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## THE GOVERNORS' CONSTITUTIONAL POWERS OF APPOINTMENT AND REMOVAL

By JOHN MURDOCH DAWLEY\*

THE past few years have witnessed a very noticeable growth in the powers of state governors. Additional responsibilities have been placed in their hands as the structure of government has expanded and become increasingly complex. This has meant a multiplication of subordinate administrative offices for the execution of the increased functions. The powers of the chief executive to appoint and remove become especially important because they constitute a significant aspect of his control over state administration. It is desirable that the extent of these powers be known, not only from the viewpoint of the governor himself but also from that of the subordinates and of the public. The present study includes only the governors' constitutional powers, as the inclusion of statutory provisions, except as they are incidental to those in the constitutions, would include too much for the scope of an article. Analogous cases dealing with other executive officers have been omitted for the same reason.

The doctrine of the separation of powers plays an important part in determining the extent of the governor's appointing power, because if the power to appoint can be called an executive function, his power will be greater, and will be subject to fewer restrictions by the legislature, than if it is not so described. There is no substantial agreement among the courts as to its classification.<sup>1</sup>

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<sup>1</sup>The Minnesota State Reorganization Act of 1925 (Mason's 1927 Minn. Stats. ch. 3A) centers state administration in a department of administra-

Some courts hold that the appointing power is executive by nature.<sup>1a</sup> This is not necessarily because of the authority to whom the power has been given.<sup>2</sup> Nor are the courts at all agreed on whether the nature of the power is in any way controlled by the kind of duties which the appointee will be called on to perform. Some courts hold that if the duties to be performed are distinctly judicial or legislative, the power to appoint is accordingly judicial or legislative and can be exercised by the body concerned.<sup>3</sup> Other courts have held that the power of appointment is executive, though it may sometimes be necessary to allow other officers to exercise it in order that the functions of their departments can be carried out, but when they do, they themselves are performing executive functions because of the nature of the act.<sup>4</sup>

This leads to the question of the power of the legislature to give to itself the authority to make appointments, when the constitution has given the legislature the power to determine how appointments shall be made. The answer to this question depends on the presence or absence of a specific constitutional prohibition against such appointment, and also on the attitude of the court towards the nature of the appointing function. If the constitution is specific on the matter, that settles the question,<sup>5</sup> and also where the courts have held the power of appointment to be inherently executive, there is no doubt about the legislature's inability to give itself the power.<sup>6</sup>

There are, of course, many courts which have held that the power of appointment is not inherently executive. It should be

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tion and finance of three members responsible to and removable at will by the governor, and provides that "Except as herein otherwise provided. . . . The term of office or employment of all state employes shall be at the pleasure of the appointing officer" (secs. 53-5, 53-48). See Young, *Reorganization of Administrative Branch of Minnesota Government*, (1925) 10 MINNESOTA LAW REVIEW 40.

<sup>1a</sup>State ex inf. *Hadley v. Washburn*, (1902) 167 Mo. 680, 67 S. W. 592.

<sup>2</sup>State ex rel. *White v. Barker*, (1902) 116 Ia. 96, 89 N. W. 204; *Curtis v. Cornish*, (1912) 109 Me. 384, 34 Atl. 799; State ex rel. *Young v. Brill*, (1907) 100 Minn. 499, 111 N. W. 294, 639; *Mosley v. Board of Commrs.*, (1928) 200 Ind. 515, 165 N. E. 241; *State v. Patterson*, (1913) 181 Ind. 660, 105 N. E. 228; State ex inf. *Hadley v. Washburn*, (1902) 167 Mo. 680, 67 S. W. 592; State ex rel. *Landis v. Bird*, (1935) 120 Fla. 780, 163 So. 248.

<sup>3</sup>State ex rel. *White v. Barker*, (1902) 116 Ia. 96, 89 N. W. 204.

<sup>4</sup>State ex rel. *Young v. Brill*, (1907) 100 Minn. 499, 111 N. W. 294; *Holliday v. Fields*, (1925) 210 Ky. 179, 275 S. W. 642; *State v. Pierre*, (1908) 121 La. 465, 46 So. 574.

<sup>5</sup>State ex rel. *Horne v. Holcombe*, (1895) 46 Neb. 88, 64 N. W. 437.

<sup>6</sup>State ex rel. *Jameson v. Denny*, (1888) 118 Ind. 382, 21 N. E. 252; State ex rel. *Yancey v. Hyde*, (1889) 121 Ind. 20, 22 N. E. 644; *Craig v. O'Rear*, (1923) 199 Ky. 553, 251 S. W. 828.

noted that where the duties to be performed by the appointee are part of, or very closely related to, the functions of one of the major departments of government, that department can make the appointment, without the necessity of a decision on the question of the nature of the appointing power.<sup>7</sup> This is in accord with the theory that the power of appointment is not necessarily executive by nature.

A favorite starting point in the argument in support of the view described in the preceding paragraph is popular sovereignty and its relation to governmental power. The theory is that all sovereign power resides in the people, and they, through the constitution which they draw up and adopt, distribute that power as they wish to have it distributed. Then, the powers which are generally given to the legislature, arising from the doctrine of implied residual powers,<sup>8</sup> are pointed out, and the statement is made that this totality of powers is in the hands of the legislature unless it has been specifically denied to the legislature. The result is that the legislature can either *confer* the appointing power *wherever* it desires, or it can exercise that power itself.<sup>9</sup>

The courts that follow this line of reasoning then proceed to point out that the separation of powers clause does not itself define in express terms what powers are legislative, executive, or judicial, and that it is therefore a limitation, not a grant of powers.<sup>10</sup> Nor does the governor receive the appointing power because the constitution may declare him to be the chief executive of the state,<sup>11</sup> nor from the constitutional duty to see that the laws are faithfully enforced.<sup>12</sup> It is interesting that not all courts holding that the governor does not obtain his appointing power from the separation of powers principle are in agreement as to the

<sup>7</sup>State ex rel. White v. Barker, (1902) 116 Ia. 96, 89 N. W. 204; Dunbar v. Cronin, (1917) 18 Ariz. 583, 164 Pac. 447.

<sup>8</sup>State ex rel. v. Compson, (1898) 34 Or. 25, 54 Pac. 349.

<sup>9</sup>Sinking Fund Commissioners v. George, (1898) 104 Ky. 260, 47 S. W. 779; State ex rel. Standish v. Boucher, (1893) 3 N. D. 389; 56 N. W. 142; State ex rel. Sherman v. George, (1892) 22 Or. 142, 29 Pac. 356; Cox v. State, (1904) 72 Ark. 94, 78 S. W. 756.

<sup>10</sup>Richardson v. Young, (1909) 122 Tenn. 471, 125 S. W. 664; Field v. The People ex rel. McClernand, (1839) 3 Ill. 79; Sinking Fund Commrs. v. George, (1898) 104 Ky. 260, 47 S. W. 779; State v. Davis, (1910) 88 S. C. 204, 70 S. E. 417.

<sup>11</sup>Cox v. State, (1904) 72 Ark. 94, 78 S. W. 756; Purnell v. Mann, (1898) 105 Ky. 87, 48 S. W. 407; Hovey v. State ex rel. Carson, (1889) 119 Ind. 395, 21 N. E. 21; Biggs v. McBride, (1889) 17 Or. 640, 21 Pac. 878; State ex rel. Lyon v. Bowdon, (1912) 92 S. C. 393, 75 S. E. 866; Richardson v. Young, (1909) 122 Tenn. 471, 125 S. W. 664.

<sup>12</sup>Mayor of Baltimore v. State ex rel. the Board of Police of Baltimore, (1859) 15 Md. 376.

nature of the power. As we have seen, several courts reject the idea that it is executive at all. Others hold that while they are not so sure there is nothing executive in the nature of the power, it makes no difference, because the executive nature of the power is not sufficiently pronounced to prevent its being performed by other branches of government if they are authorized to do so, and that the separation of powers doctrine is not sufficient to prevent such authorization.<sup>13</sup> Another viewpoint is that the strict separation of powers doctrine is breaking down, one reason for which is the difficulty of classifying certain powers, particularly the appointing power.<sup>14</sup>

In some instances the power to appoint has been given a designation entirely separate from the categories of executive, legislative, or judicial. For instance, a California court declares that this power is "political."<sup>15</sup> And an Oklahoma court gives a simple explanation, that the fact that a governor ordinarily appoints many more officers than does any other part of the government does not indicate that there is anything inherently executive about the power, but simply shows that the constitution has specifically lodged the power in this particular place, rather than elsewhere.<sup>16</sup>

The authorities that have just been discussed go further than suggesting that there are no affirmative constitutional implications or inferences that the appointing power is inherently executive, and assert that there are negative inferences to be drawn from other parts of the constitutions, showing an intention that the appointing power was not meant to be executive or handled only by the governor. Among such provisions are those enumerating the officers whom the governor can appoint,<sup>17</sup> the specific constitutional grant of certain appointments to officers other than the governor,<sup>18</sup> and the constitutional grant to state legislatures

<sup>13</sup>*Hovey v. State ex rel. Carson*, (1889) 119 Ind. 395, 21 N. E. 21; *Fox v. McDonald*, (1892) 101 Ala. 51, 13 So. 416; *French v. State ex rel. Harley*, (1895) 141 Ind. 618, 41 N. E. 2; *Richardson v. Young*, (1909) 122 Tenn. 471, 125 S. W. 664; *In re Appointment of Revisor*, (1910) 141 Wis. 592, 124 N. W. 670.

<sup>14</sup>*Mayor and Council of Americus v. Perry*, (1902) 114 Ga. 871, 40 S. E. 1004; *Mayor of Baltimore v. State ex rel. of the Board of Police of Baltimore*, (1859) 15 Md. 376.

<sup>15</sup>*People ex rel. Aylett v. Langdon*, (1857) 8 Cal. 1; see also *Richardson v. Young*, (1909) 122 Tenn. 471, 125 S. W. 664.

<sup>16</sup>*Riley v. State ex rel. McDaniel*, (1914) 43 Okla. 65, 141 Pac. 264.

<sup>17</sup>*Fox v. McDonald*, (1892) 101 Ala. 51, 13 So. 416; *State ex rel. Standish v. Boucher*, (1893) 3 N. D. 389, 56 N. W. 142; *Purnell v. Mann*, (1898) 105 Ky. 87, 48 S. W. 407.

