10]" we "set forth standards which may be applied to facts and circumstances which may foreseeably arise in the future." It is well settled that rendering "advisory opinion" is not a judicial duty imposed by article III, section 3, or article VI, sections 10 or 11 of the Constitution. (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 119-120, 145 Cal.Rptr. 674, 577 P.2d 1014.) Our "exclusive jurisdiction to determine all questions arising under" article V, section 10 is subject to the same qualification. In this case the dispute concerning the Governor's disability due to absence involves a question

ty of the Governor." (Emphasis added.) See also post p. 765 of 160 Cal.Rptr., p. 1362 of 603 P.2d for dialogue during legislative discussion of proposed amendment to article V, section 10.

that has arisen, and it is properly before us by petition of the Commission.

[5] We turn to the principal issue presented by the controversy, namely, the interpretation of the words "absence from the State." Preliminarily, we consider and reject the Governor's contention that under article V, section 10, his departure from the state can confer no gubernatorial power on the Lieutenant Governor without a prior petition to this court by the Commission, followed by this court's determination that the absence would constitute a temporary disability. It is argued that our "exclusive jurisdiction to determine all questions arising under" article V, section 10, makes us the only entity that can conclude authoritatively that the Governor is temporarily disabled by absence or other reason. The claimed prerequisite of a petition is based on the Commission's exclusive "[s]tanding to raise questions of vacancy or temporary disability."

[6] We disagree. To require express judicial authorization before the Lieutenant Governor could act as Governor during the Governor's absence or other temporary disability would contravene the purpose of article V, section 10, to prevent gaps in the availability and continuity of the executive power. As explained in the discussion of our present jurisdiction, the Constitution charges us only with determining "questions" of temporary disability, not with giving advisory opinions in the absence of dispute. The Lieutenant Governor—like any public officer with executive duties—must apply and, if necessary, interpret the law prescribing those duties as found in the Constitution, legislation, and authoritative decisions. Our role is to resolve controversies as to interpretation, not to dictate initial formulations.

[7] The parties offer two possible interpretations of the words "absence from the State." The Governor proposes that the

term "absence" must be read as an "effective absence," an absence determined by the state's need at the time for the particular act by the official then physically present. The Lieutenant Governor, on the other hand, asserts that the term must be given its literal, common meaning of physical nonpresence. We conclude that constitutional and legislative history, contemporaneous interpretation and historical practice, and considerations of public policy, namely the need for certainty in effectuating executive decisions, support the Lieutenant Governor's position.

The words "absence from the state" have remained unchanged in the California Constitution for 130 years despite several other changes in the pertinent clause. From 1849 to 1966, the Constitution provided that in case of the Governor's "impeachment" or "absence from the State" his duties "devolve upon" the Lieutenant Governor "until the disability shall cease." (Cal.Const. of 1849, art. V, § 17; Cal.Const. of 1879, art. V, § 16, with amendments of 1898, 1946 and 1948.) Present article V, section 10, adopted in 1966 and amended in 1974, similarly provides that the Lieutenant Governor "shall act as Governor during the impeachment, absence from the State, or other temporary disability of the Governor."

In 1966, during legislative discussion of the proposed amendment to article V, section 10, special counsel to the Constitution Revision Commission was asked the meaning of "absence from the state" and its reference to "disability." Counsel's response indicated that "absence from the state" meant physical absence in the literal sense; as to the use of the term "disability," he stated: ". . . [T]he Commission felt that if the constitution should prohibit the Governor from acting then it should be classified as a disability. It is not an inability. The Governor could be someplace outside the state and be very capable of performing his duties by a long distance telephone. He would be legally disabled

from doing so. Disability is more accurate."⁵

Our attention has been called to no previous challenge in court to the proposition that the Governor's physical absence from California confers full gubernatorial power on a physically present Lieutenant Governor. The state government has functioned under this provision without any question that its language means what it plainly states.⁶

It is argued that the word "absence" should be interpreted to reflect modern conditions of travel and communication and that technology has eliminated in part the objections that drafters of the early Constitutions might have had to permitting the Governor to act from outside the state or to permitting postponement of gubernatorial actions until his return. We note that the Constitution Revision Commission could have proposed a change in the language in 1966 to reflect modern conditions of travel and communication but did not do so. We are not persuaded that time or technology compels such a change by judicial fiat.

We are mindful that some jurisdictions have interpreted similar provisions to prevent the acting governor or other executive from exercising full executive powers, or more precisely, to invalidate the acts of

officials empowered to perform executive functions during the absence of the executive from the city or state.⁷ The Governor embraces the theory propounded by these cases and contends that not merely physical absence but "effective" absence must be shown before the substitute executive can act. The rationale of the cases that support his view is summarized in *Sawyer* (82 Nev. 53, 56, 410 P.2d 748, 749): "'absence' as contained within rules for orderly succession in government means 'effective absence'—i. e., an absence which is measured by the state's need at a given moment for a particular act by the official then physically not present."

[8] The conceptual difficulty with the effective-absence test is that virtually any physical absence of the Governor may create a need for action by an acting governor, at least to deal with emergencies. The Governor here does not claim any power to act from outside the state boundaries, nor does it appear that any such claim has ever been made by his predecessors. Since a physically absent Governor cannot act, the overriding purpose of avoiding a hiatus in the availability of executive power requires that, during the absence, the sole and entire power to act as Governor be transferred to a Lieutenant Governor who is physically within the state.

tion as it read prior to the amendments then being discussed.

6. Historical research reveals that in the past 16 years more than 1,400 gubernatorial actions (proclamations, executive orders, pardons and signing of legislation) have been taken by an acting governor while the Governor was physically absent from the state.

7. *Sawyer v. First Judicial District Court* (1966) 82 Nev. 53, 410 P.2d 748; *Gelinas v. Fugere* (1935) 55 R.I. 225, 180 A. 346; *Cytacki v. Buscko* (1924) 226 Mich. 524, 197 N.W. 1021; *State ex rel. Olson v. Lahiff* (1911) 146 Wis. 490, 131 N.W. 824; *Watkins v. Mooney* (1903) 114 Ky. 646, 71 S.W. 622; *Mayor of Detroit v. Moran* (1881) 46 Mich. 213, 9 N.W. 252. We find these cases neither persuasive nor controlling.

5. Transcript, Assembly Interim Committee on Constitutional Amendments, February 23, 1966, pages 29-34. Additional dialogue supports a literal interpretation of the word "absence":

Legislator: "And then, of course, absence from the state. What does absence from the state mean? Is that defined somewhere else? Suppose the Governor goes to Timbuktu or somewhere outside of the United States. During that time the Lieutenant Governor is by this provision acting temporarily. Is that right?"

Counsel: "That's correct. That's the existing law. We put these two examples [impeachment and absence from the state] in . . . because we wanted to be sure that these were construed to be temporary disability, because if we just said temporary disability we think it would be reasonable for someone to construe impeachment as not being temporary disability." (*Id.*, p. 33.)

We have no doubt that counsel's reference to "existing law" was a reference to the Constitu-

as an "effective" absence by the Governor. The particular case is not presented. In the other case, it must be given effect to physical absence. That constitutional practice, policy, namely, substituting executive power in the Lieutenant Governor.

the state" have California Constitution. Several other cases. From 1849 provided that in eachment" or his duties "devolve upon the Governor" until the Cal. Const. of 1879, art. 16 and section 10, adopted in 1974, similarly provided that in the event of the Governor's impeachment or other removal, the Governor's powers and duties shall devolve upon the Lieutenant Governor.

discussion of article V, section 5 of the Constitution. The meaning of the word "disability" and its relation to the Governor's absence from the state. In the literal sense, the term "disability" means the inability of the Governor to perform his duties. The Commission should protect the Governor's ability. It is not possible to be some- what disabled.

Legislative enactments which implement article V, section 10, are in full accord with this view. Section 12002 of the Government Code provides that "Every law of this State relating to the powers and duties of the Governor and to acts and duties to be performed by others toward him extends to the person performing for the time being the duties of Governor." Section 12058 (Gov.Code), enacted in 1966, provides that "[i]n case of impeachment of the Governor or officer acting as Governor, his *absence from the state, or his other temporary disability to discharge the powers and duties of office*, then the powers and duties of the office of Governor devolve upon the same officer as in the case of vacancy in the office of Governor, but only until the disability shall cease." (Emphasis added.)

There is no room in the all inclusive language of these statutes for a watered down "effective" absence or any other concept whereby an acting governor could discharge some but not all of the duties of the governor in his absence.

[9] Our conclusion is also in accord with the contemporaneous and settled interpretation of the constitutional provision by those charged with its execution. (See *State of South Dakota v. Brown* (1978) 20 Cal.3d 765, 777-778, 144 Cal.Rptr. 758, 576 P.2d 473 and cases there cited.) We take judicial notice (Evid.Code, § 452, subd. (c)) of the more than 1,400 gubernatorial actions taken in the last 16 years by Lieutenant Governors or other acting governors during the Governor's absence. The unquestioned acceptance of these exercises of gubernatorial power is evidence of a settled contemporaneous construction deserving of great weight. (*City of Los Angeles v. Rancho Homes, Inc.* (1953) 40 Cal.2d 764, 770-771, 256 P.2d 305; *State of South Dakota v. Brown, supra*, 20 Cal.3d at pp. 777-778, 144 Cal.Rptr. 758, 576 P.2d 473.)⁸ "Not lightly

vacated is the verdict of quiescent years.'" (*Anderson Nat. Bank v. Lockett* (1944) 321 U.S. 233, 244, 64 S.Ct. 599, 606, 88 L.Ed. 692, quoting from *Coler v. Corn Exchange Bank* (1928) 250 N.Y. 136, 141, 164 N.E. 882, 884.)

[10] The command that the Lieutenant Governor "act as Governor" during the Governor's absence (art. V, § 10) places upon the Lieutenant Governor complete, albeit temporary, responsibility for "[t]he supreme executive power of this State" and for "see[ing] that the law is faithfully executed" (art. V, § 1). As acting governor, the Lieutenant Governor is free to act on whatever matters he determines need attention during the Governor's absence. Thus, the appointment by Lieutenant Governor Curb of Judge Arabian as presiding justice of the Court of Appeal was valid.

There remains the question of the Governor's authority to revoke, rescind, or withdraw the appointment of Judge Arabian.

The Lieutenant Governor contends that his letter submitting the Arabian appointment to the Commission on Judicial Appointments exhausted the appointive power and could not be revoked by gubernatorial act. The leading statement of the principle relied on is in *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 where President Jefferson's Secretary of State, Madison, was held to have a ministerial duty to deliver a document evidencing Marbury's appointment as justice of the peace made by outgoing President Adams with the advice and consent of the Senate. Chief Justice Marshall's opinion states: "The last act to be done by the president is the signature of the commission: he has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed: he has decided. His judgment, on the advice and consent of the senate, concurring with his nomination, has been made, and the officer is appointed.

8. Also of interest is the experience of former Governor Earl Warren. In *The Memoirs of Earl Warren* (1977) at pages 264-265, he tells of leaving unsigned bills in a safe deposit box

so that a contemporary Lieutenant Governor could not sign them into law while Warren was on a trip to England.

