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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 1926 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 1926 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, 1928." 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, C. 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 ⇐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 ⇐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, 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.

3. States ⇐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 ⇐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 ⇐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 ⇐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 ⇐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, 33 Pac. 104, 20 L. R. A. 306; McCreedy v. City of Ft. Scott (Kan. Sup. No. 24905) 216 Pac. 287.

8. States ⇐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 Jessee 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 18, 1921, he resigned, effective November 1, 1921, and on October 18, 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 18, 1922, to March 18, 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. The 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. 308, 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 Breidenthal. 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, 116 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. 879.

"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." Jameson 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, 88 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. 750, 35 Pac. 817.

In Wilson v. Shaw, 194 Iowa, 28, 188 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. Pruitt v. Squires, 64 Kan. 855, 68 Pac. 643; Ash v. McVey, 85 Md. 119, 36 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) 216 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. 731. 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. 268, 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. 1914B. 519; State v. Harrison, 113 Ind. 434, 16 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 Governor 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, 16 N. E. 386, 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. 546, 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, 56 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. 626, 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 lawmaking 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. 24930 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 yeas and nays, 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 and 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 Glick 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, 361, 491, 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 576, 647, 734, and 846, although at page 567 the word "appointments" is used instead of nominations. Gov. Hodges (S. J. 1913, p. 46):

"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 senates 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 ⇐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 ⇐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 ⇐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 ⇐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 ⇐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 ⇐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 Matassarin 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.

In State ex rel. Agricultural College v. Irvine, 14 Wyo. 318, 84 Pac. 90, this court considered the constitutional and statutory provisions relating to congressional grants, and it was held that the authority conferred upon trustees, by the act establishing the Wyoming Agricultural College, "to possess and use for the benefit of the agricultural college the building and sites" provided therefor, and "to take and hold for the use and benefit of the college any real and personal estate and to dispose of the same in such manner as they may deem most conductive to the interests" of said college, is not inconsistent with the character of a public educational institution. In respect thereto the trustees are public agents. And it was held that the congressional land grants are grants to the state and not to the University. This decision was affirmed by the Supreme Court of the United States. 206 U. S. 278, 27 Sup. Ct. 613, 51 L. Ed. 1063.

If this institution of learning has an interest in the 40-acre tract of land, the state as the holder of the title to the lands mentioned in the provisions of the Act of Admission, heretofore mentioned, is the real party in interest, and to permit this action would be doing by indirection that which could not be done directly.

It has been held that for the purpose of jurisdiction there is no distinction between suits against the government directly, and suits against its property. Stanley v. Schwalby, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259; Stanley v. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960.

Among the numerous decisions of other courts we find that the Supreme Court of Alabama, in White v. Alabama Insane Hospital, 138 Ala. 479, 35 South. 454, says:

"Who doubts the right of the state to create a corporation for the management of an insane hospital, or a deaf and dumb asylum, or an institution of learning? And where they are created, who has the property interest in these institutions? Clearly the state. In the exercise of its right of sovereignty it established them for public purposes."

"A suit against a department of the state government, or a board or corporation created by the state for governmental purposes is a suit against the state, and cannot be maintained without its consent, but such a suit may be maintained when authorized by statute, as where the statute creating the corporation provides that it may sue and be sued." 39 Cyc. 919.

In Williamson v. Louisville Industrial School of Reform, 95 Ky. 251, 24 S. W. 1065, 15 Ky. Law Rep. 629, 23 L. R. A. 200, 44 Am. St. Rep. 243, the court says:

"The appellee, the Louisville Industrial School of Reform, was created a body corporate by an act of the General Assembly in 1854. * * * The incorporators and their successors are under the control and oversight of the Legislature, and are mere instrumentalities of the commonwealth. * * * It was an agency of the state, and maintained by taxation and state aid. * * * The functions of the institution are governmental." It is not answerable for an assault upon or a beating of an inmate by one of its employees.

The Agricultural and Mechanical College, which is strictly a public or quasi corporation, created and existing under and by virtue of the laws of the territory of Oklahoma, cannot, in the absence of express statutory authority therefor, be sued, and no such authority exists in this territory; hence said institution cannot be sued. Oklahoma Agricultural and Mechanical College v. Willis et al., 6 Okl. 592, 52 Pac. 921, 40 L. R. A. 677.

[3] Whether a state should consent to be sued, so as to put itself on an equality with a citizen, is not a matter for the courts, but for the Legislature. Moore v. Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712.

There is no provision of law anywhere that either expressly or by implication recognizes the defendant in this case as a body capable of being sued in suits to quiet title to real property, and until the Legislature expressly directs the manner and the courts in which such suits can be brought, we conclude that the defendant is an agency that cannot be sued in a suit of this kind.

The demurrer was properly sustained; no error was committed by the lower court, and the judgment is in all things affirmed.