<sup>18</sup>*Ross v. Freeholders of Essex*, (1903) 69 N. J. L. 291, 55 Atl. 310.

of the power to determine the method of appointment of all or specific officers.<sup>19</sup>

In deciding this question of the nature and location of the appointing power, the courts have made an extensive use of contemporaneous construction.<sup>20</sup> They have, of course, held that this evidence is not binding, but state that it is very persuasive, showing that the people have acquiesced in the situation for a period of years.

The next consideration must concern itself with the question of the extent of the power of the legislature to restrict the governor in making selections for the offices to which he has the authority to make appointments, whatever the source of that authority may be. The general doctrine is that so long as the restrictions can be classed as qualifications the legislature can prescribe them.<sup>21</sup> Examples of permissible qualifications include the requirement that a board be composed of five men and four women;<sup>22</sup> that a state board of control be composed of a member from each of five separate districts, each of whom must have been a resident for at least ten years of his district, and no one of whom could be appointed from a county where one of the state institutions was located;<sup>23</sup> and various requirements concerning party membership on a board where the legislature was attempting to provide for a nonpartisan or bipartisan board.<sup>24</sup>

Where the attempted restriction goes beyond that of mere qualification, the courts are sharply divided. Where the power to appoint is by the constitution specifically lodged in the gover-

<sup>19</sup>*Trustees v. McIver*, (1875) 72 N. C. 76; *Mayor of Baltimore v. State ex rel. Board of Police of Baltimore*, (1859) 15 Md. 376; *Elliott v. McCrea*, (1910) 23 Ida. 524, 130 Pac. 785; *Dunbar v. Cronin*, (1917) 18 Ariz. 583, 164 Pac. 447; *Hovey v. State ex rel. Carson*, (1889) 119 Ind. 395, 21 N. E. 21; *State ex rel. Rosenstock v. Swift*, (1876) 11 Nev. 128; *Richardson v. Young*, (1909) 122 Tenn. 471, 125 S. W. 664.

<sup>20</sup>*Fox v. McDonald*, (1892) 101 Ala. 51, 13 So. 416; *People ex rel. Dunham v. Morgan*, (1878) 90 Ill. 558; *Overshiner v. State*, (1900) 156 Ind. 187, 59 N. E. 468; *Eddy v. Kincaid*, (1895) 28 Or. 537, 41 Pac. 156; *Mayor and Council of Americus v. Perry*, (1902) 114 Ga. 871, 40 S. E. 1004.

<sup>21</sup>*State ex rel. Buford v. Daniel*, (1924) 87 Fla. 270, 99 So. 804; *State ex rel. Attorney General v. Bryan*, (1905) 50 Fla. 293, 39 So. 931; *State ex rel. Harvey v. Wright*, (1913) 251 Mo. 325, 158 S. W. 823; *Rogers v. Common Council of Buffalo*, (1890) 123 N. Y. 173, 25 N. E. 274.

<sup>22</sup>*State ex rel. Buford v. Daniel*, (1924) 87 Fla. 270, 99 So. 804.

<sup>23</sup>*State ex rel. Attorney General v. Bryan*, (1905) 50 Fla. 293, 39 So. 931.

<sup>24</sup>*State ex rel. Harvey v. Wright*, (1913) 251 Mo. 325, 158 S. W. 823; *Rogers v. Common Council of Buffalo*, (1890) 123 N. Y. 173, 25 N. E. 274.

nor, at least two courts have held that a legislative direction that appointees to certain boards must be selected from a list to be presented by some outside group (such as a Chiropractors' Association in case of a Chiropractors' Examining Board) is unconstitutional.<sup>25</sup> The courts emphasize the fact that if the governor's choice can be restricted to one out of five, it might also be reduced to one out of one. Where the constitution provides that the appointment of officers shall be made in such manner as may be prescribed by law, the courts which hold that appointment is an executive power have decided that the legislature cannot make the appointment itself, nor authorize anyone not connected with the executive branch of the government to do so.<sup>26</sup>

Other courts, however, have held that the legislature can place restrictions on the appointing power of the governor.<sup>27</sup> This is especially true in those states whose courts do not regard the power to appoint as being strictly executive in nature.<sup>28</sup> And where the constitution is silent on the subject of appointments and there is no express provision for separation of powers, but the court has held that the power of appointment is not inherently executive, we find that at least one state has allowed the legislature to make restrictions on the governor's appointing power.<sup>29</sup>

As to the strictness of the adherence to restrictions, if the restriction is not mandatory the governor need not follow it.<sup>30</sup> However, if it is mandatory, the courts that have considered the question have decided that if the governor ignores the restrictions, the appointments are invalid.<sup>31</sup> If the restriction is held invalid and not binding on the governor, but the governor has nevertheless followed it, the appointment is good, unless the invalidity of the restriction is sufficient to invalidate the whole statute.<sup>32</sup> Even

<sup>25</sup>*Westlake v. Merritt*, (1923) 85 Fla. 28, 95 So. 303; *State ex rel. Childs v. Griffen*, (1897) 69 Minn. 311, 72 N. W. 117. But compare *State ex rel. Buell v. Frear*, (1911) 146 Wis. 291, 131 N. W. 832.

<sup>26</sup>*State ex inf. Hadley v. Washburn*, (1902) 167 Mo. 680, 67 S. W. 592; *State ex rel. Tolerton v. Gordon*, (1911) 236 Mo. 142, 139 S. W. 403; *Ex Parte Pope*, (1925) 33 Okla. Cr. Rep. 5, 242 Pac. 290.

<sup>27</sup>*In re Registration of Campbell, a Physician*, (1901) 197 Pa. St. 581, 47 Atl. 860; *Ingard v. Barker*, (1915) 27 Ida. 124, 147 Pac. 293.

<sup>28</sup>*Elledge v. Wharton*, (1911) 89 S. C. 113, 71 S. E. 657; *State ex rel. Buford v. Daniel*, (1924) 87 Fla. 270, 99 So. 804.

<sup>29</sup>*Rosoff v. Haussamen*, (1930) 59 N. D. 154, 228 N. W. 830.

<sup>30</sup>*Ingard v. Barker*, (1915) 27 Ida. 124, 147 Pac. 293.

<sup>31</sup>*Elledge v. Wharton*, (1911) 89 S. C. 113, 71 S. E. 657; *People ex rel. McDougall v. O'Toole*, (1897) 164 Ill. 344, 45 N. E. 141.

<sup>32</sup>*Ex parte Lucas*, (1900) 160 Mo. 218, 61 S. W. 218; *State ex rel. Simeral v. Seavey*, (1887) 22 Neb. 454, 35 N. W. 228.

if the appointment is held to be invalid, the acts of the officer will be upheld as those of a *de facto* officer, as against anyone but a rightful claimant of the office.<sup>33</sup>

Another question concerning the power of the legislature arises when the constitution gives a blanket appointing power to the governor if no method of appointment has been "otherwise provided." Where the constitution adds ". . . unless a different mode of appointment be prescribed by the law creating the office,"<sup>34</sup> it seems clear that the legislature can provide for an appointing authority other than the governor.<sup>35</sup> Where, however, the words are ". . . and whose appointments are not otherwise provided for," the courts have decided that inasmuch as the phrase is in the present tense, it means provided for in the constitution, and that the legislature cannot itself make other provision.<sup>36</sup>

Related to this question of the power of the legislature to make appointments or to restrict the governor's power, is the question whether or not the grant of new duties to an already established office is the creation of a new office or the appointment of an officer to a new office. The general doctrine is that it is neither.<sup>37</sup> This is true even if some agency other than the governor is given the power to select from several individuals, all of whom have been appointed to their original offices by the governor. This doctrine cannot, however, be used to circumvent the governor's constitutional appointing power by abolishing the office whose incumbent he had the power to appoint, and giving essentially the same duties to another officer who is selected in a different manner.<sup>38</sup>

It is well to turn next to a consideration of certain rules which are based on judicial interpretation. Where the power of appointment is not specifically in the governor, and an office would

<sup>33</sup>*Elledge v. Wharton*, (1911) 89 S. C. 113, 71 S. E. 657.

<sup>34</sup>Maryland, constitution, art. II, sec. 10.

<sup>35</sup>*Riggin v. Lankford*, (1918) 134 Md. 146, 105 Atl. 172; See also *Davis v. The State*, (1854) 7 Md. 151; *Mayor of Baltimore v. State ex rel. of the Board of Police of Baltimore*, (1859) 15 Md. 376; *State ex rel. Simeral v. Seavey*, (1887) 22 Neb. 454, 35 N. W. 228.

<sup>36</sup>*People ex rel. Welker v. Bledsoe*, (1873) 68 N. C. 457. See also *State ex rel. Clark v. Stanley*, (1872) 66 N. C. 59; *State ex rel. Howerton v. Tate*, (1873) 68 N. C. 546; *People ex rel. Nichols v. McKee*, (1873) 68 N. C. 429.

<sup>37</sup>*Cathers v. Hennings*, (1906) 76 Neb. 295, 107 N. W. 586; *People v. Crissman*, (1907) 41 Colo. 450, 92 Pac. 949; *State v. Coombs*, (1851) 32 Me. 526; *Commonwealth v. Leach*, (1923) 246 Mass. 464, 141 N. E. 301.

<sup>38</sup>*State ex rel. Schalk v. Wrightson*, (1895) 58 N. J. L. 50, 32 Atl. 820.



remain vacant if someone did not make an appointment to fill it, can the governor take that power? Some courts have answered this question in the affirmative, implying the power from the governor's position as chief executive, and from the power to see that the laws are faithfully executed.<sup>39</sup> Other courts have held that the governor obtains no extra power from these laws, and that he cannot make an appointment, even though the office may otherwise stand vacant.<sup>40</sup> And even if the constitution specifies that the legislature shall provide for the *election* of certain officers, provision can be made for temporary appointment by the governor until there can be an election.<sup>41</sup>

The problem of whether or not the governor had intended to make an appointment would not seem to present difficulties, but questions have arisen in several cases. Thus, when the governor approved a bill by which the legislature made certain appointments, and the court held that the legislature had no power of appointment, the South Dakota court construed the action of the governor as an appointment.<sup>42</sup> This construction seems rather strained. The doctrine of other cases seems to be that if a certain construction of the actions of the governor will give the result that he accomplishes what he legally has the power to accomplish, and another construction will mean that his action is invalid and of no effect, the first construction will be adopted, unless it is too forced or is very obviously contrary to what the governor intended.<sup>43</sup>

One matter on which there has been a large amount of controversy has been vacancies and the power of the governor to make appointments to fill them. One of the first questions that arises concerns anticipatory appointments, the power to make an appointment to fill a vacancy that has not as yet occurred. The general rule is that such an appointment can be made if the term

<sup>39</sup>State ex rel. Collett v. Gorby, (1889) 122 Ind. 17, 23 N. E. 678; Barrett v. Duff, (1923) 114 Kans. 220, 217 Pac. 918; State ex rel. Fritts v. Kuhl, (1889) 51 N. J. L. 191, 17 Atl. 102.