This appointment is evidenced by an open unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

"Some point of time must be taken, when the power of the executive over an officer, not removable at his will, must cease. That point of time must be, when the constitutional power of appointment has been exercised. And this power has been exercised, when the last act, required from the person possessing the power, has been performed: this last act is the signature of the commission." (5 U.S. at p. 157.)

[11] California courts have followed that principle. (See *Weatherbee v. Cazneau* (1862) 20 Cal. 503 [Governor's interim appointment]; *People ex rel. Ryder v. Mizner* (1857) 7 Cal. 519, 526 [same]; *MacAlister v. Baker* (1934) 139 Cal.App. 183, 33 P.2d 469 [city council's appointment to vacant council seat].) On the other hand, uncompleted appointments are subject to withdrawal. (See *Conger v. Gilmer* (1867) 32 Cal. 75 [board of supervisors could reconsider appointment before issuing appointee a commission]; *Harrington v. Pardee* (1905) 1 Cal.App. 278, 82 P. 83.) Thus, in *Harrington*, Governor Pardee was held entitled to refuse to issue a commission to a person whose appointment by his predecessor had been confirmed by the Senate, since issuance of the commission was deemed a discretionary act.

[12] *Harrington* is distinguishable here because transmittal of an appointment to the Commission on Judicial Appointments completes the gubernatorial action necessary to an appellate judicial appointment. Though the Governor issues commissions to new appellate judges (see Gov.Code, § 1340, subd. (c)), the Constitution makes the appointment "effective when confirmed by the Commission on Judicial Appointments."

(Art. VI, § 16, subd. (d); see Gov.Code, § 68121 [confirmation "is effective when filed in writing with the Secretary of State"].)

[13] Even though submission for commission confirmation completes the gubernatorial action necessary for an appointment to an appellate judgeship, it does not complete the appointive process or confer even an interim right to assume office.⁹ Under those circumstances may the Governor withdraw the appointment before confirmation?

Past governors appear to have withdrawn appointments from commission consideration without challenge of their power to do so. (See Partial Rep. of Joint Judiciary Com. on Administration of Justice, pp. 38-39, 2 Appendix to Sen.J. (1959 Reg.Sess.), testimony of Chief Justice Gibson.) There are good reasons, for upholding the power. The fact that the appointee has not yet acquired any rights eliminates the objection that withdrawal constitutes removal from office. The withdrawal power prolongs gubernatorial scrutiny of the appointment, furthering the confirmation's ultimate purpose of assuring thorough consideration of the candidate's qualifications. (See Nelson, *Variations on a Theme—Selection and Tenure of Judges* (1962) 36 So.Cal.L.Rev. 4, 19-26.)

[14] Finally, the general rule in other states is that "where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested." (*McChesney v. Sampson* (1930) 232 Ky. 395, 401, 23 S.W.2d 584, 586-587; accord: *McBride v. Osborn* (1942) 59 Ariz. 321, 127 P.2d 134 [upholding withdrawal]; *Burke v. Schmidt* (1971) 86 S.D. 71, 191 N.W.2d 281; *In re Advisory Opinion to the Governor* (Fla.1971) 247 So.2d 428, 433; *State ex rel.*

9. We are not here called upon to decide at what point the appointment of a judge not subject to

confirmation by the Commission on Judicial Appointments becomes irrevocable.

Todd v. Essling (1964) 268 Minn. 151, 156, 128 N.W.2d 307.) Therefore we conclude that Governor Brown's withdrawal of the Arabian appointment was valid.

Let a peremptory writ of mandate issue directing the Commission on Judicial Appointments to exercise its discretion with respect to the appointment of Justice Jefferson.

TOBRINER, Acting C. J., and MOSK, CLARK, RICHARDSON and TAYLOR (Assigned by the Acting Chairperson of the Judicial Council), JJ., concur.

NEWMAN, Justice, concurring.

I agree that the withdrawal of the Arabian appointment was valid and that the writ should issue. I do not agree that "a physically absent Governor cannot act" (*ante*, p. 766 of 160 Cal.Rptr., p. 1363 of 603 P.2d).

That phrases in a constitution were deemed apt for a horse-and-wagon era does not ordain that we eschew sensible, up-to-date analysis of their meaning 130 years later. Justice Holmes once cautioned: "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what this country has become . . ." (*Missouri v. Holland* (1920) 252 U.S. 416, 433-434, 40 S.Ct. 382, 383, 384, 64 L.Ed. 641.)

His wise admonition applies here, as does this comment by Chief Justice Hughes in *Home Bldg. & Loan Ass'n. v. Blaisdell* (1934) 290 U.S. 398, 442, 54 S.Ct. 231, 78 L.Ed. 413 (see also A. S. Miller, *The Elusive Search for Values in Constitutional Interpretation* (1979) 6 Hast.Const.L.Q. 487): "It is no answer to . . . insist that what

the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is a constitution we are expounding' (*McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 407, 4 L.Ed. 579)—'a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.' *Id.*, p. 415. . . . [¶] [W]e find no warrant for the conclusion that . . . the founders of our Government would have interpreted the clause [at issue] differently had they had occasion to assume that responsibility in the conditions of the later day." (Italics in that final sentence added.)

In our case the focus of the majority opinion is "absence". How to interpret the phrase "absence from the State" is labeled "the principal issue presented by the controversy" (*ante*, p. 764 of 160 Cal.Rptr., p. 1362 of 603 P.2d).

I believe that we are better guided if we focus not on "absence" but instead on the words "other temporary disability". The California Constitution in article IV, § 21(b) provides for "[f]illing of the office of Governor should the Governor be killed, missing, or disabled, until the Governor . . . is able to perform the duties of the office" (italics added). Article V, § 10 refers to other "temporary exercise of the Governor's functions"; and it orders the Lieutenant Governor to "act as Governor during the impeachment, absence from the State, or OTHER TEMPORARY DISABILITY of the Governor" (emphasis added).

My majority colleagues conclude that "absence" means having crossed a State

boundary. Might it rather mean now what the draftsmen intended it to mean 130 years ago; that is, absence constitutes a disability like other temporary disabilities when now, as then, *in fact* it is disabling? (Note again the words "disabled" and "able" in article IV, § 21(b), quoted in my preceding paragraph.)

When the Governor is absent from the State is he in fact disabled from performing the duties of his office? Indeed he is not. Car-to-office, air-to-ground, and ship-to-shore calls are routine; so are conference calls and closed-circuit TV consultation. Many tasks that Governors have performed while temporarily residing in San Francisco or Los Angeles, say, could be done from any city, within or without California. Constant travelers such as the President of the United States, the Governors of other States with problems comparable to ours, the mayors of great cities, and countless government and corporate executives every day benefit from telecopiers, distance-ignoring word-processors, "talking" typewriters, signature reproducers, instant information-retrieval, other marvels not affected by State or even international boundaries. (Cf. Hanna, *Law Office of the Future* (Feb. 1979) N.J.S.B.J. No. 86, p. 10; Brown, N. Y. U. Law Professor to Teach on Coast via TV, N.Y. Times Sept. 5, 1979 "an interactive hookup by satellite that will permit him to take questions and engage . . . in discussion for an hour").

So therefore should we infer that, in the 20th Century, absence is never disabling? The answer is No. The Lieutenant Governor (or his surrogate, should he too be temporarily disabled) must be alert not only "[t]o meet the needs resulting from war-caused or enemy-caused disaster" (art. IV, § 21) but also to act as Governor whenever the elected Governor suffers a true disability. It could be caused by serious illness. It could occur when he is incommunicado—in a jungle or a mountain wilderness, for instance, or because of a natural disaster or

other catastrophe. It could be the result of electronic or other malfunctioning. But the test should always be "disability". *Absence that is not disabling is not a temporary disability.*

The 1849 and 1879 constitutions talked of the Governor's "inability to discharge the powers and the duties of the said office" and required the Lieutenant Governor to act "until the disability shall cease". To hold in this Centennial Year 1979 that the 130-year-old tradition must be frozen until modernized by constitutional amendment seems almost irrational and yet radical. By no means does rationality call for a Gold Rush Days approach to governing. (See the quotations from Justices Holmes and Hughes, *supra*.) And when we contemplate its antiquated, stifling, and potentially hurtful impact on use of the executive power in our complex State, cannot the majority's approach here fairly be labeled radical (albeit reactionary)?

The majority concede that "the purpose of article V, section 10, [is] to prevent gaps in the availability and continuity of the executive power" (*ante*, p. 764 of 160 Cal. Rptr., p. 1362 of 603 P.2d); and they refer to "public policy, namely the need for certainty in effectuating executive decisions" (*ante*, p. 764 of 160 Cal. Rptr., p. 1362 of 603 P.2d). Yet neither the availability nor the continuity of executive power need be affected by mere absence. (See *In re Advisory Opinion to the Governor* (Fla. 1959) 112 So.2d 843.) Moreover, serious discontinuity and uncertainty and even bizarre effects can result from the pretense that "a physically absent Governor cannot act." (*Ante*, p. 766 of 160 Cal. Rptr., p. 1363 of 603 P.2d. The *Justice Jefferson vs. Judge Arabian* contretemps here is illustrative; and cf. "Program of would-be acting governor curbed", S.F. Examiner, Nov. 8, 1979, p. 46.)¹

WHAT WAS THE TRUE INTENT IN 1966?

The scores of individuals involved in the drafting and approval of the 1966 revision

1. If, hypothetically, Earl Warren had been Chief Justice of California and not a politically

ambitious Governor, would he have construed "absence from the State" restrictively? Cf. the

of the words concerning us that now are in effect ("The Lieutenant Governor shall act as Governor during the impeachment, absence from the State, or other temporary disability of the Governor") might have written, "The Lieutenant Governor shall act as Governor during the impeachment or other temporary disability of the Governor." Instead they included and thus preserved "absence from the State". Does that imply an intent in 1966 to cast in concrete all the old assumptions on what those four words demand? I think not.

In February 1966 the California Constitution Revision Commission submitted the first of many reports to the Legislature. It was lengthy (212 pages). It proposed *first*, that many words (16,000 out of 22,000) be deleted from the Constitution (from articles III to VIII and also XXIV); *second*, that many other words be left unchanged; *third*, that new wordings be adopted to effect major and minor revisions, several of them simplificatory only.

Was there an intent in 1966 to freeze the non-judicial, archaic interpretation of "absence from the State" that my majority colleagues now decree? Their opinion relies on excerpts from February 23, 1966 testimony before the Assembly Interim Committee on Constitutional Amendments. They summarize it as follows (*ante*, p. 765 of 160 Cal.Rptr., p. 1362 of 603 P.2d): "[S]pecial counsel to the Constitution Revision Commission was asked the meaning of 'absence

from the state' and its reference to 'disability.' Counsel's response indicated that 'absence from the state' meant physical absence in the literal sense; as to the use of the term 'disability,' he stated: '[T]he Commission felt that if the Constitution should prohibit the Governor from acting then it should be classified as a disability. It is not an inability. The Governor could be someplace outside the state and be very capable of performing his duties by a long distance telephone. He would be legally disabled from doing so. Disability is more accurate.'"

The quoted words (and also those in the majority's footnote 5) are best understood if we check the full testimony. "To use snippets . . . is perilous." (*People v. Tanner* (1979) 24 Cal.3d 514, at 539, 156 Cal.Rptr. 450, 596 P.2d 328 (conc. opn.).)