BLUME, J., and P. W. METZ, District Judge, concur.

PEOPLE ex rel. EMERSON v. SHAWVER.

(No. 1168.)

(Supreme Court of Wyoming. Jan. 8, 1924.)

1. Quo warranto ⇐55—Right of relator to office must affirmatively appear, but no presumption in favor of respondent seizing office.

In quo warranto to determine right and title to office, legal right of the relator to the office must affirmatively appear, but without indulging any presumption in favor of respondent who has forcibly obtained the possession.

2. Evidence ⇐11—History shown by legislative journals and records judicially noticed.

The court may take judicial notice of the history of the state government shown by the legislative journals and other public records.

3. Constitutional law ⇐20—Effect of practical construction.

Where uniform executive construction of Const. art. 8, § 5, was that it provided for a succession of terms for state engineer of six years each, so that a vacancy during a term would constitute a vacancy in the term to be filled for the unexpired part of such term,

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 ⇐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. 8, § 5, article 4, § 7, and article 6, subtit. "Elections," § 4.

5. Quo warranto ⇐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 ⇐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 8, § 5, and article 6, subtit. "Elections," § 4.

7. States ⇐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 ⇐46—Appointment of state engineer by Governor and confirmation by Senate need not be concurrent in point of time.

Under Const. art. 8, § 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 ⇐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. 8, § 5, during Senate recess, could be confirmed 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 ⇐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 ⇐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 ⇐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 ⇐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. 8, § 5.

14. States ⇐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 ⇐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 ⇐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, § 318.

[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, § 318, 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. E. Corthell, of Laramie, amici curiæ.

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, § 85; 1 Kinkead's Code Pleading, p. 96, § 94; Id. p. 112, § 116; 21 R. C. L. pp. 530, 531, § 92; 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, 181 Ill. 625, 54 N. E. 611; Carlson v. People ex rel., 118 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 petition 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, accompained 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 alleged. Ekern v. McGovern, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796.

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 16 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, 1892, 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 S. 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 16, 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 6 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. 539; People ex rel. v. McIver, 68 N. C. 467; Branham v. Long, 78 Va. 352; Barrett v. Duff, 114 Kan. 220, 217 Pac. 918; 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. § 128; 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.) 308. 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 ad 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, 507, 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 Governor, 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. 869, 17 Ann. Cas. 32. 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 commission 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, 51 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, 187 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 herein 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. 519.

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. 87. 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 23, 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. Matassarin, 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 examiner 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 [illegible] the meaning or effect of the [illegible]" or a provision that the Governor [illegible] 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. 188, 59 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, 187 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 8, §§ 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.) 588, 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 11, 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. 137; State ex rel. Stearnes v. Smith, 6 Wash. 496, 33 Pac. 974; State ex rel. McGreavy v. Burke, 8 Wash. 412 (36 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 appointed 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. 873, 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. 118.

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 6 (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) (16 Amer. Law. Review, 793–817) 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; Mechem on Public Officers, § 457; People ex rel. v. Howland, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838.

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, 69 Mass. (3 Gray) 126; State v. Douglas, 26 Wis. 428, 7 Am. Rep. 87; State v. Prater (N. D.) 189 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 constitute 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, 182 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 malfeasance 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 adressed 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. 569; 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. 128; 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 Hay 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 ⇐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 Constitution 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 ar 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 Virgina 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 appointee 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 eligible 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 record 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 issurance 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 legaliy 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 Patteson 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 Patteson 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 Educat 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 Education 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, § 30, 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 provides 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 Virginia 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 584, 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 * * *'", notwithstanding 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 requesting 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 tefm; 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 removal 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. 547, 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. 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) 78 Conn. 636, 63 Atl. 512.

Illinois. — People ex rel. Laist v. Lower (1911) 251 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. 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; 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. Wadhams (1896) 64 Minn. 318, 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 (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) 82 N. Y. Supp. 811 (affirmed in (1903) 88 App. Div. 434, 84 N. Y. Supp. 1125) (confirmation of appointment); Casler v.

Tanzer (1923) 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 purpose 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. 918, 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. 918, 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) 168 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) 286 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 (1861) 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) 82 N. Y. Supp. 811, affirmed in (1903) 88 App. Div. 434, 84 N. Y. Supp. 1125 (confirmation of appointment); Casler v. Tanzer (1929) 134 Misc. 48, 234 N. Y. Supp. 571.

Ohio. — State ex rel. Calderwood v. Miller (1900) 62 Ohio St. 436, 57 N. E. 227, 78 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. (1848) 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) 158 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. Justice

(1917) 200 Ala. 433, 76 So. 425, 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 charter 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 cancelation 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.

c. 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) 138 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) 133 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 (1884) 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 (1884) 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) 158 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. 280, 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, 63 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 (1933) — 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 [illegible]e 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 business, 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) 138 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, 82 Pac. 83, 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, 19 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