<sup>40</sup>Cull v. Wheltle, (1910) 114 Md. 58, 78 Atl. 820; State ex rel. Attorney General v. Seay, (1876) 64 Mo. 89; In re Filling of Vacancies by the Governor, (1907) 28 R. I. 602, 67 Atl. 802; Cahill v. Board of State Auditors, (1901) 127 Mich. 487, 86 N. W. 950.

<sup>41</sup>State ex rel. Wichman v. Gerbig, (1933) 55 Nev. 46, 24 P. (2d) 313.

<sup>42</sup>Thomas et al v. State, (1904) 17 S. D. 579, 97 N. W. 1011. See also State v. Adams, (1829) 2 Stew. (Ala.) 231; Walsh v. People ex rel. McClenahan, (1922) 72 Colo. 406, 211 Pac. 646.

<sup>43</sup>State ex rel. Worrell v. Peelle, (1889) 121 Ind. 495, 22 N. E. 654; Stamps v. Tittle, (Tex. Civ. App. 1914) 167 S. W. 776.

of the appointing power extends beyond the point of time when the vacancy arises, but not otherwise.<sup>44</sup> Where the legislature has set up a new office, some courts have held that the governor can make an appointment immediately, although the law does not go into effect immediately.<sup>45</sup> At least one court, however, has come to the opposite conclusion.<sup>46</sup> It should also be noted that in some states not only are anticipatory appointments allowed, but they are required.<sup>47</sup> This is for the purpose of having appointments made during a legislative session, so as to avoid the necessity of recess appointments. But the general rule that an appointing governor cannot tie the hands of his successor by making anticipatory appointments, has an exception where the successor is the lieutenant governor, for in that case the latter is simply performing the functions of the governor, and is not enjoying a new term of his own.<sup>48</sup>

If the appointment can be made, the question of the time of eligibility of the candidate then arises. This is a common question of constitutional law, and the pronounced split of opinion has received full discussion elsewhere.<sup>49</sup> In the main case involving the powers of a governor, the court decided that if the individual were qualified at the time he took the office, that would be sufficient.<sup>50</sup>

Another kind of vacancy which might arise comes from the creation of a new office. Even though the new office never has been filled, the majority opinion seems to be that there is a vacancy, which the governor can fill.<sup>51</sup> The opposite opinion holds

<sup>44</sup>*Pattangall v. Gilman*, (1916) 115 Me. 344, 98 Atl. 936; *Ivy v. Lusk*, (1856) 11 La. Ann. 486; *Oberhaus v. State ex rel. McNamara*, (1911) 173 Ala. 483, 55 So. 898; *State ex rel. Taylor v. Cowen*, (1917) 96 Ohio St. 277, 117 N. E. 238.

<sup>45</sup>*People ex rel. Graham v. Inglis*, (1896) 161 Ill. 256, 43 N. E. 1103; *State ex rel. Clarke v. Irwin*, (1869) 5 Nev. 111; *Ross v. Jones*, (1921) 151 Ga. 425, 107 S. E. 160.

<sup>46</sup>*State ex rel. Wolcott v. Kuhns*, (1913) 4 Boyce (Del.) 416, 89 Atl. 1.

<sup>47</sup>*Brady v. Howe*, (1874) 50 Miss. 607.

<sup>48</sup>*State ex rel. Nagle v. Stafford*, (1934) 97 Mont. 275, 34 P. (2d) 372.

<sup>49</sup>46 C. J. 938.

<sup>50</sup>*State ex rel. West v. Breckinridge*, (1912) 34 Okla. 649, 126 Pac. 806.

<sup>51</sup>*State ex rel. Wood v. Cotham*, (1914) 116 Ark. 36, 172 S. W. 260; *People ex rel. Barbour v. Mott*, (1851) 3 Cal. 502; *People ex rel. Tucker v. Rucker*, (1880) 5 Colo. 455; *Gormley v. Taylor*, (1871) 44 Ga. 76; *Knight v. Trigg*, (1909) 16 Ida. 256, 100 Pac. 1060; *State ex rel. Dreibelbiss v. Berghoff*, (1901) 158 Ind. 349, 63 N. E. 717; *Schnaffner v. Shaw*, (1921) 191 Iowa 1047, 180 N. W. 853; *State v. Holcomb*, (1910) 83 Kan. 256, 111 Pac. 188; *Yates v. McDonald*, (1906) 123 Ky. 596, 96 S. W. 865; *State ex rel. Henderson v. County Court of Boone County*, (1872) 50 Mo. 317; *Patterson v. Lentz*, (1914) 50 Mont. 322, 146 Pac. 932; *State ex rel.*

that where there has never been an occupant there cannot be a vacancy.<sup>52</sup> The governor has the appointing power even though the state constitution gives it to him only when an office shall "become vacant," and the office has never been occupied,<sup>53</sup> and also though the legislature obviously set the time for an act to take effect two days after a general election, with the result that the governor appoints to an otherwise elective office.<sup>54</sup>

Occasionally a vacancy will occur because the appointing power, other than the governor, has failed to act. In general, the occurrence of this situation does not of itself give to the governor the power to make the appointment, and he does not have it unless authority for it can be found elsewhere.<sup>55</sup> This is especially true where the vacancy arises because it is unconstitutional for an officer designated in a statute to act *ex officio*, though the governor was allowed to make the appointment where the main office was abolished, but the *ex officio* office was not abolished.<sup>56</sup>

Where the legislature has given itself the power to make a certain appointment, and has given to the governor the power to fill vacancies, he can make an appointment when the legislature adjourns without having done so.<sup>57</sup> But if the legislature has given the power of appointment to some other body in case it fails to make the appointment, the governor cannot appoint if the legislature adjourns without acting, for the power to make the appointment is "vested elsewhere."<sup>58</sup> Where the question of the time of the occurrence of the vacancy is important, there is a split of authority, the Indiana court holding that if the vacancy existed during the legislative session and that group did not appoint, the vacancy did not "occur" during a legislative recess, and therefore the governor could not appoint.<sup>59</sup> The New Hampshire court has held the opposite.<sup>60</sup>

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West v. Breckinridge, (1912) 34 Okla. 649, 126 Pac. 806; People ex rel. Snyder v. Hylan, (1914) 212 N. Y. 236, 106 N. E. 89; Walsh v. Commonwealth ex rel. Evans, (1879) 89 Pa. St. 419.

<sup>52</sup>State ex rel. Attorney General v. Messmore, (1861) 14 Wis. 177; People ex rel. Ewing v. Forquer, (1825) Breese (Ill.) 104; Ewart v. Jones, (1895) 116 N. C. 570, 21 S. E. 787.

<sup>53</sup>Gormley v. Taylor, (1871) 44 Ga. 76.

<sup>54</sup>State ex rel. Dreibelbiss v. Berghoff, (1901) 158 Ind. 349, 63 N. E. 717.

<sup>55</sup>People ex rel. Simmons v. Sanderson, (1866) 30 Cal. 160.

<sup>56</sup>Quigg v. Evans, (1898) 121 Cal. 546, 53 Pac. 1093.

<sup>57</sup>People ex rel. Aylett v. Langdon, (1857) 8 Cal. 1.

<sup>58</sup>People ex rel. Shoaff v. Parker, (1869) 37 Cal. 639.

<sup>59</sup>Collins v. The State ex rel. Morrison, (1856) 8 Ind. 344.

<sup>60</sup>Opinion of the Justices, (1864) 45 N. H. 590.

The effect of a constitutional provision that an incumbent shall hold office until the selection and qualification of a successor affects the situation under discussion. There is a wide split of authority on the main question whether there is a vacancy at the end of a term when there is a holdover provision, and no one has been selected to fill the office. Upholding the affirmative proposition that there is no vacancy because there is someone actually in the office, we find the states of California, Georgia, Indiana, Kansas, Maryland, Michigan, Missouri, Montana, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah and Wyoming.<sup>61</sup> In the opposing group, holding that there is a vacancy which the governor can fill, even though the holdover is still in office, there are the states of Colorado, Connecticut, Florida, Kentucky, Louisiana, Minnesota, Mississippi, Missouri and Texas.<sup>62</sup> There is some doubt as to the proper place to put Mississippi, for there have been decisions on both sides,<sup>63</sup> but the latest pronouncement of its court seems to place it in the second group.<sup>64</sup> Missouri, likewise, has decisions on both sides of the question,<sup>65</sup> but this is because of the question as to who has the power to make the subsequent appointment.

This question as to the nature and location of the appointing

<sup>61</sup>People ex rel. Parsons v. Edwards, (1892) 93 Cal. 153, 28 Pac. 831; State ex rel. Carson v. Harrison, (1887) 113 Ind. 434, 16 N. E. 384; Ash v. McVey, (1897) 85 Md. 119, 36 Atl. 440; People ex rel. Andrews v. Lord, (1861) 9 Mich. 227; Lawrence v. Hanley, (1891) 84 Mich. 399, 47 N. W. 753; Shackelford v. West, (1912) 138 Ga. 159, 74 S. E. 1030; Borton v. Buck, (1871) 8 Kan. 207; State ex rel. Stelsing v. Davis, (1883) 45 N. J. L. 390; Klock v. Mann, (1911) 16 N. M. 744, 120 Pac. 313; State ex rel. Nagle v. Stafford, (1934) 97 Mont. 275, 34 P. (2d) 372; State ex rel. Holt v. Bristol, (1898) 122 N. C. 245, 30 S. E. 1; State ex rel. v. Howe, (1874) 25 Ohio St. 588; State ex rel. Wagner v. Compson, (1898) 34 Or. 25, 54 Pac. 349; Broom v. Hanley, (1848) 9 Pa. St. 513; Lyon v. Bowdon, (1912) 92 S. C. 393, 75 S. E. 866; Conger v. Roy, (1924) 151 Tenn. 30, 267 S. W. 122; State ex rel. Stain v. Christensen, (1934) 84 Utah 185, 35 P. (2d) 775; Richardson v. Henderson, (1893) 4 Wyo. 535, 35 Pac. 517.