The Commission's special counsel and the staff attorney who testified with him understandably had to ad-lib many answers to often-tough questions put by legislators at the hearing.² I doubt that the special counsel, if pressed, could have documented his view (quoted in my excerpt from the majority opinion) as to what it was "the Commission felt". There were some 80 commissioners—including 6 legislative members, 17 "ex officio legislative members", and 11 individuals who had resigned or died. The draft language that puzzles us here was a tiny segment of a huge set of initial recommendations. Most commissioners, obviously, "felt" nothing whatsoever on our subject.

majority's footnote 8 and also Rodda, *The not-always-accurate memoirs of Earl Warren*, Calif.J. (Nov. 1977) p. 378.

2. That sometimes the correct answers were not known is shown by this exchange: "WILLSON: . . . What is the process in the Constitution for impeaching the Governor of the State of California? Is there a trial by the Assembly and trial by the Senate? [¶] [SPECIAL COUNSEL]: He is tried by the Assembly, I believe, he is tried by the lower house. [¶] WILLSON: Is there a written charge that claims he should be impeached on certain charges? Is that the way it operates? [¶] [SPECIAL COUNSEL]: The specific form, the pleading, is not in the Constitution, Mr. Willson, and I'm not sure what it is."

One wonders why the staff attorney said that "the Supreme Court could provide for an acting Governor" in this excerpt: "[I]f the Governor were merely impeached the Supreme Court could provide for an acting Governor in the Lieutenant Governor who would take over the duties of office until the Governor was either convicted, in which case the Lieutenant Governor would become Governor, or was acquitted, in which case the Governor would resume his office."

The two excerpts exemplify the kind of partially correct answering that often typifies legislative committee hearings.

Regarding what "the Commission [might have] felt", are not the most reliable guides the words that appear in the Commission's formal proposal? It read: "The Lieutenant Governor . . . shall act as Governor during the impeachment, absence from the State, or other temporary disability of the Governor. . . . The Legislature shall provide for an order of precedence after the Lieutenant Governor . . . for the temporary exercise of [the Governor's] functions."

To be contrasted are certain words (which I now bracket and italicize) that the Commission proposed to delete from the then existing Constitution, as amended in 1948: "In case of impeachment of the Governor . . ., his absence from the State, or his other temporary disability [*to discharge the powers and duties of office*], then the powers and duties of the Office of Governor devolve upon the same officer as in the case of vacancy in the Office of Governor [*, but only until the disability shall cease*]."

It seems clear that the proposed deletion of "to discharge the powers and duties of office" evidenced no intent to change "other temporary disability" and that the deletion of "but only until the disability shall cease" involved mere style. Those two phrases are helpful, though, in analyzing the 1946 deletion of the word "inability".

INABILITY AND DISABILITY

Readers will recall, from an earlier paragraph in this opinion, the dictum of the Revision Commission's special counsel that "[D]isability . . . is not an inability." The 1849 constitution provided that "the powers and duties of the office shall devolve upon the Lieutenant Governor . . . until the disability shall cease"; and "disability" meant impeachment, absence from the State, and "*inability to discharge the powers and duties of the office*" (italics added). There was no change in 1879.

In 1946 the clause was amended to read, "In case of the impeachment of the Gover-

nor . . ., his absence from [the] State, or his other temporary disability to discharge the powers and duties of office, then the powers and duties of the office of Governor devolve . . ., but only until the disability shall cease." *In this lawsuit there is not even a scrap of evidence that suggests any intent by anyone in 1946 to distinguish "disability" from "inability".* For nearly a century the words had been treated as synonymous. After 1946 they still were synonymous. The special counsel erred, I think, when he ad-libbed his brief comment in 1966.

Further, a Revision Commission memo on "Presentation of proposed Article V", addressed by the staff attorney on April 7, 1966 to the Chairman of the Commission, the Chairman of its Article V Committee, and the Chairman of its Drafting Committee, on p. 3 states: "Standard of 'temporary disability' has a sufficiently definite and understood meaning to serve as a reasonable guideline for the court. Additional detail might bind the court, in a situation which we cannot now foresee, in a way that defeats the otherwise clear purpose underlying the scheme of succession and disability provisions." What was that clear purpose? It was to have the "scheme of succession" take effect whenever the Governor becomes temporarily disabled, for any reason.

Quite comparable is this excerpt from the hearings: "SONG: . . . [W]hat if a Governor is so physically disabled he's confined to bed? His mental process is working quite well. I would assume, then, from what you say, that the court can declare the office vacant. [¶] [STAFF ATTORNEY]: They would have that authority, yes, subject to all the responsibilities placed upon a judiciary construing the Constitution. [¶] SONG: Shouldn't certain limitations be spelled out in the Constitution? [¶] [STAFF ATTORNEY]: We felt that the spelling out of certain limitations and describing specific situations left the body which has to make this ultimate determina-

tion, a very difficult determination, really insufficient tools to do it with."

Nonetheless the majority opinion here does spell out an indisputably needless limitation; i. e., that mere absence is a disability, always.

In sum, analysis and history justify a conclusion that "absence from the State" does mean now what it meant when it was first written. In 1979, as in 1849, absence should effect the transfer of gubernatorial power only when in fact it is disabling, temporarily.

OFFICIAL TRAVEL?

A hidden weakness in the majority opinion is disclosed when we examine its reach. Californians are advised that "*the sole and entire power* to act as Governor" is transferred to the Lieutenant Governor when he is within the State while the Governor is outside (*ante*, p. 766 of 160 Cal.Rptr., p. 1363 of 603 P.2d; italics added). Similarly he has "*complete*, albeit temporary, responsibility"; and he is "*free to act on whatever matters* he determines need attention during the Governor's absence" (*ante*, p. 767 of 160 Cal.Rptr., p. 1364 of 603 P.2d; italics added).

What those words overlook is that most travels by modern Governors are for official State purposes. Most trips involve something more than seeking federal office, exploring a distant continent, or vacationing with family or friends. Yet if the Lieutenant Governor truly does have "the sole and entire power", if his duties do involve "complete . . . responsibility" if he is "free to act on whatever matters he determines need attention", then may he not legally intervene in the official projects of the traveling Governor?

To illustrate: How should a Congressional committee respond if a telegram or phone call from a Sacramento-based Lieutenant Governor purports to negate the ongoing testimony of a Governor who is in Washington, D.C., to describe California's

emergency needs? When the Governor is absent here but present there, who articulates authoritatively our State's concerns at the out-of-State headquarters of the innumerable officials who, pursuant to negotiations that might involve the Governor, supply federal funds for State use? Who speaks and acts for California at Governors' sessions, at formal meetings with other State and overseas investors, at innumerable other "outside forums" where the Governor's main concerns demonstrably are official concerns?

The majority opinion fails to recognize those questions. It ignores even more intricate questions as to the need for limitations on a Lieutenant Governor's power to undermine indirectly, in Sacramento, gubernatorial projects outside the State that for various reasons an ambitious Lieutenant Governor might not wish to countermand or modify directly.

Finally, the majority's words are so comprehensive that they may even authorize improbable, yo-yo-like contests regarding rescission or revocation of prior acts of the Governor. In this case, for example, what might have happened if the Lieutenant Governor, after March 28, 1979 and during a subsequent absence of the Governor, had withdrawn the Jefferson appointment and reappointed Arabian?

I conclude by quoting the possibly prophetic comment of a legislator during the 1966 committee hearings: "Assuming we have a Democratic Governor and a Republican Lieutenant Governor, I can see the court getting into the midst of a tremendous political brawl . . ."



88 A.L.R. 1439-1480.

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88 A.L.R. 1519-1524.

Supplementing 86 A.L.R. 1520.
Supplemented in 89 A.L.R. 312 and 98 A.L.R. 829.

88 A.L.R. 1532-1533.

Supplementing 84 A.L.R. 1499, and 86 A.L.R. 1172.
Supplemented in 92 A.L.R. 1525 and 95 A.L.R. 1383; 101 A.L.R. 1318; and 114 A.L.R. 820.

89 A.L.R. 13-114.

Supplemented in 126 ALR 284.

89 A.L.R. 118-126.

Supplementing 29 ALR 1482; 33 ALR 1400; 44 ALR 704; and 48 ALR 293.
Supplemented in 180 ALR 1400.

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89 A.L.R. 171-200.

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89 A.L.R. 287-291.

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89 A.L.R. 295-333.

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88 ALR 1519-1524

Supplemented 96 ALR 212 and 96 ALR 826.+

88 ALR 1532-1533

Supplemented 92 ALR 1525 and 95 ALR 1583; 101 ALR 1315; and 114 ALR 820.+

89 ALR 13-114

Supplemented 126 ALR 281.+

89 ALR 118-126

Superseded 43 ALR2d 632.+

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89 ALR 171-200

Supplemented 194 ALR 1301.+

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89 ALR 266-279

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89 ALR 287-291

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89 ALR 295-333

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88 ALR 1016-1017
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88 ALR 1078-1080
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88 ALR 1084-1085
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88 ALR 1114-1122
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88 ALR 1131-1148
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88 ALR 1185-1188
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88 ALR 1192-1194
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88 ALR 1318-1348
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88 ALR 1352-1361
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88 ALR 1519-1524
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88 ALR 1532-1533
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88 ALR 1016-1017
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88 ALR 1084-1085
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88 ALR 1185-1188
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88 ALR 1260-1262
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88 ALR 1318-1348
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88 ALR 1380-1416
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88 ALR 1439-1480
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88 ALR 1519-1524
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88 ALR 1532-1533
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89 ALR 13-114
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89 ALR 118-126
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- U.S.—First Flight Associates, Inc. v P. G. Co. Inc. (CA Tenn) 527 F2d 931
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89 ALR 287-291

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88 ALR 1016-1017
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88 ALR 1103-1107
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88 ALR 1422-1428
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89 ALR 118-126
 Superseded 43 ALR2d 632+

89 ALR 132-163
 U.S.—Garfield v U. S. (CA FC) 770 F2d 1061

89 ALR 171-200
 Supplemented 104 ALR 1301+

89 ALR 210-238
 U.S.—Norman v D. (CA9 Wash) 371 F2d 1483
 U. S. v Anderson (ED Wash) 591 F Supp 1
 Neb.—Northport Irrig. Dist. v J., 215 Neb 152, 337 NW2d 733

89 ALR 252-261
 U.S.—Willis v C. C. Corp. (CA9 Wash) 842 F2d 1139, 3 BNA IER Cas 192, 108 CCH LC 755872
 Hawes Office Systems, Inc. v W. L., Inc. (ED NY) 580 F Supp 812
 Ill.—Publishers Resource, Inc. v W.D. P., Inc. (CA7) 762 F2d 557
 Mo.—E.F. Higgins, Inc. v K. D. C. Co. (App) 663 SW2d 318
 Pa.—Village Gentry, Inc. v W. V. Super 463 A2d 427
 Tenn.—Barnett v W., Inc. (App) 682 SW2d 212