<sup>62</sup>Walsh v. People, ex rel. McClenahan, (1922) 72 Colo. 406, 211 Pac. 646; State ex rel. Eberle v. Clark, (1913) 87 Conn. 537, 89 Atl. 172; State ex rel. Landis v. Bird, (1935) 120 Fla. 780, 163 So. 248; Bell v. Sampson, (1930) 232 Ky. 376, 23 S. W. (2d) 575; State v. Young, (1915) 137 La. 102, 68 So. 241; State ex rel. Smallwood v. Windom, (1915) 131 Minn. 401, 155 N. W. 629; State ex rel. Hairston v. Baggett, (1926) 145 Miss. 142, 110 So. 240; State ex rel. Withers v. Stonestreet, (1889) 99 Mo. 361, 12 S. W. 895; Denison v. State, (1933) 122 Tex. 459, 61 S. W. (2d) 1017.

<sup>63</sup>State ex rel. Booze v. Cresswell, (1918) 117 Miss. 795, 78 So. 770; State v. Hays, (1907) 91 Miss. 755, 45 So. 728; State ex rel. Hairston v. Baggett, (1926) 145 Miss. 142, 110 So. 240.

<sup>64</sup>State ex rel. Hairston v. Baggett, (1926) 145 Miss. 142, 110 So. 240.

<sup>65</sup>State ex rel. Tredway v. Lusk, (1853) 18 Mo. 333; State ex rel. Withers v. Stonestreet, (1889) 99 Mo. 361, 12 S. W. 895.

power is, I believe, the key to the whole situation. Those courts which hold that the governor cannot make the appointment state that the appointment must be made by the power who has the authority to make the original appointment, the governor and senate, the legislature, or some other individual or body, as the case may be. Those on the opposite side hold that it does not make any difference who this appointing power may be because there is a vacancy, and the governor has the power to fill vacancies. On the decision as to these two related points rests the whole difference of opinion that has been expressed. If there is no general or specific holdover provision that applies to a certain office, the weight of authority is that none will be implied, and that the governor can therefore make an appointment.<sup>66</sup>

There are other types of clauses which provide for the execution of the duties in case of incapacity of the incumbent. The designation by law of some other officer to perform the functions does not prevent an appointment by the governor,<sup>67</sup> but if the law designates some other person to make the appointment, there is a split of authority on the question whether the governor can appoint under his general power to fill vacancies.<sup>68</sup> There is substantial agreement on the doctrine that in the face of a constitutional provision giving to the governor the power to fill vacancies the legislature can make a provision for filling the office temporarily.<sup>69</sup>

Where time limits have been placed on the governor's power to appoint, as, for instance, where a vacancy is to be filled at the next general election unless it occurs within two months previous to the election, and where the question involved has been at all complex, it is noticeable that the decisions have tended to restrict the governor's power within as narrow limits as possible, and to give to the people the power of election at the earliest possible opportunity.<sup>70</sup>

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<sup>66</sup>Commonwealth ex rel. v. Sheatz, (1910) 228 Pa. St. 301, 77 Atl. 547; State ex rel. Wood v. Sheldon, (1896) 8 S. D. 525, 67 N. W. 613; State ex rel. Lavin v. Bacon, (1901) 14 S. D. 284, 85 N. W. 225.

<sup>67</sup>People ex rel. Henderson v. Snedecker, (1856) 14 N. Y. 52.

<sup>68</sup>State ex rel. Sanders v. Blakemore, (1891) 104 Mo. 340, 15 S. W. 960; State ex rel. Fritts v. Kuhl, (1889) 51 N. J. L. 191, 17 Atl. 102; King v. State, (1901) 43 Fla. 211, 81 So. 254.

<sup>69</sup>State v. Monk, (1842) 3 Ala. 415.

<sup>70</sup>McCreary v. Williams, (1913) 153 Ky. 49, 154 S. W. 417; People ex rel. Hart v. Goodrich, (1904) 92 App. Div. 445, 87 N. Y. S. 117; State ex rel. Baxter v. Brown, (1876) 22 Minn. 482; State ex rel. Satterthwaite v. Highfield, (1930) 4 Harr. (Del.) 272, 152 Atl. 45; Commonwealth ex rel. King v. King, (1877) 85 Pa. St. 103.

The power of the governor to make an appointment when the elected person dies before he has qualified depends on the presence or absence of a holdover provision and of an individual in the office. There is no differentiation in results based on whether the incumbent is reelected or someone else is elected for the new term. If there is a holdover provision the majority opinion is that there is no vacancy to which the governor can appoint,<sup>71</sup> even though the deceased is the reelected incumbent and the actual appointment is only for the remaining few weeks of the old term.<sup>72</sup> If there is no such provision, or if the court decides that the holdover provision shall not be thus interpreted, the governor can make an appointment.<sup>73</sup>

The effect of a resignation is important. For a resignation to become effective, it must be accepted by the officer having the power to fill the vacancy which it will cause. Until then it can be withdrawn, and it can be withdrawn afterwards if the accepting officer gives permission, and rights of third parties have not intervened.<sup>74</sup> After the resignation has been accepted there is a vacancy, and a holdover provision will not apply.<sup>75</sup>

Besides the causes of vacancies which have been discussed there are many minor ones which can only be mentioned. Among these are the failure of the senate to act on nominations sent in by the governor,<sup>76</sup> the holding of two incompatible offices by one individual,<sup>77</sup> and a tie vote and an election contest.<sup>78</sup> Courts have held that no vacancies result because of mental or physical disability<sup>79</sup> or absence of the incumbent.<sup>80</sup>

Another question of significance concerns the term of office of the governor's appointee. Where a vacancy has been filled, the constitution may specify the length of the term, but if it does not do so one court has decided that the term of the appointee should

<sup>71</sup>In re Supreme Court Vacancy, (1894) 4 S. D. 532, 57 N. W. 495.

<sup>72</sup>Townsley v. Hartfield, (1914) 113 Ark. 253, 168 S. W. 140; State, on Complaint of Ryan v. Roden, (1935) 219 Wis. 132, 262 N. W. 629.

<sup>73</sup>People ex rel. Mattison v. Nye, (1908) 9 Cal. App. 148, 98 Pac. 241; In the matter of Hamlin, (1921) 196 App. Div. 714, 188 N. Y. S. 326.

<sup>74</sup>Biddle v. Willard, (1857) 10 Ind. 62; State ex rel. Van Buskirk v. Boecker, (1874) 56 Mo. 17.

<sup>75</sup>Cragin v. Frohmler, (1934) 43 Ariz. 251, 30 P. (2d) 247.

<sup>76</sup>Bell v. Sampson, (1930) 232 Ky. 376, 23 S. W. (2d) 575; State ex rel. Robert v. Murphy, (1893) 32 Fla. 138, 13 So. 705.

<sup>77</sup>Truitt v. Collins, (1914) 122 Md. 526, 89 Atl. 850.

<sup>78</sup>State v. Adams, (1829) 2 Stew. (Ala.) 231.

<sup>79</sup>Huth's Case, (1895) 4 Dist. Rep. (Pa.) 233; In re Advisory Opinion to Governor, (1914) 67 Fla. 423, 65 So. 4.

<sup>80</sup>Holman v. Lutz, (1930) 132 Or. 185, 284 Pac. 825.

continue only until such time as the office could be filled in the regular way, either by the legislature or by the people,<sup>81</sup> while another court arrived at the conclusion that it should be for the balance of the unexpired term.<sup>82</sup>

When the term of an office is specified, but there is no designation of the time when it shall commence, at least one court has held that the governor's appointee shall serve for a full term, no matter when he is appointed.<sup>83</sup> This is rectified in most states by the setting of a date when all terms shall commence. When the provision is that the governor shall appoint a person to hold until the next general election, the courts have held that the latter's term expires when the election occurs, and not when the term of others elected at that time would regularly begin.<sup>84</sup> But when is "the next election?" That depends partly on how the phrase is worded in the constitution and partly on its interpretation. Various decisions have selected the *very* next election,<sup>85</sup> or the next election at which that particular type of officer would ordinarily be elected.<sup>86</sup> Where the phrase is "the next general election," there is a similar split of authority,<sup>87</sup> as is likewise the case where the phrase is "the next regular election."<sup>88</sup> There are, of course, several constitutions in which the term of the appointee is so explicitly defined that there is no room for interpretation. The general rule would seem to be that if the constitution is not explicit, the tenure of the appointee will not be for the balance of the unexpired term if the whole constitution indicates an intention that the appointing power of the governor shall be restricted, and that the people shall fill the offices whenever it is practicable.

The term of an appointee where the statutory term is uncon-

<sup>81</sup>State ex rel. Custer v. Schortemeier, (1925) 197 Ind. 507, 151 N. E. 407; See also State ex rel. Sullivan v. Moore, (Ariz. 1937) 64 P. (2d) 809.

<sup>82</sup>State ex rel. Holmes v. Finnerud, (1895) 7 S. D. 237, 64 N. W. 121.

<sup>83</sup>Clark v. State ex rel. Graves, (1912) 177 Ala. 188, 59 So. 259; See also McDowell v. Burnett, (1912) 92 S. C. 469, 75 S. E. 873.

<sup>84</sup>State ex rel. Cosgrove v. Perkins, (1897) 139 Mo. 106, 40 S. W. 650; State ex rel. Linn v. Millett, (1898) 20 Wash. 221, 54 Pac. 1124.

<sup>85</sup>State ex rel. Weeks v. Gamble, (1870) 13 Fla. 9; People ex rel. Barbour v. Mott, (1851) 3 Cal. 502.

<sup>86</sup>People ex rel. Lynch v. Budd, (1896) 114 Cal. 168, 45 Pac. 1060.

<sup>87</sup>State ex rel. Patterson v. Lentz, (1914) 50 Mont. 322, 146 Pac. 932; Baker v. Payne, (1892) 22 Or. 335, 29 Pac. 787; State ex rel. Evard v. Roach, (1916) 269 Mo. 500, 192 S. W. 745; In re Supreme Court Vacancy, (1894) 4 S. D. 532, 57 N. W. 495; State ex rel. Halbach v. Clausen, (1933) 216 Iowa 1079, 250 N. W. 195.

<sup>88</sup>State ex rel. Attorney General v. Conrades, (1869) 45 Mo. 45; Wendorff v. Dill, (1911) 83 Kan. 782, 112 Pac. 588; State v. Holcomb, (1910) 83 Kan. 256, 111 Pac. 188.

stitutional is important. The appointment itself may be good,<sup>89</sup> and under certain circumstances the appointee will hold at the pleasure of the governor.<sup>90</sup> Other courts have held the whole statute unconstitutional.<sup>91</sup> Where the situation is that the governor has appointed for a period longer than that authorized by the constitution, the courts have not held the whole appointment void, but have allowed the appointee to hold for the maximum term allowed by the constitution.<sup>92</sup>

The relations of the governor to the senate are a significant phase of his appointing power. What can the governor do after he has made an appointment and before the senate has acted upon it? If his action is considered merely a nomination, the governor can withdraw it at will, but if it is considered as an appointment, it is complete and irrevocable, subject only to favorable action by the senate.<sup>93</sup> If the appointment is a recess appointment to fill a vacancy, the power of the governor to revoke it will depend on the court's interpretation of the constitutional provision involved, the governor having been given full power under one,<sup>94</sup> and no power at all under another.<sup>95</sup> The effect of the ending of the governor's term is not to vest his successor with any more power than he himself had, but to give the successor the same power as his predecessor.<sup>96</sup>

Another relationship of the governor to the senate is the requirement of senatorial approval of the governor's appointments. In at least one state this is held to involve a two-thirds majority, though this is because of the wording of the particular constitutional provision involved.<sup>97</sup> Where the constitution empowers the governor to appoint, by and with the consent of the senate, all officers established by the constitution or by law and whose appoint-

<sup>89</sup>People v. Burch, (1891) 84 Mich. 408, 47 N. W. 765.

<sup>90</sup>People ex rel. Davidson v. Perry, (1889) 79 Cal. 105, 21 Pac. 423; Lewis v. Lewelling, (1894) 53 Kan. 201, 36 Pac. 351.

<sup>91</sup>State ex rel. Davis v. Botts, (1931) 101 Fla. 361, 134 So. 219.

<sup>92</sup>Cobb v. Hammock, (1907) 82 Ark. 584, 102 S. W. 382; Walsh v. People ex rel. McClenahan, (1922) 72 Colo. 406, 211 Pac. 646.

<sup>93</sup>Barrett v. Duff, (1923) 114 Kan. 220, 217 Pac. 918; State ex rel. Griffith v. Matassarin, (1923) 114 Kan. 244, 217 Pac. 930; McChesney v. Sampson, (1930) 232 Ky. 395, 23 S. W. (2d) 584; People ex rel. Ryder v. Mizner, (1857) 7 Cal. 519.

<sup>94</sup>State ex rel. Meyer v. Van Tromp, (1875) 27 La. Ann. 569.

<sup>95</sup>Barrett v. Duff, (1923) 114 Kan. 220, 217 Pac. 918; People ex rel. Wetherbee v. Cazneau, (1862) 20 Cal. 504.

<sup>96</sup>Barrett v. Duff, (1923) 114 Kan. 220, 217 Pac. 918; State ex rel. Griffith v. Matassarin, (1923) 114 Kan. 244, 217 Pac. 930.

<sup>97</sup>Denison v. State, (1933) 122 Tex. 459, 61 S. W. (2d) 1017.



ment or election is not otherwise provided for, the courts have held that in creating an office the legislature can empower the governor to fill it without senatorial consent.<sup>98</sup> At least one state has held that the intent of the legislature to give the governor this power must be very explicitly shown.<sup>99</sup> Appointments to fill vacancies for unexpired terms very seldom require confirmation.<sup>100</sup> This same rule is applied where a statute creating a new office required senatorial confirmation of the governor's appointment, but he signs the bill after the legislature has adjourned,<sup>101</sup> though there is some authority contra.<sup>102</sup>

The necessity of senatorial confirmation has been considered, and the general rule seems to be that when the constitutional term is until the end of the next legislative session no confirmation is necessary, but if the appointment is sent to the senate and confirmed, it acts as an appointment to fill the vacancy for as long a term as the law allows.<sup>103</sup> When the governor makes an appointment, but fails to notify the senate, the decisions are unanimous that the senate can consider the names without official notification.<sup>104</sup>

Another angle of the senate's function is its power to make confirmations during special sessions. The courts which have considered this question have all agreed that the limitation on the legislature to consider in special session only those things for which it was called does not include the confirmation of appointments.<sup>105</sup>

<sup>98</sup>In *re* Question Propounded by the Governor, (1888) 12 Colo. 399, 21 Pac. 488; *In re* Inman, (1902) 8 Ida. 398, 69 Pac. 120; *Holstein v. Guss*, (1918) 143 La. 6, 78 So. 131; *Ash v. McVey*, (1897) 85 Md. 119, 36 Atl. 440; *State ex rel. Simeral v. Seavey*, (1887) 22 Neb. 454, 35 N. W. 228.

<sup>99</sup>*Sewell and Allington v. Bennett and Levi*, (1920) 187 Ky. 626, 220 S. W. 517; *Bell v. Sampson*, (1930) 232 Ky. 376, 23 S. W. (2d) 575.

<sup>100</sup>*State ex rel. West v. France*, (1913) 38 Okla. 446, 134 Pac. 403; *State Prison of N. C. v. Day*, (1899) 124 N. C. 362, 32 S. E. 748; *State ex rel. Holmes v. Finnerud*, (1895) 7 S. D. 237, 64 N. W. 121; *State ex rel. v. Manson*, (1900) 105 Tenn. 232, 58 S. W. 319; *State ex rel. Brandon v. Board of Control*, (1919) 84 W. Va. 417, 100 S. E. 215.

<sup>101</sup>*People ex rel. v. Scott*, (1911) 52 Colo. 59, 120 Pac. 126; *People v. Hasbrouck*, (1895) 11 Utah 291, 39 Pa. St. 918; *Merrill v. Commissioners of Garrett County*, (1889) 70 Md. 269, 16 Atl. 723.

<sup>102</sup>*O'Leary v. Adler*, (1875) 51 Miss. 28.

<sup>103</sup>*People ex rel. Wetherbee v. Cazneau*, (1862) 20 Cal. 504; *State v. Powell*, (1888) 40 La. Ann. 241, 4 So. 447; *Commonwealth v. Waller*, (1892) 145 Pa. St. 235, 23 Atl. 382.

<sup>104</sup>*Barrett v. Duff*, (1923) 114 Kan. 220, 217 Pac. 918; *Bell v. Sampson*, (1930) 232 Ky. 376, 23 S. W. (2d) 575; *State ex rel. Kriebs v. Halladay*, (1928) 52 S. D. 497, 219 N. W. 497; *People v. Showver*, (1923) 30 Wyo. 366, 222 Pac. 11.

<sup>105</sup>*People ex rel. Knight v. Blanding*, (1883) 63 Cal. 333; *State v.*

There is, however, a split of authority on the question whether appointments *must* be confirmed at special sessions, based on differing interpretations of such constitutional phrases as "at the next ensuing session," or "at the next session."<sup>106</sup> After a confirmation has once been completed it cannot be withdrawn, but it must be certain that the confirmation is really complete, for under its power to adopt its own rules a state senate can provide the power to reconsider a vote on confirmation within a certain number of days after the confirmation has been made.<sup>107</sup> And if the senate fails to take any action on the appointment the governor cannot make an appointment unless the courts hold that a vacancy results which the governor can fill under his general appointing power.<sup>108</sup>

There are several decisions concerning the power of the governor to make a recess appointment when he could have filled an office during the senatorial session, but failed to do so. Where the only provision is one requiring confirmation if the appointment is made during the legislative session, the governor can make recess appointments.<sup>109</sup> Where, however, the governor's power is to fill vacancies where there is no method provided in the constitution or statutes, the governor cannot make a recess appointment if he could have appointed during the senate session.<sup>110</sup> Where a holdover provision precludes the presence of a vacancy, the governor cannot appoint.<sup>111</sup> In some states the decision depends on the interpretation of the words "happen" or "occur," as when the vacancy happens or occurs during the session of the legislature. We find here a flat split of authority, some courts holding that these terms mean to "begin," or to "commence,"<sup>112</sup> while other courts hold that they mean "shall chance to exist," or "shall hap-

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Dowling, (1929) 167 La. 907, 120 So. 593; State ex inf. Major ex rel. Sikes v. Williams, (1909) 222 Mo. 268, 121 S. W. 64; Advisory Opinion to the Governor, (1912) 64 Fla. 16, 59 So. 782; State v. Williams, (1883) 20 S. C. 12.

<sup>106</sup>Advisory Opinion to the Governor, (1912) 64 Fla. 16, 59 So. 782; State v. Dowling, (1929) 167 La. 907; 120 So. 593; State v. Irion, (1929) 169 La. 482, 125 So. 567; People ex rel v. Scott, (1911) 52 Colo. 59, 120 Pac. 126.

<sup>107</sup>Dust v. Oakman, (1901) 126 Mich. 617, 86 N. W. 151; Wither-  
spoon v. State ex rel. West, (1925) 138 Miss. 310, 103 So. 134.

<sup>108</sup>Watkins v. Watkins, (1852) 2 Md. 341; State ex rel. Robert v. Murphy, (1893) 32 Fla. 138, 13 So. 705; Bell v. Sampson, (1930) 232 Ky. 376, 23 S. W. (2d) 575.

<sup>109</sup>Stamps v. Tittle, (Tex. Civ. App. 1914) 167 S. W. 776.

<sup>110</sup>People ex rel. Wetherbee v. Cazneau, (1862) 20 Cal. 504.

<sup>111</sup>State ex rel. Lyon v. Bowdon, (1912) 92 S. C. 393, 75 S. E. 866.

<sup>112</sup>Murphy v. People ex rel. Lehman, (1925) 78 Colo. 276, 242 Pac. 57; Collins v. The State ex rel. Morrison, (1856) 8 Ind. 344.

pen to be."<sup>113</sup> In the latter case, of course, the mere existence of a vacancy during the senate recess will empower the governor to make an appointment, no matter when the vacancy may originally have commenced.