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89 ALR 295-333
 U.S.—U. S. v Ely (CA7 Ill) 719 F2d 902
 U. S. v Hack (CA10 Wyo) 782 F2d 862
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 Magill v D. (CA11 Fla) 824 F2d 879
 Jeffers v R. (CA9 Ariz) 832 F2d 476, 24 Fed Rules Laid Serv 321
 Messer v F. (CA11 Fla) 834 F2d 390
 Robtoy v K. (CA9 Wash) 871 F2d 1478
 U. S. v Griffin (DC Ariz) 627 F Supp 1551
 Brown v D. C., N. C. (ED NY) 637 F Supp 1096
 Gilmore v A. (WD Mo) 681 F Supp 632
 U. S. v Miller (ED Mich) 690 F Supp 1578
 Blanco v D. (SD Fla) 691 F Supp 308
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 Bishop v S., 294 Ark 303, 742 SW2d 911
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some section of those 20 principal heads. So as we envision the state now, it would never have more than 20 principal departments, although there might be a great many subdivisions thereof. We vest in the governor the appointive power for the heads of these departments. That is subject to confirmation by the houses of the legislature meeting in joint session. All the way through here you will note that we have given the power of approval of the governor's appointments to a joint session of the legislature. We did so after checking with the department on the legislative which was following a similar procedure in the matter of approval of appointments. I might also add that the approval of appointments has been done in Alaska in that manner for many years by a joint session of both houses. In the matter of the major department heads we have left the power of removal in the hands of the governor. That I believe could be implemented by certain legislative law in regard to certain restrictions or hearings or appeals from the governor's removal powers, but it was intended that he should have a strong enough power to remove from office anybody without disgrace, mind you, we are not talking about impeachment, we are talking about just the removal of somebody who might prove to be incompetent or unable to perform the duties of the office. We have given certain power to the governor in setting up the executive or rather the administrative departments in that he may, in order to effectuate the strong executive and not be tied into any one of these departmental heads with any particular functions, reassign the functions to the different departments as the occasion and need might rise, but he will make those changes and would set them forth in an executive order which would not become effective until after it has been before the next succeeding legislature, and if they desired to, they could take an action disapproving that. If they did not take such action of disapproval, then the executive order as issued by the governor would become law, so he cannot go into the departments and make a quick shuffle without first having it submitted to the legislature and having their general consent by reason of their taking no negative action. That brake was thought necessary in order to maintain the stability in the administrative offices. Now we have set up in practically all cases, we hope the principal departments will be headed by a single executive, but we have also made provision that if there are multiheaded principal departments that they will be appointed by the governor, there again approved by both houses of the legislature, and they in turn may appoint an executive officer to perform as their functioning head. He will be subject to removal not by the governor but by the order of the board under such rules and regulations they may adopt. I might add, however, that we have left the removal powers of the board members of the heads of these principal departments in the governor's hands. I wanted to mention that the heads of all principal departments, along with their ability to perform their particular functions, will also have to have an acquaintance and a knowledge of Alaska under this requirement. We have

set up that they shall have been a resident of the state for at least three years preceding appointment to office. There again it was deemed by the Committee that any man who is to have a close hand in the handling of the Territory affairs, especially in regard to making policy, should have a close acquaintance with our country and with its people and with their needs and their desires. Three years was thought to be an absolute minimum for heads of principal departments who would assist in effectuating and carrying out departmental or state government policies. Now we have given the governor the power to fill any vacancy occurring during a recess. You will notice there are certain limits upon his power to fill those vacancies. If at the end of the session any of his ad interim appointments expire, or at the end of the next regular session is the way we have put it, but if he nominates somebody and they are sent down for confirmation to the legislature, the legislature does not confirm them during the session, then he may not nominate that same man for an interim appointment after the legislature has adjourned. We felt it was necessary there to have that restriction in order that the governor might not bypass the approving power of the legislature and make an ad interim appointment of somebody the legislature had refused to approve and did not confirm. I would like to ask if from my description here or my comments if I have omitted anything, I would like to ask any member on the Committee to further amplify upon the intent and thoughts of the Committee at this time before we go into a detailed discussion.

PRESIDENT EGAN: Mrs. Nordale.

NORDALE: I think that we overlooked putting something in our last paragraph here, did we not? We first talk about appointments to be made by the governor with the advice and consent of the senate, or legislature in joint meeting. Our thought there was that possibly the legislature might pass an act providing that some certain appointee would be approved only by the senate, but then later on we neglected to put in the legislature in joint session. I am sure it was our intent that beginning with line 17 on the very last paragraph, the last page, "After the end of the session no ad interim appointment to the same office shall be made unless the governor shall have submitted to the senate or the legislature meeting in joint session," and then the very same thing in the very last line, "If the nomination shall have failed of confirmation by the senate or by the legislature meeting in joint session", that is the intent?

V. RIVERS: That was the intent and we will make a correction at the next recess on that so just keep in mind that it is the intent of the Committee that it shall read, "the legislature in joint session" there.

PRESIDENT EGAN: Are there questions? Mr. Johnson.

V. RIVERS: Speaking yet, without a motion on the floor, for the Committee, the Committee decided after the discussion in the judicial article in which the confirmation was by joint session that we would, as a Committee group, go along unanimously with the approval of confirmations by joint sessions of the legislature, so I will move and ask unanimous consent that this group express as a policy the intent that approval of appointments shall be confirmed by legislatures in joint session and that we will correct our proposals to conform to that policy.

RILEY: I'll second the motion.

PRESIDENT EGAN: Mr. Rivers moves, Mr. Riley seconds the motion. Mr. Victor Rivers.

V. RIVERS: I'll speak briefly on this motion. I might just say that the policy of confirmation by both houses in joint session is the present method by which we now confirm appointees to the various Territorial positions. It has been used for a number of years.

PRESIDENT EGAN: Mr. Hellenenthal.

HELLENTHAL: Mr. President, this only applies to cases where provision is now made for confirmation by the house or the senate, period. It does not apply to all officers.

V. RIVERS: It does not apply to all officers. There is a paragraph in here that I might call your attention to. That is Section 18, where the governor fills vacancies. Now we don't know but what sometime there may come up a law which the legislature enacts that in the matter of filling vacancies they may be or may not be required to be confirmed by either or both houses, so it was our intent in that case on line 13 where it says, "...by the governor with the advice and consent of the senate or...". We were going to strike "of the senate or" and "with the advice and consent of either house". That would be the only exception where there is a possibility that the law would be enacted providing approval by one house, it's a matter of filling vacancies.

HELLENTHAL: Question. Do you realize we have set up the article on the composition of the advisory board on districting and those people are appointed by the governor. Now is it the intention that there be language superimposed there, by and with the consent of the joint houses assembled, or is this only to apply where in the present language the consent of one or the other body is required?

V. RIVERS: Yes, that is the intent. It reads this way: "The governor may fill any vacancy occurring in any office during a

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recess of the legislature, appointment to which is made by the governor with the advice and consent of..." We would have it "of either house of the legislature".

HELLENTHAL: Then it would not apply to the redistricting board?

V. RIVERS: It would not apply to the redistricting board.

PRESIDENT EGAN: Mr. Johnson.

JOHNSON: Well, I perceive it is a little bit useless for me to argue this point too much. However, I am convinced that we are being slightly paradoxical because we have already declared ourselves firmly in favor of a bicameral legislature and yet in the legislative article we diluted that by saying that vetoes of the governor shall be acted on in joint session instead of by each house separately. Now when this executive article first came out it contained almost uniformly the provision that appointments were to be made by the governor with the advice and consent of the senate, something that occurred to me as being extremely good. I believe firmly that we should have a strong executive and there has been a great deal of argument around here about expense. If under this article the governor can call the senate back into session, there is no reason why appointments couldn't be acted upon when he did so. However, now if appointments are to be acted on in that manner, he must call together both houses of the legislature and have them in joint session, and I disagree that the apportionment board or redistricting board, or whatever you call it, would not be covered by this language because, as I understand it, we are now adopting a general policy to cover all appointments in the future or present, and if we do that, then it will certainly cover the matter that Mr. Hellenthal raised. At least I can't see why that should be excepted from the general provisions. I am certainly against this type of amendment. I am against this type of procedure. I thought we were proceeding along the line of ultimately adopting a constitution that we would have no trouble in selling to the Congress of the United States and now I am not so sure.

PRESIDENT EGAN: Mr. Barr.

BARR: Mr. President, I agree with Mr. Johnson that this is a paradoxical situation; however, having seen this body change its mind several times, I'll say they are at least consistent in changing their minds. I am not in favor of this because I am in favor of a bicameral legislature. It is true that a joint session has been our method of confirming appointments, but I have never agreed with it because I have been there, seen

COOPER: Mr. President. Mr. Hellenenthal asked the Committee Chairman a question that if certain boards or commissions were excluded. The answer was given as yes, but in Section 18 it says, "The governor may fill any vacancy occurring in any office during a recess of the legislature...", and Mr. Hellenenthal pointed out that the board of apportionment, there might be a vacancy occur and before the governor could have a man seated on that board that could act with any legality whatsoever, both houses would have to be convened to confirm his appointment. Now you have a Legislative Council and it is my thinking that if the senate were to confirm at least some of these minor board members, the Legislative Council could poll the senate without even having to convene them. Certainly you do not want to have to fly 60 members to the state legislature to Juneau to appoint a member to the board of reapportionment.

PRESIDENT EGAN: Mr. Fischer.

V. FISCHER: Mr. President, the way I read Section 18, it says, "The governor may fill any vacancy occurring in any office during a recess of the legislature, appointment to which is made by the governor with the advice and consent of the senate or of the legislature in joint meeting." This refers to very specific appointments, not to just any old board, and so I don't follow that argument at all.

PRESIDENT EGAN: Mrs. Nordale.

NORDALE: Mr. President, you notice that the nonpartisan board of reapportionment does not require confirmation.

COOPER: I know that, but Mr. President, might I have the floor on a point of personal privilege?

PRESIDENT EGAN: If there is no objection, Mr. Cooper, you may have the floor on a point of personal privilege.

(Mr. Cooper then spoke on a point of personal privilege.)

PRESIDENT EGAN: Mr. Barr.

BARR: Mr. President. Mr. Cooper and 175,000 other people have a perfect right to be confused, I believe. It was the intent of the Committee to exclude those appointments which did not have to be confirmed by the legislature, but according to the construction of this sentence, it is a little confusing. I would like to call it to the attention of the Style and Drafting Committee and I think they could take care of that.

PRESIDENT EGAN: Mr. Hellenenthal.

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HELLENTHAL: Mr. President, I think that it is clear, but probably not as clear as it could be. I know of two suggestions which will clarify it beyond any question. The thing should read like this: "The governor may fill any vacancy occurring in an office, appointment to which is made by the governor with the advice and consent of the senate or of the legislature in joint meeting during a recess of the legislature." Now if you put the word "an" in instead of "any", I think Mr. Cooper's objections will be met and it will be clearer.

PRESIDENT EGAN: Will the Chief Clerk please read the proposed amendment, or the proposed motion.

CHIEF CLERK: Mr. Rivers moved and asked unanimous consent that "The group express as a policy the intent that approval of appointments shall be confirmed by the legislature in joint session and we will correct this proposal to conform with the policy." That was the motion.

PRESIDENT EGAN: Mr. Victor Rivers.

V. RIVERS: Mr. President, after hearing the arguments, it may be that some of the delegates feel it is just too broad a handling of this subject and they may desire to handle it individually. I might say, that in all fairness to all delegates, I feel that if the thought of the body is that it is too broad an approach of policy, then it should be voted down and we handle this individually. I was trying to expedite the matter by making this motion, not to exclude anyone from a fair chance to be heard on each point.

PRESIDENT EGAN: Mr. Victor Rivers.

V. RIVERS: I move and ask to withdraw the motion, Mr. President.

PRESIDENT EGAN: Mr. Victor Rivers has asked unanimous consent to withdraw his proposed motion.

R. RIVERS: I object.

PRESIDENT EGAN: Mr. Ralph Rivers objects.

R. RIVERS: The basis of my objection is that this is a fundamental proposition. We are not going to do it two or three different ways throughout the constitution. If we decide right now which way we will make all the articles conform. We've got it squarely before us which way we want to pursue. I think we just hashed it for 20 minutes, we've almost arrived at something, let's vote on this.

The "ayes" have it and the motion has been adopted. Mr. Hurley.

HURLEY: Mr. President, I would like to ask for the purpose, at least for my clarification, a question.

PRESIDENT EGAN: If there is no objection, Mr. Hurley, you may ask your question.

HURLEY: Is it the intent of the Committee that interim appointments be approved by either house of the legislature or both houses of the legislature?

PRESIDENT EGAN: Mr. Victor Rivers.

V. RIVERS: It was the intent of the Committee that interim appointments could be made under this clause by the governor subject to being filled in the manner provided by the constitution which we understood would be by joint session of the legislature.

HURLEY: I guess I didn't make my point. If there is a vacancy in any appointive office and the governor appoints someone else to fill it and the legislature is not at that time in session, will it be necessary for that legislature to reconvene and approve the appointment?

V. RIVERS: No, that was not the intent. We are referring to recess or interim appointments. He may appoint under this clause without calling the legislature and they will fill it until the legislature meets, and then the policy would be to confirm them in joint session of both houses. Is that clear?

HURLEY: Yes.

PRESIDENT EGAN: Are there amendments to Section 13? Mr. White.

WHITE: I have a question of the Chairman, Mr. President, regarding Sections 11 and 12, just to make sure I understand it. Do I assume from these two sections that it is not necessary nor desirable to declare martial law in every event when the governor might wish to call out the armed forces of the state?

PRESIDENT EGAN: Mr. Victor Rivers.

V. RIVERS: As was pointed out yesterday, the declaration of martial law puts everything under the military and stops all the action of civil lawmaking and legislating bodies, and we felt that the intention here was that only in cases of invasion or rebellion or imminent danger thereof, would he declare martial law. However, if you have an emergency such as was mentioned

request for the adoption of this proposed amendment? Mr. Victor Rivers.

V. RIVERS: I will now ask to withdraw the proposed amendment because there is going to be one there that will cover it in a manner acceptable, I am sure, to all of us.

PRESIDENT EGAN: Mr. Victor Rivers asks unanimous consent to withdraw the proposed amendment. If there is no objection it is so ordered. Mr. Victor Fischer.

V. FISCHER: I have an amendment on the desk which has been there since before the recess. I would like it read.

PRESIDENT EGAN: The Chief Clerk will please read the proposed amendment offered by Mr. Fischer.

CHIEF CLERK: "Strike Section 18." → (H 5511-10 P 10/17)

V. FISCHER: I so move.

HERMANN: I second the motion.

PRESIDENT EGAN: Mr. Fischer moves, Mrs. Hermann seconds the motion that Section 18 be stricken, be deleted from the proposal.

V. FISCHER: Mr. President, all I would like to say is that we presently have a law to this effect on our statute books. It was enacted by the last session of the legislature. I do not see why we must enact things like this which we have in our regular enactments of the legislature, why we must include them in the constitution. I think the discussion here has shown the difficulties and problems that may arise out of bringing in this kind of detailed procedure. I think that the subject can be very adequately covered by legislation.

PRESIDENT EGAN: Is there further discussion? Mrs. Nordale.

NORDALE: I favor leaving it in. Any act of the legislature can be removed by the succeeding legislature. We are setting up a strong executive and we are requiring that most appointments be confirmed in some manner or other. In the constitution it is by joint session. There may be many laws setting up other positions which will require only confirmation by only one house or the other. But nonetheless, I think that the people have a right to expect the governor will submit his appointments to the legislature for confirmation when that is part of the constitution. This is not without precedent may I say. The New Jersey Constitution which is reputed to be very short and concise and contains almost the identical language.

PRESIDENT EGAN: Mr. Victor Rivers.

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V. RIVERS: I will say a few words along the same line, that this is one of the essential powers of the executive that we felt should be included in the constitution and we feel, as Delegate Nordale has stated, that while an act could be passed it might be changed and altered materially through the years, and that the governor with a different composition of the legislature from time to time might be faced with difficult problems of making interim appointments. It seems to us in the Committee, essential that we provide the power for making interim appointments when the legislature was not in session and also provide that the governor could not make interim appointments, jump the time the legislature was in session and then make another interim appointment of the same man. This does take care of that situation.

PRESIDENT EGAN: Mrs. Hermann.

HERMANN: Mr. President, we are, apparently, all of the opinion that we should have a strong executive and we have therefore given to the governor the power of appointment not only of the boards but of all of his officers of principal departments and minor departments. I think the mere statement that this is the law that we have at the present time is sufficient to describe it as a statutory measure and as a statutory measure it does not belong in the constitution. Any attempt to put into the constitution, a law, an actual statute that is already in effect, can only be construed to mean that we are substituting statutory law for fundamental law, which is what the constitution should contain. That is why I seconded the motion.

PRESIDENT EGAN: The question is, "Shall the proposed amendment, deleting Section 18 from Committee Proposal No. 10/a, be adopted by the Convention?" All those in favor of the adoption of the proposed amendment will signify by saying "aye", all opposed by saying "no". The "ayes" have it and the proposed amendment is ordered adopted. Are there other amendments? Mr. Taylor.

TAYLOR: I would like to offer an amendment to Section 18.

PRESIDENT EGAN: It has been deleted, Mr. Taylor.

TAYLOR: I will withdraw.

PRESIDENT EGAN: Are there amendments to Section 1 of Committee Proposal No. 10/a? Mrs. Nordale.

NORDALE: Mr. President, do I understand that that last amendment deleted the entire section? Then the governor has no authority to make interim appointments at all, is that correct?

PRESIDENT EGAN: Unless it is covered by statutory law, Mrs. Nordale.

The action of the Convention deleted Section 18, that is correct.

NORDALE: I just wanted to be clear on that.

PRESIDENT EGAN: Mr. Sundborg.

SUNDBORG: With respect to Section 17, lines 4 and 5, how do they read according to our Chief Clerk? Did we, in other words, amend that by providing with the advice and consent of the legislature in joint session?

CHIEF CLERK: That motion the other day that was adopted changes that automatically.

SUNDBORG: Is it the understanding of the Chairman of the Engrossment and Enrollment Committee that that will be done in each place where there is a mention of advice and consent of one of the houses?

SWEENEY: I have been making my corrections in ink when they have been adopted, and the one we were talking about this morning and also a couple of items in Section 18, where we added in "the legislature meeting in joint session"; we talked about those and I put them down just as question marks, and so my understanding is there has been no change made in 17 except this addition of "citizens of the United States and" in line 4. Now the journal can show different.

CHIEF CLERK: No, it does not.

SUNDBORG: We adopted a motion by Mr. Victor Rivers saying that it is our intention to have that language changed, but I believe we have to do it specifically, don't we, Mr. Rivers?

V. RIVERS: In this proposal it was the intention that where we mentioned "confirmation" and "advice and consent of the senate" that the words be changed to "legislature in joint session", in this Proposal No. 10/a.

SUNDBORG: Is that sufficient to carry the language right into the proposal in the view of the Chairman of the Engrossment and Enrollment Committee? Would you write that in, in view of the action that we took on Mr. Rivers' motion?

SWEENEY: Not unless the body adopted it. It was my understanding that it was not adopted by the body.

CHIEF CLERK: Do you want me to read the motion that was adopted on Saturday?

PRESIDENT EGAN: Please.

SECTION 17. WHEREVER A BOARD OF COMMISSION IS AT THE HEAD OF A PRINCIPAL DEPARTMENT OR OF A REGULATORY OR QUASI-JUDICIAL BODY, THE MEMBERS THEREOF SHALL BE NOMINATED AND APPOINTED BY THE GOVERNOR, WITH THE ADVICE AND CONSENT OF THE SENATE, AND MAY BE REMOVED IN THE MANNER PROVIDED BY LAW. SUCH A BOARD OR COMMISSION MAY APPOINT A PRINCIPAL EXECUTIVE OFFICER WHEN AUTHORIZED BY LAW, BUT THE APPOINTMENT SHALL BE SUBJECT TO THE APPROVAL OF THE GOVERNOR.

SECTION 18. THE GOVERNOR MAY FILL ANY VACANCY OCCURRING IN ANY OFFICE DURING A RECESS OF THE LEGISLATURE, APPOINTMENT TO WHICH IS MADE BY THE GOVERNOR WITH THE ADVICE AND CONSENT OF THE SENATE OR OF THE LEGISLATURE IN JOINT MEETING. AN APPOINTMENT SO MADE SHALL EXPIRE AT THE END OF THE NEXT REGULAR SESSION OF THE LEGISLATURE, UNLESS A SUCCESSOR SHALL BE SOONER APPOINTED

AND QUALIFIED. AFTER THE END OF THE SESSION NO AD INTERIM APPOINTMENT TO THE SAME OFFICE SHALL BE MADE UNLESS THE GOVERNOR SHALL HAVE SUBMITTED TO THE SENATE A NOMINATION TO THE OFFICE DURING THE SESSION AND THE SENATE SHALL HAVE ADJOURNED WITHOUT CONFIRMING OR REJECTING IT. NO PERSON NOMINATED FOR ANY OFFICE SHALL BE ELIGIBLE FOR AN AD INTERIM APPOINTMENT TO SUCH OFFICE IF THE NOMINATION SHALL HAVE FAILED OF CONFIRMATION BY THE SENATE.

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CONSTITUTIONAL CONVENTION
COMMITTEE PROPOSAL/11
DECEMBER 15, 1955

REPORT OF THE COMMITTEE ON EXECUTIVE BRANCH
HON. WILLIAM A. EGAN
PRESIDENT, ALASKA CONSTITUTIONAL CONVENTION
DEAR MR. PRESIDENT:

THE COMMITTEE ON THE EXECUTIVE BRANCH PRESENTS FOR CONSIDERATION AND ADOPTION BY THE CONVENTION THE ATTACHED ORDINANCE ON THE FIRST ELECTION OF THE GOVERNOR AND THE SECRETARY OF STATE. A COMMENTARY EXPLAINING THE NEED FOR THIS ORDINANCE IS ALSO ATTACHED.

RESPECTFULLY SUBMITTED,

(PAGE)/PAGE NUMBER: 137

CONSTITUTIONAL CONVENTION
COMMITTEE PROPOSAL/12
DECEMBER 15, 1955

REPORT OF THE COMMITTEE ON EXECUTIVE BRANCH
HONORABLE WILLIAM A. EGAN
PRESIDENT, ALASKA CONSTITUTIONAL CONVENTION
DEAR MR. PRESIDENT:

THE COMMITTEE ON THE EXECUTIVE BRANCH PRESENTS FOR CONSIDERATION AND ADOPTION BY THE CONVENTION THE ATTACHED ARTICLE ENTITLED GENERAL AND MISCELLANEOUS PROVISIONS; ALTHOUGH THESE PROVISIONS ARE OF PARTICULAR INTEREST TO THIS COMMITTEE, THEY WERE NOT INCLUDED IN THE PROPOSED ARTICLE ON THE EXECUTIVE BRANCH BECAUSE THEY HAVE APPLICATION ALSO TO THE OTHER BRANCHES OF GOVERNMENT.