Sometimes the senate rejects the governor's nominee, and in seven state constitutions there is an absolute prohibition against the governor subsequently appointing the same person for a recess appointment. Where there is no restriction, at least one court held that none will be implied.<sup>114</sup> Even when the governor has made a nomination and the senate has confirmed it, the discretionary power of the governor is not exhausted, for the appointment is not complete until the governor has issued the commission, and he may refuse to do this if he so desires.<sup>115</sup> This doctrine may, however, be different where the original constitutional provision is different. In fact, one court states that a commission is merely evidence of appointment or election, that the direction to the governor to issue it is mandatory, and that the failure or refusal to issue it does not affect the right of the officer to discharge his duties.<sup>116</sup>

Thus far we have been considering only state officers, but the relationship of the governor to the appointment of local officers is also important. The main question is whether local officers are included in the general constitutional provision concerning appointments. The usual principle is that the general grant of power applies only to state offices, and does not include vacancies in city, township, school district, or county offices.<sup>117</sup>

We have already seen that if the senate refuses to perform its part in the appointment procedure it cannot be compelled to do so. Is the same thing true of the governor? An apparent split of authority can be reconciled by stating that if the duty to appoint is both mandatory and exclusive, a mandamus will issue against

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<sup>113</sup>Opinion of the Justices, (1864) 45 N. H. 590; State ex rel. Fritts v. Kuhl, (1889) 51 N. J. L. 191, 17 Atl. 102.

<sup>114</sup>Commonwealth ex rel. Lafean v. Snyder, (1918) 261 Pa. St. 57, 104 Atl. 494.

<sup>115</sup>Lane v. Commonwealth ex rel. Attorney General, (1883) 103 Pa. St. 481; Harrington v. Pardee, (1905) 1 Cal. App. 278, 82 Pac. 83.

<sup>116</sup>State ex rel. Coleman v. Lewis, (1936) 181 S. C. 10, 186 S. E. 625.

<sup>117</sup>Hogins v. Bullock, (1909) 92 Ark. 67, 121 S. W. 1064; People ex rel. Dunham v. Morgan, (1878) 90 Ill. 558; People ex rel. Grinnell v. Hoffman, (1886) 116 Ill. 587, 8 N. E. 788; People ex rel. Hinton v. Hammond, (1885) 66 Cal. 654, 6 Pac. 741; State ex rel. Gleason v. Gerdink, (1909) 173 Ind. 245, 90 N. E. 70.

the governor,<sup>118</sup> but if it is not mandatory a mandamus will not issue.<sup>119</sup>

An incidental question concerns the methods or legal actions by which the various questions already discussed can be raised. If the only question to be decided is that of title to the office, mandamus will not issue.<sup>119a</sup> But if the person seeking the writ shows prima facie evidence of title in himself, and he seeks to oust an intruder, the court will protect the prima facie right by issuing the writ, but without deciding the question of title.<sup>120</sup> The court will, however, receive evidences of title to an office in a mandamus proceeding, in order to determine whether or not a prima facie showing of title has been made out.<sup>121</sup> An injunction can be issued to prevent an ouster, without actually deciding the question of title, though the courts have also said that because there was only one code action they would go ahead and decide the title so as to settle all questions at once.<sup>122</sup> If there is a sharp distinction made between actions at law and suits in equity, the question of title cannot be decided by any method other than an action of quo warranto.

So closely allied to the appointing power is the power of removal, that many courts discuss both of them at the same time. They seem complementary, and have so many points in common that a study of one of them should include a study of the other. Hence, the removal power of the governor will now be considered.

Despite the fact that in some cases the power has been given to the governor, there are ways in which the legislature can, in effect, exercise it. One of these is to fail to make appropriations. Another is by abolishing the office, which it can do unless it is restrained by some provision of the constitution itself.<sup>123</sup> It is

<sup>118</sup>State ex rel. Trauger v. Nash, (1902) 66 Ohio St. 612, 64 N. E. 558.

<sup>119</sup>Allen v. Byrd, (1928) 151 Va. 21, 144 S. E. 469.

<sup>119a</sup>As to the extension of mandamus beyond its common law limitations under the Minnesota Veterans' Preference Law, Mason's 1927 Minn. Stat., secs. 4368-4369, see Jennings, Removal from Public Office in Minnesota, (1936) 20 MINNESOTA LAW REVIEW 721, 747-748, note 116.

<sup>120</sup>People ex rel. Ewing v. Forquer, (1825) Breese (Ill.) 104; State ex rel. Vail v. Draper, (1871) 48 Mo. 213; Conklin v. Cunningham, (1894) 7 N. Mex. 445, 38 Pac. 170; Maramillo v. State ex rel. County Comms., (1926) 32 N. M. 20, 250 Pac. 729; Lawrence v. Hanley, (1891) 84 Mich. 399, 47 N. W. 753.

<sup>121</sup>Cameron v. Parker, (1894) 2 Okla. 277, 38 Pac. 14.

<sup>122</sup>Ekern v. McGovern, (1913) 154 Wis. 157, 142 N. W. 595. See also Jennings, Removal from Public Office in Minnesota, (1936) 20 MINNESOTA LAW REVIEW 721, 734 (note 60), 825.

<sup>123</sup>Lloyd v. Silver Bow County, (1891) 11 Mont. 408, 28 Pac. 453; State ex rel. Kenny v. Hudspeth, (1896) 59 N. J. L. 320, 36 Atl. 662; McGehee v. State ex rel. Tate, (1917) 199 Ala. 287, 74 So. 374.

impossible for the legislature to abolish that which is specifically established by the constitution, but it can make provisions as to matters (such as duties, filing of bonds, etc.) not included in the constitutional provision, although the result may be the removal from office of an incumbent who has been legally selected.<sup>124</sup> In those state where the courts hold that an incumbent has a property right or a contract right, the legislature cannot abolish the office as long as it contains an incumbent.<sup>125</sup>

The question of obtaining consent of some other body is often involved in removals. Very few states now employ executive councils, but where they are employed, a court has at one time required council consent,<sup>126</sup> but has subsequently changed its decision, due to a constitutional amendment.<sup>127</sup> Where the removal power has been given to the governor with no mention of the senate, at least one court has held that senate consent is not necessary.<sup>128</sup> Where the constitutional provision is that an officer shall be removed by the power which appointed him, there is a split of authority, some courts holding that this would necessarily include the senate,<sup>129</sup> while others hold that consent is not part of the appointing power and is therefore not necessary for removal.<sup>130</sup> Pennsylvania has also announced the artificial doctrine that the appointing power (and therefore that of removal) belongs to that branch of government whose functions those of the office in dispute most closely resemble. If they are legislative in character, then the legislature can decide the method of removal, and can prescribe senate consent.<sup>131</sup>

Another subject discussed by the courts is the nature of the causes for removal. As a preliminary it should be noticed that an officer could be removed even if the cause arose while he was acting in an *ex officio* capacity,<sup>132</sup> but where a certain officer is specified as being removable, that will not include all officers performing similar functions.<sup>133</sup> The courts have also decided that

<sup>124</sup>Hyde v. State, (1876) 52 Miss. 665.

<sup>125</sup>State Prison of N. C. v. Day, (1899) 124 N. C. 362, 32 S. E. 748.

<sup>126</sup>Opinion of Justices, (1881) 72 Me. 542.

<sup>127</sup>Opinion of the Justices, (1926) 125 Me. 529, 133 Atl. 265.

<sup>128</sup>State ex rel. Ulrick v. Sanchez, (1927) 32 N. M. 265, 255 Pac. 1077.

<sup>129</sup>People ex rel. Travers v. Freese, (1888) 76 Cal. 633, 18 Pac. 812.

<sup>130</sup>Lane v. Commonwealth, ex rel. Attorney General, (1883) 103 Pa. St. 481.

<sup>131</sup>Commonwealth ex rel. Attorney General v. Benn, (1925) 284 Pa. St. 421, 131 Atl. 253; Commonwealth ex rel. v. Stewart, (1926) 286 Pa. St. 511, 134 Atl. 392.

<sup>132</sup>Attorney General v. Jochim, (1894) 99 Mich. 358, 58 N. W. 611.

<sup>133</sup>Henry v. State ex rel. Coody, (1922) 130 Miss. 855, 95 So. 67.

the reasons for removal must have occurred during the term of the officer being removed,<sup>134</sup> and that they must relate to the office itself, and not simply to the conduct of the officer as a private individual.<sup>135</sup> One court adds that the first part of this rule applies only to finished offenses which are known and have been condoned by election or appointment, but does not apply to a situation where there is neglect of a continuing duty (such as to prosecute a case) during a current term when the officer should be discharging the duties of the office.<sup>136</sup>

Closely akin to the power of removal is the power of suspension. Some courts have held that this power is included in the power to remove,<sup>137</sup> but in at least one state the decision has been opposite.<sup>138</sup> There is, however, a surprising unanimity of opinion that where the governor does have the power of suspension there is no necessity for him giving a notice and hearing.<sup>139</sup> The fact of suspension alone does not render the officer ineligible for selection for a succeeding term.<sup>140</sup> There are, in addition to these decisions several made by the Florida court, which are interesting, but which do not lay down general rules, because they are interpreting a very special provision found only in the Florida constitution.<sup>141</sup>

One question which we have seen arising both in the cases of appointment and suspension has been that of the implying of these powers if they are not specifically granted. The same problem arises in relation to the power of removal. The generalization found in most American Government text-books is that while the President's power of removal is implied, this is not so in most states with regard to the governor. Dictum in some states

<sup>134</sup>In re Advisory Opinion to the Governor, (1914) 67 Fla. 489, 65 So. 224. But compare State ex rel. Douglas v. Megaarden, (1901) 85 Minn. 41, 93, 88 N. W. 412, 413.

<sup>135</sup>State ex rel. Martin v. Burnquist, (1918) 141 Minn. 308, 170 N. W. 201.

<sup>136</sup>State v. Allen, (Fla. 1937) 172 So. 222.

<sup>137</sup>State ex rel. Clapp v. Peterson, (1892) 50 Minn. 239, 52 N. W. 655; Martin v. County of Dodge, (1920) 146 Minn. 129, 178 N. W. 167; State ex inf. Shartel v. Brunk, (1930) 326 Mo. 1181, 34 S. W. (2d) 94.

<sup>138</sup>Cull v. Whelple, (1910) 114 Md. 58, 78 Atl. 820.

<sup>139</sup>Martin v. County of Dodge, (1920) 146 Minn. 129, 178 N. W. 167; Gray v. McLendon, (1910) 134 Ga. 224, 67 S. E. 859; State ex rel. Attorney General v. Johnson, (1892) 30 Fla. 433, 11 So. 845.