A COMMENTARY IS ALSO ATTACHED WHICH EXPLAINS THE PURPOSE OF EACH SECTION.

RESPECTFULLY
VICTOR R.
FRANK B.
JOHN C.
THOMAS
MAYN

BOSWELL: I withdraw my question.

PRESIDENT EGAN: The Convention will come to order. Mr. McNees.

MCNEES: May I call Mr. Boswell's attention to the explanatory article in our commentary relative to the section on impeachment. I think that will explain the situation and get us completely away from any controversy at the present time.

PRESIDENT EGAN: Are there other questions relative to the report of the legislative branch? Mr. Victor Rivers, as Chairman of the Executive Committee, would you like to give a summary of your particular proposal?

V. RIVERS: Yes, Mr. President. As I think all delegates have heard, the Executive Committee has worked on the theory of the strong executive. That was the intention throughout the article to centralize authority and responsibility for the administration of government, enforcement of laws, in a single elective official. Now there is the ideal which is set up by the model constitution. We have some variations on that. We have an elected governor and also an elected secretary of state. The procedure to be followed there would be to elect both of these officials on the same ballot as is done in the State of New York and as is done nationally. The governor's qualifications would be a minimum of 30 years of age, 20 years a citizen of the United States, seven years a resident of the Territory of Alaska. The term of the governor would be for four years, and he could hold office for two successive terms. At the end of that time he would have to have a four year break before he would again be eligible to run for the governorship. We have provided for the governor's replacement in case of a vacancy or in the case of his temporary absence from the state. His powers would be taken over by the secretary of state. We felt the second elected official was necessary in order that when there was a vacancy, an individual who was elected by all the voters of the whole Territory would still be eligible as his successor, both if a permanent vacancy occurred or if the absence was a temporary one. The secretary of state would not sit, under our proposal, as a president of the senate. He would have duties prescribed to him by law and by the legislature. The succession was one thing we had considerable discussion about. The succession would run from the governor to the secretary of state, to the president of the senate, to the speaker of the house, in that order. In the latter two, of course, they would be elected by a segment only of the electorate of the state. In regard to compensation for the governor it was to be fixed by law. The governor would have the strong power, power of appointing all his department heads. They would also be removable at the governor's will. He would also make the appointments for the multiheaded boards in case there are such, and some there probably will be. The executive secretary of any of the regulatory or quasi-judicial boards

could not be removed by the governor but removed in a manner provided by law. The purpose of that is that in a regulatory board, regulating the power rates, telephone rates, etc., the power of removal might be the power to make the office ineffective so that removal would be prescribed by the legislature. There are set up a maximum of 20 single department heads. The major departments would be limited to 20. That is similar, in parallel to the Hawaiian situation. Those departments were not named, the departments would fall into the classification or in a category set up in an organization chart of the state government. We have covered some other clauses that have to do with related matters, such as a civil service establishment under the administrative department of the state government, and we have included the necessary qualifications for disqualification for disloyalty and for taking oath of office which are more or less mandatory and probably not controversial. I think that covers generally the approach we have made to the executive. I might say that our Committee is not in entire agreement on certain points, but on the major approach however the Committee is in agreement. The other points that we are in disagreement on will probably come out more than once on the floor during the time that our proposal is being studied.

PRESIDENT EGAN: Thank you, Mr. Rivers. Are there any questions? Mr. Davis.

DAVIS: Awhile ago Mr. Rivers mentioned some other portions of this Executive Article. I thought it was said they had been passed out, but I don't seem to have them.

PRESIDENT EGAN: On Saturday they were read for the first time.

DAVIS: I do remember something being done with them, but I don't have them here.

HERMANN: It was referred to the Committee on Ordinances, and the other to the Rules Committee.

PRESIDENT EGAN: That is right, but the copies should have been made available for the delegates. Would the messenger see that Proposals No. 11 and 12 are made available to the delegates, copies of them. Mr. Buckalew?

BUCKALEW: What is Proposal No. 6. I don't have it.

CHIEF CLERK: Local government.

PRESIDENT EGAN: Local government. It will be out in just a few minutes. If there are no further questions at this time on the Executive Branch, we will proceed with the report of the Chairman of the Resources Committee. Mr. Smith.

SMITH: Mr. President, I would like to say first that a letter

before the commission could appoint and submit the name to the legislature for approval, but you also have to have the approval of the legislature, and in the case of judges you have a very similar situation under our new judiciary. The judicial council recommends a judge to the governor who makes a selection from two or more and then it is approved by the legislature. I see no variation in the method particularly.

PRESIDENT EGAN: Mr. Cooper.

COOPER: It does not say though that this executive officer is approved by the senate or any legislators. It is merely that the appointment shall be subject to the approval of the governor. There would be no appointment of a principal executive officer. There would be the appointment and the confirmation of the senate of the five members, that is what the board consisted of.

V. RIVERS: That's right. There would be no approval of the senate of the executive officer. I misstated, I was thinking of a board member.

PRESIDENT EGAN: Mr. Buckalew.

BUCKALEW: Mr. Rivers, did you consider the use of the expression "administrative board" instead of "quasi-judicial body"?

V. RIVERS: Yes, we considered a great deal of terminology there -- regulatory boards, nonregulatory boards, administrative boards, quasi-judicial bodies, and we tried to arrive at the wording which would most nearly express the intent and "quasi-judicial" means one more board exercising powers as we visualize it, that are semijudicial in nature and have certain powers to make rules and certain powers to make rules and regulations that might have the force of law.

PRESIDENT EGAN: Mr. Buckalew.

BUCKALEW: You are getting into the field of administrative law then, aren't you?

V. RIVERS: I presume that is the right place to put this matter.

PRESIDENT EGAN: Mr. Smith:

SMITH: Mr. President, I would like to ask Mr. Rivers, I am still not quite clear on what the difference between a principal department with a single executive, what the difference between that and the principal department under a board or commission. Now possibly I can make myself clear by referring to the Alaska Department of Fisheries. If that department were set up without a board, then would you say it was a principal department and

business and also know the Territory and its people.

PRESIDENT EGAN: Mrs. Hermann.

HERMANN: Mr. President, I notice that in the letter of transmittal to the President it mentions that Proposal No. 15 as being outside the terms of reference and not included in this and says it should be referred to another committee for consideration. I wondered what committee that had been referred to.

PRESIDENT EGAN: What was Committee Proposal No. 15?

HERMANN: Proposal by Mr. Smith that all the provisions of the constitution would be mandatory.

PRESIDENT EGAN: Would they have referred it to the Ordinance Committee, Mr. Rivers?

V. RIVERS: I don't remember, but our secretary has the minutes upstairs if you want it looked up.

PRESIDENT EGAN: I don't think that is necessary right at this moment, Mr. Kilcher.

KILCHER: Mr. President, in mentioning quasi-judicial boards in one place, don't you think mentioning that in the constitution would be sanctioning forever quasi-judicial boards, and don't you think that it is possible to solve all the problems that occasionally are solved by these quasi-judicial boards in a different manner, to split the duties between the executive and the judiciary as we have it? It is a vital question that has come up, and I wonder if the board has given it any special consideration.

V. RIVERS: Mr. Kilcher, consideration was given to the different types of boards, regulatory, administrative, and quasi-judicial. There seems among some of the delegates to be considerable opposition, or rather I should say, question as to the interpretation of the term "quasi-judicial", and it seems to be a point of some controversy. If that field of boards could be covered by another equally expressive term or more expressive term, I feel that possibly it should be, but in the lack of any other such term for that group of boards we felt that this one did cover it, "quasi-judicial".

KILCHER: Since "quasi-judicial" seems to have a fairly concise connotation, has the question come up whether they are desirable or not, and if they possibly were not desirable, if they could be prohibited in the constitution?

V. RIVERS: Well, there is nothing here that says any board, regulatory, quasi-judicial, or administrative must be established. It merely creates the authority for the legislature and defines the certain restrictions if such boards are established by law, so we make nothing mandatory in regard to establishment of quasi-judicial boards. That would be up to the legislature in making the law.

POULSEN: I move for a 15-minute recess.

PRESIDENT EGAN: Mr. Poulsen moves that the Convention stand at recess until 3:50. If there is no objection, the Convention is at recess.

RECESS

PRESIDENT EGAN: The Convention will come to order. We now have before us Committee Proposal No. 10a in second reading and open to amendment. We will start with Section 1 for the purposes of amendment. Are there amendments to Section 1? Does anyone have an amendment to propose for Section 1 of Committee Proposal No. 10a? Section 2? Are there amendments to be proposed to Section 2? Mr. White.

WHITE: I have an amendment.

PRESIDENT EGAN: You may present your amendment, Mr. White.

WHITE: I think maybe I had better present it in two parts.

V. RIVERS: Before you take up that amendment, there are two minor committee amendments which I mentioned in the discussion. I would like to bring them to the attention of the body.

PRESIDENT EGAN: The Chairman of the Committee asks that the committee amendments be considered first. If there is no objection that is the manner in which we will proceed. The Sergeant at Arms will please bring the amendments forward. The Chief Clerk will please read the first proposed committee amendment.

CHIEF CLERK: "Page 1, line 11, place a period after the word 'governor' and strike the balance of the section."

BUCKALEW: Please read it again.

CHIEF CLERK: "Page 1, line 11, place a period after the word 'governor' and strike the balance of the section."

PRESIDENT EGAN: What is your pleasure, Mr. Rivers?

SUNDBORG: Mr. President, in view of Mr. Rivers' statement, I will withhold making my motion until the body decides whether it does wish to constitute the office of attorney general.

PRESIDENT EGAN: Are there amendments to Section 14? Mr. Buckalew.

BUCKALEW: I have an amendment.

PRESIDENT EGAN: The Chief Clerk may read the proposed amendment to Section 14.

CHIEF CLERK: "Line 23 and line 24, page 6, strike 'quasi' and 'judicial'."

PRESIDENT EGAN: Mr. Buckalew, what is your pleasure?

BUCKALEW: Mr. President, I move its adoption. Also, strike the "and".

PRESIDENT EGAN: If there is no objection, it may be added to the amendment.

BUCKALEW: I move its adoption, Mr. President.

PRESIDENT EGAN: Mr. Buckalew moves the adoption of the proposed amendment.

AWES: I'll second the motion.

PRESIDENT EGAN: Miss Awes seconds the motion. The Chief Clerk will please read the proposed amendment.

CHIEF CLERK: "Section 14, line 23, page 6, strike 'and quasi' and line 24, strike 'judicial'."

PRESIDENT EGAN: Mr. Buckalew.

BUCKALEW: The reason I introduced this amendment is for the reason that there has been a dangerous tendency in the last 20 years to establish all kinds of boards that act almost in the capacity of a court. They have the power to fine, revoke licenses, and take all kinds of action. I think that it is setting a dangerous policy in the constitution to mention "quasi-judicial" boards with no limitations on it at all. I am opposed to quasi-judicial bodies and looking at this section with the rest of the sections, it seems to me you find yourself in the position of where you would have a fisheries board, for example, and then have at the same time have a board going

along with it which would be regulating fisheries, imposing fines and taking care of the violations under the regulations of the fishing boards. I think the language should be stricken.