<sup>140</sup>In re Advisory Opinion to the Governor, (1893) 31 Fla. 1, 12 So. 114. Compare State ex rel. Childs v. Dart, (1894) 57 Minn. 261, 263, 59 N. W. 190 (ineligible to reappointment ad interim to remainder of term).

<sup>141</sup>Advisory Opinion to the Governor, (1915) 69 Fla. 508, 108 So. 450; State ex rel. Jackson v. Crawford, (1918) 76 Fla. 388, 79 So. 875.

has been contra.<sup>142</sup> An old rule, followed by many courts, is that when the tenure of office is not fixed by law, and is thus indefinite, the power of removal is incidental to the power of appointment.<sup>143</sup> In the case of a holdover in office after the expiration of his term the court has decided that inasmuch as a holdover is only a locum tenens, the governor can remove him,<sup>144</sup> the removal in this case having been accomplished by the appointment of a successor. In other states, however, the doctrine that removal is not incidental to the power of appointment has been laid down.<sup>145</sup>

There is greater unanimity where other sources of constitutional implication have been attempted, the courts holding that the removal power will not be implied from the separation of powers clause,<sup>146</sup> the grant of the chief executive power to the governor,<sup>147</sup> the obligation to see that the laws of the state shall be faithfully executed,<sup>148</sup> the power to require information from inferior officers,<sup>149</sup> or the power to fill a vacancy.<sup>150</sup> In fact, there are certain other grants of power that show a definite intention not to give the governor a removal power, such as granting it to specified officers.<sup>151</sup>

<sup>142</sup>Opinion of Justices, (1881) 72 Me. 542; Cameron v. Parker, (1894) 2 Okla. 277, 38 Pac. 14. But compare cases and language cited in Jennings, Removal from Public Office in Minnesota, (1936) 20 MINNESOTA LAW REVIEW 721, 736, note 70.

<sup>143</sup>Commonwealth ex rel. Lehman v. Sutherland, (1817) 3 Serg. and Rawle (Pa.) 145; Halder v. Anderson, (1925) 160 Ga. 433, 128 S. E. 181; Keenan v. Perry, (1859) 24 Tex. 253; Cole v. Territory ex rel. Wilson, (1897) 5 Ariz. 137, 48 Pac. 217; State ex rel. Nagle v. Sullivan, (1935) 98 Mont. 425, 40 P. (2d) 995. In Sykes v. City of Minneapolis, (1913) 124 Minn. 73, 144 N. W. 453, the same rule was applied to an office with a fixed term. See Jennings, Removal from Public Office in Minnesota, (1936) 20 MINNESOTA LAW REVIEW 721, 736, note 68.

<sup>144</sup>State ex rel. Withers v. Stonestreet, (1889) 99 Mo. 361, 12 S. W. 895.

<sup>145</sup>State ex rel. Lyon v. Rhame, (1912) 92 S. C. 455, 75 S. E. 881; Votteler v. Fields, (1926) 232 Ky. 322, 23 S. W. (2d) 588; Dubuc v. Voss, (1867) 19 La. Ann. 210; Field v. The People ex rel. McClernand, (1839) 3 Ill. 79; Johnson v. Laffoon, (1935) 257 Ky. 156, 77 S. W. (2d) 345.

<sup>146</sup>Field v. The People ex rel. McClernand, (1839) 3 Ill. 79.

<sup>147</sup>Bruce v. Mattock, (1908) 86 Ark. 555, 111 S. W. 990; Halder v. Anderson, (1925) 160 Ga. 433, 128 S. E. 181; Field v. The People ex rel. McClernand, (1839) 3 Ill. 79; State ex rel. Lyon v. Rhame, (1912) 92 S. C. 455, 75 S. E. 881; State ex rel. Huckabee v. Hough, (1915) 108 S. C. 87, 87 S. E. 436; State ex rel. Weke v. Frazier, (1921) 47 N. D. 314, 182 N. W. 545; Johnson v. Laffoon, (1935) 257 Ky. 156, 77 S. W. (2d) 345.

<sup>148</sup>Field v. The People ex rel. McClernand, (1839) 3 Ill. 79; Halder v. Anderson, (1925) 160 Ga. 433, 128 S. E. 181.

<sup>149</sup>Field v. The People ex rel. McClernand, (1839) 3 Ill. 79.

<sup>150</sup>Page v. Hardin, (1846) 8 B. Mon. (Ky.) 648; Votteler v. Fields, (1926) 232 Ky. 322, 23 S. W. (2d) 588.

<sup>151</sup>State ex rel. Lyon v. Rhame, (1912) 92 S. C. 455, 75 S. E. 881;

When the governor does have the removal power, to whom is it applicable? Where the constitution provides that he can remove those officers whom he can appoint, the courts have given it a wide interpretation, and have included officers in whose appointment the governor had a part, whether senate consent was or was not necessary for the appointment.<sup>152</sup>

Where the constitution allows the legislature to provide the manner of removal for certain specified offenses, the legislature cannot empower the governor to make removals for other causes.<sup>153</sup> The constitutional recital is exclusive. A similar doctrine is that where the constitution lists the reasons for which an officer can be impeached, and places the sole power of impeachment in the legislature, the legislature cannot give the governor the removal power over that officer.<sup>154</sup>

Occasionally a question arises concerning the intent of the governor to make a removal. Where the governor had an unrestricted removal power and appointed a new man to the position already filled, the commission reading "vice John Abbott" (the incumbent), the court held it a good removal.<sup>155</sup> This is true even where the removal power is implied, and the term of the office is not fixed.<sup>156</sup> Where the court's interpretation of a holdover provision is that it does not fill a vacancy, the filling of the vacancy by the governor will automatically remove the holdover,<sup>157</sup> but where the interpretation is that the holdover fills the vacancy the governor does not have the appointing power, and therefore cannot remove by this method.<sup>158</sup> There is some authority that if it is obvious that the governor does not intend his appointments to act as removals they will not be so construed.<sup>159</sup>

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McDowell v. Burnett, (1912) 92 S. C. 469, 75 S. E. 873; State ex rel. Huckabee v. Hough, (1915) 108 S. C. 87, 87 S. E. 436.

<sup>152</sup>Wilcox v. People ex rel. Lipe, (1878) 90 Ill. 186; Harman v. Harwood, (1881) 58 Md. 1.

<sup>153</sup>State ex rel. Holmes v. Shannon, (1895) 7 S. D. 319, 64 N. W. 175; Bowman's Case, (1909) 225 Pa. St. 364, 74 Atl. 203. But see Jennings, Removal from Public Office in Minnesota, (1936) 20 MINNESOTA LAW REVIEW 721, 735-736, note 68, as to the interpretation of art. 13, sec. 2 of the Minnesota constitution. See also Mason's 1927 Minn. Stat., sec. 6954, a very common type of statute.

<sup>154</sup>State ex inf. Shartel v. Brunk, (1930) 326 Mo. 1181, 34 S. W. (2d) 94.

<sup>155</sup>State and Di Carlo v. Abbott, (1889) 41 La. Ann. 1096, 6 So. 805.

<sup>156</sup>Keenan v. Perry, (1859) 24 Tex. 253.

<sup>157</sup>State ex rel. Withers v. Stonestreet, (1889) 99 Mo. 361, 12 S. W. 895.

<sup>158</sup>People ex rel. Andrews v. Lord, (1861) 9 Mich. 227.

<sup>159</sup>Territorial Board of Education v. Territory of Oklahoma ex rel. Taylor, (1902) 12 Okla. 286, 70 Pac. 792.



Where the removed officer refuses to surrender his office, at least one court has held that the governor cannot have him physically thrown out, but the man in possession of the office is entitled to equitable interference to prevent forcible disturbance except as a result of judicial proceedings.<sup>160</sup> And where a suspended officer resigns during removal proceedings, it has been held that he cannot be immediately reappointed, for that would nullify the removal procedure.<sup>161</sup>

The "due process" clause involves legal doctrines that may affect the removal power. The concept of an office as a form of property has undergone a great change. Originally considered as being a property right, the development has gone all the way to the other extreme in some courts, to the doctrine that an office is in no way property within the meaning of this clause.<sup>162</sup> It would seem that the best doctrine is that enunciated by the Wisconsin court that an office does have a pecuniary value, and that therefore, while there is no tangible property, there is some element which will be protected under the due process clause.<sup>163</sup> The result will be that the person being removed will be entitled to a notification of the charges for which he is being removed, time to prepare an answer, and a hearing.<sup>164</sup>

Aside from this doctrine, there is authority that where the removal can be made by the governor for cause, but the causes are not specified, notice and hearing are not necessary.<sup>165</sup> This may be true even when the causes are specified in the constitution or statute.<sup>166</sup> The power of summary removal is likewise present where the tenure of the officer is not fixed.<sup>167</sup> Some impli-

<sup>160</sup>*Ekern v. McGovern*, (1913) 154 Wis. 157, 142 N. W. 595.

<sup>161</sup>*State ex rel. Childs v. Dart*, (1894) 57 Minn. 261, 59 N. W. 190.

<sup>162</sup>*Attorney General v. Jochim*, (1894) 99 Mich. 358, 58 N. W. 611; *Gray v. McLendon*, (1910) 134 Ga. 224, 67 S. E. 859; *State ex inf. Attorney General v. Hedrick*, (1922) 294 Mo. 21, 241 S. W. 402; *State ex rel. Attorney General v. Hawkins*, (1886) 44 Ohio St. 98, 5 N. E. 228.

<sup>163</sup>*State ex rel. Rodd v. Verage*, (1922) 177 Wis. 295, 187 N. W. 830; *Ekern v. McGovern*, (1913) 154 Wis. 157, 142 N. W. 595; *Fugate v. Weston*, (1931) 156 Va. 107, 157 S. E. 736. And see Jennings, *Removal from Public Office in Minnesota*, (1936) 20 MINNESOTA LAW REVIEW 724-725, 727-728.

<sup>164</sup>*Ekern v. McGovern*, (1913) 154 Wis. 157, 142 N. W. 595; *Fugate v. Weston*, (1931) 156 Va. 107, 157 S. E. 736.

<sup>165</sup>*Trimble v. The People*, (1893) 19 Colo. 187, 34 Pac. 981; *Conklin v. Cunningham*, (1894) 7 N. M. 445, 38 Pac. 170.

<sup>166</sup>*Keenan v. Perry*, (1859) 24 Tex. 253.

<sup>167</sup>*Keenan v. Perry*, (1859) 24 Tex. 253; *State ex inf. Barker v. Crandall*, (1916) 269 Mo. 44, 190 S. W. 889.

cation can be drawn from the fact that a constitutional provision does not mention the necessity for notice and hearing.<sup>168</sup>

There is authority *contra* to the rules set down immediately above. The Colorado court has held there was a necessity for notice and hearing when the causes for removal were specified.<sup>169</sup> When the tenure of office is fixed, the general rule is that the incumbent cannot be summarily removed.<sup>170</sup> And some courts have decided that notice and hearing are necessary unless the constitution manifestly intends otherwise. The mere omission of the requirement is not sufficient manifestation of intent.<sup>171</sup>

In order to determine who may execute the removal power, it is sometimes necessary to decide what kind of power it is. One answer is that it is judicial in nature because of the action involved in the process.<sup>172</sup> This decision does not, however, prevent the legislature from granting the power to the governor.<sup>173</sup> The Virginia court adds that unless there is a power of review in the courts the governor has been given a judicial function.<sup>174</sup>

Other courts classify the removing power as hybrid, quasi- or semi-judicial.<sup>175</sup> The effect of this decision seems to be similar to that of the doctrine that the power is judicial. And, finally, there are those courts that hold the power of removal to be essentially executive in nature,<sup>176</sup> in which case, of course, there is no doubt as to the legislature's power to give it to the governor if he does not already have it.

Closely related to all these angles of the removal power is the

<sup>168</sup>State ex rel. Ulrick v. Sanchez, (1927) 32 N. M. 265, 255 Pac. 1077; State ex rel. Holland v. Ledwith, (1872) 14 Fla. 220; State ex rel. Hatton v. Joughin, (1931) 103 Fla. 877, 138 So. 392.

<sup>169</sup>Benson v. People ex rel. McClelland, (1897) 10 Colo. App. 175, 50 Pac. 212; See also State ex rel. McReany v. Burke, (1894) 8 Wash. 412, 36 Pac. 281.

<sup>170</sup>Lease v. Freeborn, (1894) 52 Kans. 750, 35 Pac. 817.

<sup>171</sup>Dullam v. Willson, (1894) 53 Mich. 392, 19 N. W. 112.

<sup>172</sup>State v. Pritchard, (1873) 36 N. J. L. 101; State ex rel. Kinsella v. Eberhart, (1911) 116 Minn. 313, 133 N. W. 857; Randall v. The State, (1863) 16 Wis. 340; Dullam v. Willson, (1894) 53 Mich. 392, 19 N. W. 112.

<sup>173</sup>South v. Commissioners of Sinking Fund, (1887) 86 Ky. 186, 5 S. W. 567; McCran v. Gaul, (1920) 95 N. J. L. 393, 112 Atl. 341.

<sup>174</sup>Fugate v. Weston, (1931) 156 Va. 107, 157 S. E. 736.

<sup>175</sup>Ekern v. McGovern, (1913) 154 Wis. 157, 142 N. W. 595; Germaine v. Governor, (1913) 176 Mich. 585, 142 N. W. 738; State ex rel. Weke v. Frazier, (1921) 47 N. D. 314, 182 N. W. 545.

<sup>176</sup>State ex inf. Attorney General v. Hedrick, (1922) 294 Mo. 21, 241 S. W. 402; In the matter of Guden, (1902) 171 N. Y. 529, 64 N. E. 451; Cameron v. Parker, (1894) 2 Okla. 277, 38 Pac. 14; Johnson v. Laffoon, (1935) 257 Ky. 156, 77 S. W. (2d) 345; State ex rel. Matson v. O'Hern, (Mont. 1937) 65 P. (2d) 619.

question of the power of the courts to review the governor's action. Several judges have held that where the power is to remove for cause, without the causes being specified, the governor's power is exclusive and the courts cannot review his actions.<sup>177</sup> The same result has occurred even when the causes of removal are specified.<sup>178</sup> Likewise, where the case is brought against the governor, and the court decides that it cannot issue an order against the governor, the governor's actions cannot be reviewed, though they can be reviewed if the case is between two individuals where one of them asserts some rights by virtue of some executive action.<sup>179</sup> These decisions have all involved statutory clauses, but the cases concerning constitutional clauses are in accord.<sup>180</sup> An additional doctrine is that as to the question of the presence of jurisdictional facts the court does have the power of review, as it has also as to their sufficiency, though it cannot review the sufficiency of the evidence that supports these facts.<sup>181</sup>

An examination of the various constitutional provisions and judicial decisions which have been described shows that the governor of a state is not a chief executive to the same extent that the president of the United States is a chief executive. It is true that the governor is generally given this description in the state constitution, but a comparison of the extent of his powers of appointment and removal with the extent of those of the president shows conclusively his more restricted position.

In the first place, the constitutional and statutory provisions themselves do not give to the governor the appointing and remov-

<sup>177</sup>*Trimble v. The People*, (1893) 19 Colo. 187, 34 Pac. 981; *Gray v. McLendon*, (1910) 134 Ga. 224, 67 S. E. 859; *State ex inf. Barker v. Crandall*, (1916) 269 Mo. 44, 190 S. W. 889.

<sup>178</sup>*State ex rel. Attorney General v. Lamantia*, (1881) 33 La. Ann. 446; *State and Di Carlo v. Abbott*, (1889) 41 La. Ann. 1096, 6 So. 805; *Bynum v. Strain*, (1923) 95 Okla. 45, 218 Pac. 883.

<sup>179</sup>*Germaine v. Governor*, (1913) 176 Mich. 585, 142 N. W. 738; *State ex rel. Rawlinson v. Ansel*, (1906) 76 S. C. 395, 57 S. E. 185.

<sup>180</sup>*State ex rel. Holland v. Ledwith*, (1872) 14 Fla. 220; *In the matter of Guden*, (1902) 171 N. Y. 529, 64 N. E. 451; *Wilcox v. People ex rel. Lipe*, (1878) 90 Ill. 186; *State ex rel. Ulrick v. Sanchez*, (1927) 32 N. M. 265, 255 Pac. 1077.

<sup>181</sup>*State ex rel. Bridges v. Henry*, (1910) 60 Fla. 246, 53 So. 742; *State ex rel. Hatton v. Joughin*, (1931) 103 Fla. 877, 138 So. 392; *State ex rel. Hardie v. Coleman*, (1934) 115 Fla. 119, 155 So. 129. See annotation of this last case in 92 A. L. R. 989; *State ex rel. Attorney General v. Hawkins*, (1886) 44 Ohio St. 98, 5 N. E. 228; *Ekern v. McGovern*, (1913) 154 Wis. 157, 142 N. W. 595; *State ex rel. Churchill v. Hay*, (1895) 45 Neb. 321, 63 N. W. 821; *People ex rel. Johnson v. Coffey*, (1927) 237 Mich. 591, 213 N. W. 460; *State ex rel. Kinsella v. Eberhart*, (1911) 116 Minn. 313, 133 N. W. 857.

ing power that the president enjoys. The president is given the power to appoint all officers, by and with the advice and consent of the senate, with the exception of the so-called "inferior" officers.<sup>182</sup> No governor has so extensive a power.

So far as explicit constitutional provisions for the removal of officers are concerned, the governors seem to have been given more power than the president, for the United States constitution gives to the latter no specific removal power at all, but some state constitutions do give the power of removal, generally for certain specified causes, to the governor. However, this seeming disparity of powers between the president and the governors has been reversed as a result of judicial decisions.

Court decisions, both in the case of appointment and removal, have tended to enlarge the powers of the president and to restrict those of the governors. Many examples of this narrow construction of the governor's appointing power have been examined in this study, and a few of them may be mentioned. The interpretation of the holdover provision, decisions as to the length of the term of the governor's appointee to fill a vacancy, and the refusals to allow the governor to make appointments when an officer dies shortly before an election show this tendency in the case of the appointing power.

It is not fair to leave this assertion without modifying it by showing that there have also been decisions which extend the governor's power. The minority doctrine that appointment is executive by nature, the interpretation of the word "vacancy" in relation to newly created offices, and some decisions on the power of the governor to appoint individuals whom the senate has rejected show some liberality toward the governor's appointing power by the courts.

In the case of the removal power, the United States courts and the state courts have traveled in opposite directions. Despite the fact that the United States constitution gives to the president no power to remove officers, the supreme court has decided that a very extensive removal power can be implied,<sup>183</sup> and is beyond legislative curtailment, though this latter has been somewhat modified by a more recent decision.<sup>184</sup> But a majority of the state

<sup>182</sup>United States, constitution, art. II, sec. 2, clause 2.

<sup>183</sup>Myers v. United States, (1926) 272 U. S. 52, 47 Sup. Ct. 21, 71 L. Ed. 160.

<sup>184</sup>Humphrey's Executor (Rathbun) v. United States, (1935) 295 U. S. 602, 55 Sup. Ct. 869, 79 L. Ed. 1611.

courts has decided just the opposite, holding that the power of removal cannot be implied from any of the elements depended on by the United States supreme court. In addition, when a state constitution has granted the power of removal to the governor, the court of that state has generally given the provision a very strict construction. But here, too, there are exceptions to this generalization, as in the decisions concerning the power of suspension, and the power of the courts to review the actions of the governor.

Although this is primarily a study of the constitutional power of the governor, it is advisable to call attention to the effects of statutes on the conclusions which have been reached. The general result of the statutes concerning appointment and removal has been to extend the powers of the governor. Many of the reorganizations of state governments which have taken place during the past few years have been brought about by statute, and one common feature of these statutes has been a greatly increased centralization of authority in the governor. This has meant giving him larger and more extensive powers of appointment and removal. The courts do not find so much difficulty in broadening statutory rules as they do in broadening constitutional provisions, and it is probably through the former that a further extension of the governor's powers will come.

Finally, the manner in which the growth of the governor's position is mirrored in the development of his powers of appointment and removal is interesting. As can be seen from the dates of the cases, many of the decisions which have been discussed were rendered during the period when the general policy was to restrict the powers of that office. But the newer constitutions and the later decisions show a tendency to extend the powers of the governor. Judicial construction of these powers is still strict, but it is less strict than formerly, and this tendency, together with those of the constitution and statute makers will probably result in the governor becoming more truly a chief executive than he has been in the past.