V. FISCHER: May I ask Mr. Buckalew a question, Mr. President?

PRESIDENT EGAN: If there is no objection, Mr. Fischer, you may ask your question.

V. FISCHER: What does "quasi-judicial" mean? I know what "judicial" means, but what does the "quasi" mean?

BUCKALEW: I don't know exactly what it does mean, and I doubt if any lawyer in the body knows exactly what it means. It is a board that has fact-finding power and at the same time, it has the power to support its findings with some sort of punitive action so it's sort of a court, except it doesn't have the same kind of jurisdiction, but it is a combination -- I can't explain it. Mr. Hellenenthal, can you?

PRESIDENT EGAN: The Convention will come to order. Mr. Hellenenthal.

HELLENTHAL: It is precisely what Mr. Buckalew says it is. It is a board that has very limited functions, ordinarily assumed by specialized courts and within definite limitations so that there can be no abuses. The Interstate Commerce Commission is a very fine example of a quasi-judicial board. A utility commission is another excellent example, where they can prescribe fines for violation of utility regulations, but within a limited sphere. They can't execute you, they can't send you to the penitentiary. They can prescribe fines within a sphere set by the legislature, so there is no danger of anybody running away with anything, but the advantage of specialization is secure and that is why the quasi-judicial boards are created, so that expert men, in their fields, can interpret the laws of the legislature subject to checks imposed by the legislature.

PRESIDENT EGAN: Mr. Fischer.

V. FISCHER: I would like to follow up with Mr. Hellenenthal. He said a utilities board would be quasi-judicial. What is the difference then between "regulatory" and "quasi-judicial"? To me a utilities board would be regulatory.

PRESIDENT EGAN: Mr. McLaughlin.

McLAUGHLIN: Perhaps I can explain it in the terms best known to Alaskans. Very roughly, the Fish and Wildlife Service and the

CAB, the Fish and Wildlife Service can set down regulations. Normally if there is an infraction of those regulations, they pick up the offender and deliver him to a judicial body, that is to the United States Commissioner, or to the United States District Court. They have no power of absolute confiscation on their own, no power to deprive of money or rights. In the case of the CAB, the Fish and Wildlife, in substance then, sets down regulations, but in the case of the CAB, they go further than that. In substance, they determine as between carrier and carrier, who is privileged and who can be deprived of it. I think if you strike, it would be erroneous and possibly fateful if we strike that word "quasi-judicial" because as Mr. Hellenthal has mentioned, in the national sphere you have the RCC, FCC, things that are important and material to us. You might even destroy the possibility of ever creating an alcoholic beverage control board under the state, and dependent on your viewpoint that is good or bad, but I would recommend that it be kept in there, if at any time it becomes an intrusion upon the judicial power, I am sure that all of those non-partisan judges of the superior and supreme court will rise up and destroy it under the constitution.

PRESIDENT EGAN: Mr. Gray.

GRAY: Mr. President, I have a question of Mr. McLaughlin, if I could ask it.

PRESIDENT EGAN: State your question.

GRAY: Mr. McLaughlin, I want to put this question to you. Do you have any recourse from the judgment of a quasi-judicial board by the courts, or is their action final?

McLAUGHLIN: No, their action is never final, particularly under our judiciary article.

PRESIDENT EGAN: Miss Awes.

AWES: I just wanted to state that I seconded the motion when it was made because I thought it was a matter that should be brought on the floor and open for discussion, but I don't want my second to be taken as approval of the striking of the word.

PRESIDENT EGAN: Mr. Victor Rivers.

V. RIVERS: Mr. President, in connection with this, two of the delegates who are on the Committee have checked the meaning of the word "quasi-judicial". According to the interpretation of Webster's, which was checked and brought up by Delegate Nordale, the interpretation is given in reference to "quasi" when used

as a prefix means, "that which resembles". "Quasi-judicial, designating an act or proceeding of or before an administrative tribunal or official of the general nature of a judicial act or proceeding but not within the judicial power as defined under the Constitution." Now that is a broad interpretation of the term as we use it here, and it is the interpretation of Webster. However, Delegate Londborg has also looked the matter up in Black's Law Dictionary and it is practically the same. Do you have that here, Mr. Londborg?

LONDBORG: No, I don't.

PRESIDENT EGAN: Mr. Hurley.

HURLEY: May I ask Mr. McLaughlin a question, or anyone else who would care to answer it?

PRESIDENT EGAN: You may, Mr. Hurley, if there is no objection.

HURLEY: If the amendment carries, and the wording is struck, it would read: "Regulatory bodies and temporary agencies..." In your opinion, if that were the case, would "regulatory bodies" imply that the legislature could, in setting up such regulatory bodies, give them quasi-judicial powers.

McLAUGHLIN: I think it could, but in view of Mr. Buckalew's attempt to strike it out, at any time when the courts go back to read the constitution, they see that Mr. Buckalew presented an amendment striking the word "quasi-judicial" on the grounds that they were getting too big and intruding on government, and they might interpret it as abolishing the right, that is abolishing the right of the legislature to create quasi-judicial bodies.

PRESIDENT EGAN: Mr. Davis.

DAVIS: I would support Mr. Buckalew's amendment, not on the ground that the agencies are too big or not desirable, but because the thing is adequately covered in the other word used.

PRESIDENT EGAN: Mr. Emberg.

EMBERG: Mr. President, I would like to put a question before the body here. Under the language of this sentence, would it be possible to set up a board which was both regulatory and at the same time a quasi-judicial body? That is what I would object to.

PRESIDENT EGAN: Mr. McNealy.

McNEALY: Mr. President, I want to speak in favor of the amendment, just on the point that Mr. Emberg raised, and as to the

Reg/... ..

interpretation of the words "quasi-judicial body", I think you'll find in the law, and I believe when I mention it that the greater share of the attorneys here will agree with me, we speak of "quasi-contracts" which are, in effect, contracts implied by law and the greater share of your court's interpretations which go further than the dictionaries here, would be to the effect that the word "quasi" here, in effect, means that it is an implied judicial body. I won't enlarge on it anymore than that, but I fear this one thing, that the nomination of regulatory and quasi-judicial bodies raise a condition such as, I'll only mention one, such as the Game Commission which can set up their own rules and regulations, send out their own men to enforce them, and I am very much in favor of game conservation and the game commission, but the abuses that we have known of that right, here in the Territory and specifically in the Fourth Division where it was necessary while I was district attorney, to take issue with the Game Commission because they did set up their own laws, they felt that it wasn't necessary to abide by the laws of search and seizure. They went out and broke the locks of cabins and caches, went in and searched for furs that they thought might be there, that were improperly caught, or caught too great a number. I'm not going off on that subject because it would take a half-hour to cover all of the violations that did happen and were possible under that, and in which I believe have to a great extent been simmered down, and some of the matters were resolved against the Game Commission at that time. Now there are others that are even greater offenders than the Game Commission and I speak of them, and I back the Game Commission 100 per cent in their purpose, but the point is that if you have the words "regulatory and quasi-judicial bodies" combined here, I fear very much that it is going to open it up where you are going to establish boards that not only set up the laws, but they enforce them, and when you do you are combining legislative, executive and judicial all in one branch and it is a dangerous situation, and I feel that I am starting to get a little steamed up on this. I ought to close on a bit of humor here. I believe that I should be against the amendment on the theory that the legislature might be able to set up some implied courts in opposition to Mr. McLaughlin's judicial system.

PRESIDENT EGAN: Mr. Peratrovich.

PERATROVICH: I wish to support Mr. McNealy's views on that. I, too, question the language there, but before I start, I would like to direct a question to Mr. McLaughlin, if I may.

PRESIDENT EGAN: You may, Mr. Peratrovich.

PERATROVICH: I just want to know, under this setup, the language used here, is it possible to limit powers of such a body? Is there a way that you can regulate the powers of such a body?

Ke / me

PRESIDENT EGAN: Mr. McLaughlin.

McLAUGHLIN: I'll put it this way, this does not direct the legislature to create these bodies and it is my personal opinion that you could not attempt to define in the constitution the limitations of the powers on the regulatory or the quasi-judicial bodies. It would be an impossibility, because the vagueness of the term would require great definition and precision. Do I think that quasi-judicial bodies are necessary? I definitely do. I think if you specifically prohibit them in your constitution, you are hamstringing yourself. The legislature won't be able to create the boards that are necessary. You will have to rely on the discretion of the legislature that they will appoint the appropriate body, and the only difference then is that they will be our collection of thieves rather than those of the national government.

PRESIDENT EGAN: Mr. Peratrovich.

PERATROVICH: I would like to relate some experiences in support of what Mr. McNealy has related to you. I can't help but feel there is a possibility of abuse of power in such a setup. In the experience I have had is in the case of game wardens and the fisheries, like Mr. McNealy relates. We have known of cases in our division where our fishermen with some fish aboard, say with perhaps 300 or 400 fish aboard caught just before darkness and go inside of the line and anchor. There would happen to be a good harbor there, and perhaps during the night the fisheries commission warden would come in there and this man is pinched and if you can't defend yourself, if you can't talk and try to reason with a warden, then you're picked up and taken into the commissioner's court. I don't say they're convicted in all cases, but it does require time to prove that you are innocent. On the other hand, if a trapper is out on his line, on his boat, anchored in the bay, he is perhaps out on his trap line. When he comes back, he finds his hatch covers all off, his food lockers all open and everything else, and that is another case of where a game warden comes along on a plane and takes the liberty of going aboard to see if they had any illegal meat, fur or something of that nature. I feel that under a setup of this type, we don't have a way of regulating their duties. I don't think we can remedy what has transpired under our former government.

PRESIDENT EGAN: Mrs. Nordale had been attempting to get the floor. Mr. Hellenthal.

HELLENTHAL: May I ask a question of Mr. Peratrovich?

PRESIDENT EGAN: If there is no objection.

HELLENTHAL: Don't you, Mr. Peratrovich, and Mr. McNealy, both feel though that those poor regulations were due to Congressional action, and that an Alaska state legislature would never permit such a situation?

PERATROVICH: I agree with you, but I want to make it clear here, that I for one don't understand the terms that you lawyers use here, but I can see very dimly that there may be a possibility of correcting the errors that we have made under our Territorial setup. If we could remedy that under the state setup, then that is what I am for, and that is the reason I want to make it clear here. I am satisfied with your explanation.

PRESIDENT EGAN: Does anyone want the floor that hasn't had the floor? Mr. Ralph Rivers. Haven't you had the floor?

R. RIVERS: Not on this subject. I have refrained up to this point, but bearing on this is the proposition that we are talking about whether regulatory and quasi-judicial bodies shall be placed in principal departments or whether they shall be placed out of principal departments. If we knock out the word "quasi-judicial", the legislature could still create quasi-judicial departments but would simply be making principal departments out of them instead of keeping them out of the principal departments. I was going to make the same point that Mr. Helleenthal made, that we can't get to first base protesting some of the abusive enforcement methods of an agency that is created back in Washington, that we would have to go back to Congress to get remedial measures, but after we have our own legislature here, which will have the power to create these bodies, even if we do strike the word "quasi-judicial" from this particular article, we have a legislature near at hand meeting every two years where the citizens can go down and complain about how this state agency is taking this highhanded method or the other, so if we need to leave this in the hands of the legislature, let's trust the legislature to put in the suitable restrictions and go to the legislature with our complaints every two years when the time comes.

PRESIDENT EGAN: Miss Awes.

AWES: The Convention expressed the desire to adjourn about 3:45 so they could catch the bus at 4:05, and I think that clock has stopped. Mr. Marston and I both have 3:50.

PRESIDENT EGAN: Whether or not we can get to this amendment by then, we'll see. The question is, "Shall the proposed amendment as offered by Mr. Buckalew be adopted by the Convention?" All those in favor of the adoption of the proposed amendment will

executive orders of the governor which may change the assignment of functions among the departments, and I am wondering just what force they would have in law, for example, where they contravene some law that might have been passed by the legislature saying that the function of a certain department shall be thus and so and then the governor issues an executive order which says here that it will become effective at the close of the next regular legislature. What happens to the law on the books? Is it of no avail?

PRESIDENT EGAN: Mr. Rivers.

V. RIVERS: Mr. President, I am pleased to answer that question because it is one that we discussed at some length in the Committee, and in regard to organizational efficiency of the executive department, the governor would be able to recommend this change in his executive order. It would not become effective until after the legislature had reviewed it and could then take an action upon it. It is the same clause that goes along with, of course, the idea of the strong executive. It is also the same clause that is used in a similar manner for the reorganization powers of the President of the United States. It does give him the power to alter existing organizational structures that have been set up by law, but only after the legislature has failed to say "No, we won't let you do that."

SUNDBORG: Don't you feel we have to specifically give those orders the force of law in the constitution or otherwise before they could contravene an act of the legislature?

V. RIVERS: We discussed that and thought this wording would cover it by and with the advice and also discussion with more than one consultant on the matter. Occasionally there is a body within the organizational administrative setup of government where they have the power of making rules that have the force of law, and it was thought this wording covered it. Of course, none of the rules that are upset or changed, or become law are actually accepted until the legislature fails to take a positive repealing or negative action.

SUNDBORG: Would the governor have the authority, and I assume he would, to veto an act of the legislature which would undo one of these executive orders of his? If not, should we not say so?

V. RIVERS: This is a resolution, not an act. They would do it by resolution if they did not approve, and he has no veto power over a resolution. That is a joint action of the house or the two houses independent of any governor's approval in connection with resolutions as I understand it.

SUNDBORG: Does any state have a provision such as this?

V. RIVERS: I believe there are some of the newer state

A' Included

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Buckalew, deleting the words 'and quasi-judicial' from Section 14 of Committee Proposal No. 10/a be adopted by the Convention?" All those in favor of the adoption of the proposed amendment will signify by saying "aye", all opposed by saying "no". The "noes" have it and the proposed amendment has failed of adoption. Mr. Robertson.

ROBERTSON: I would like to ask the Chairman, Victor Rivers, why is the word "administrative" omitted from that particular sentence? You refer to "administrative" in line 1 of Section 14, why don't you have the word "administrative" in there?

V. RIVERS: Which sentence is that, Mr. Robertson?

ROBERTSON: In line 23, "regulatory and quasi-judicial bodies", why shouldn't you have the words, "regulatory, administrative, and quasi-judicial bodies" in there?

V. RIVERS: Well, as I understand it, it is our understanding that administrative bodies as a group should be under principal departments and this would make it possible to exempt them. Certain classes of administrative bodies, such as regulatory, quasi-judicial, and temporary need not be for the purposes of efficient administration, all of the major administrative bodies would fall under a principal department. That was the Committee intent.

PRESIDENT EGAN: Are there other proposed amendments to Section 14, 15, 16? Mr. Riley.

RILEY: I have an amendment on the Clerk's desk.

PRESIDENT EGAN: The Chief Clerk may please read the proposed amendment as offered by Mr. Riley to Section 16.

CHIEF CLERK: "Section 16, page 7, line 21, strike the last sentence." Is that right?

RILEY: Yes. Mr. President, I move its adoption.

PRESIDENT EGAN: Mr. Riley moves the adoption of the proposed amendment.

GRAY: I second it.

PRESIDENT EGAN: Seconded by Mr. Gray. Mr. Riley.

RILEY: Mr. President, to a degree we have considered this problem with respect to the article submitted by the Committee on the Judicial Branch, and it is my memory that on that occasion quite a bit of discussion occurred, and it was the feeling of the body that we should not deprive ourselves of the services of

PRESIDENT EGAN: Mr. Cooper.

COOPER: I raised a question on this Saturday also. It says "...at the head of a principal department or of a regulatory or quasi-judicial body..." Therefore, I feel that all boards or commissions eventually would be classed within those three limitations and that the governor would have to approve the appointment of the executive officer, and I agree with Mr. Walsh and others that eventually politics can possibly enter into some board or commission where it has no point of being and I support the amendment.

PRESIDENT EGAN: Mr. Fischer.

V. FISCHER: I would just like to say that I do not consider education or anything else a "holy cow". It is a function of this state. It is part of the general administrative organization, and I do not believe that it deserves any kind of special treatment. I think that the commissioner of education should possibly be appointed by a special board of education, a non-partisan board. At the same time, however, that commissioner will have to work with the governor. He will have to work with other department heads. For instance, the commissioner of education, I do not believe it would be right to leave the way open for the appointment of a commissioner of education who will just be separate from the general executive branch of the state and from that standpoint I am very much opposed to the amendment, and I stand by the article as it is written.

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: May I ask a question of Mr. Victor Rivers?

PRESIDENT EGAN: You may.

HELLENTHAL: Mr. Rivers, would you have any objection if specific language excluding the University of Alaska were included in the section?

V. RIVERS: Mr. Hellenthal, I will stand by the committee report in this matter. It is one of the things we discussed at length. We feel we have solved it adequately and properly, and I would not care to see a specific inclusion, or exclusion made. I speak for myself and I think for the whole Committee on that.

HELLENTHAL: For example, would you object to saying, "Provisions of this section shall not be construed to apply to the board of regents of the University of Alaska."?

V. RIVERS: I would object. I understand that there is going to be brought in in connection with the actual indication of the University of Alaska as a state university, and if there

GOVERNOR'S DEVICES DURING THE TEMPORARY ABSENCE OF THE GOVERNOR.
(SECTION 10. EXECUTIVE POWERS.)

THIS SECTION MAKES THE GOVERNOR RESPONSIBLE FOR THE
FAITHFUL

COMMITTEE PROPOSAL NO. 10 - PAGE 2

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EXECUTION OF THE LAWS AND GIVES HIM POWER TO DO SO THROUGH THE
COURTS AND BY OTHER MEANS. IT AUTHORIZES HIM TO MAKE
RECOMMENDATIONS TO THE LEGISLATURE AND TO CONVENE THE
LEGISLATURE OR THE SENATE ALONE WHEN HE DEEMS IT NECESSARY IN
THE PUBLIC INTEREST. CONVENING THE SENATE ALONE MIGHT BE
NECESSARY TO OBTAIN SENATE CONFIRMATION OF APPOINTMENTS.
(SECTION 11. ARMED FORCES OF THE STATE.)

THE PURPOSES FOR WHICH THE GOVERNOR MAY CALL OUT THE ARMED
FORCES OF THE STATE ARE THE SAME AS THOSE CONTAINED IN MANY
STATE CONSTITUTIONS. THE AUTHORITY OF THE GOVERNOR TO APPOINT

OFFICERS OF THE ARMED FORCES IS MADE SUBJECT TO APPLICABLE LAW
OF THE STATE AND THE UNITED STATES.

(SECTION 12. MARTIAL LAW.)

THIS PROVISION CONFERS AUTHORITY TO DECLARE MARTIAL LAW AND
AT THE SAME TIME LIMITS THE SITUATIONS IN WHICH THE AUTHORITY
CAN BE EXERCISED. IN ORDER TO CONTINUE MARTIAL LAW FOR LONGER
THAN 20 DAYS, THE APPROVAL OF A MAJORITY OF MEMBERS OF BOTH
HOUSES OF THE LEGISLATURE IN ATTENDANCE AT A JOINT SESSION WOULD
HAVE TO BE OBTAINED, AND IF THE LEGISLATURE WERE NOT IN SESSION
AT THE TIME, THE GOVERNOR WOULD HAVE TO CALL IT INTO SPECIAL
SESSION FOR THE PURPOSE.

(SECTION 13. EXECUTIVE CLEMENCY.)

THE POWER CONFERRED BY THIS SECTION IS SIMILAR TO THAT
CONFERRED BY MANY STATE CONSTITUTIONS ON THE CHIEF EXECUTIVE OF
THE STATE.

(SECTIONS 14 - 17. ORGANIZATION.)

A CLEAR DISTINCTION IS MADE BETWEEN THE ADMINISTRATIVE
DEPARTMENTS, SUCH AS PUBLIC WORKS, HEALTH, EDUCATION, AND
WELFARE, AND THE REGULATORY, INCLUDING QUASI-JUDICIAL, BODIES
SUCH AS A RATE-SETTING PUBLIC UTILITY COMMISSION. THE HEAD OF
AN ADMINISTRATIVE DEPARTMENT, WHETHER SINGLE OR MULTIPLE, CAN BE
REMOVED AT ANY TIME BY THE GOVERNOR. THE MEMBERS OF REGULATORY
BODIES CAN BE REMOVED ONLY IN THE MANNER PROVIDED BY LAW. IN

ORDER TO ENSURE MAXIMUM COORDINATION OF STAFF SERVICES, THE
APPOINTMENT OF AN EXECUTIVE DIRECTOR FOR A REGULATORY BODY
REQUIRES THE GOVERNOR'S APPROVAL. THE APPOINTMENT AND REMOVAL
OF AN EXECUTIVE DIRECTOR OF ANY ADMINISTRATIVE DEPARTMENT WHICH
IS HEADED BY A BOARD ARE LEFT TO DETERMINATION BY LAW. THE
GOVERNOR CAN FROM TIME TO TIME BY EXECUTIVE ORDER, REORGANIZE
GOVERNMENTAL AGENCIES PROVIDED THAT ANY SUCH EXECUTIVE ORDER
SHALL NOT BECOME EFFECTIVE UNTIL A FULL REGULAR SESSION OF THE
LEGISLATURE HAS BEEN HELD AFTER THE ORDER IS ISSUED AND HAS NOT
DISAPPROVED IT BY A MAJORITY OF BOTH HOUSES IN JOINT SESSION
ASSEMBLED.

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CONSTITUTIONAL CONVENTION
COMMITTEE PROPOSAL/10/A
JANUARY 12, 1956

REVISED REPORT OF THE COMMITTEE ON EXECUTIVE BRANCH
WON. WILLIAM A. EGAN, PRESIDENT
ALASKA CONSTITUTIONAL CONVENTION
DEAR MR. PRESIDENT:

THE COMMITTEE ON THE EXECUTIVE BRANCH PRESENTS FOR
CONSIDERATION AND ADOPTION BY THE CONVENTION THE ATTACHED
ARTICLE ON THE EXECUTIVE BRANCH. A COMMENTARY EXPLAINING THE
