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The Power of the Governor to Revoke a Call for an Extraordinary Session of the General Assembly

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manufactured by Churchill Downs, Inc."[9] The only mention of anything that approached an injury to substance was a slight inconvenience in the mixing of the mail and freight of the two companies. In view of these facts this case must stand for the proposition that a name is to be protected as a name, and that it is not necessary to show an injury to substance.

ANDREW CLARK.

THE POWER OF THE GOVERNOR TO REVOKE A CALL FOR AN EXTRAORDINARY SESSION OF THE GENERAL ASSEMBLY

The governor of this state does not have the power to adjourn the legislature where it has convened and organized, except in certain emergencies as provided for by the constitution.[1] Nor has the legislature the power to convene itself in extraordinary session in the absence of a constitutional provision to that effect.[2]

The power of the governor to revoke a call for a special session of the legislature previous to the organization of such session is a more complicated question and has only been adjudicated twice in the United States.

The Supreme Court of Nebraska in the case of People v. Parker,[3] in construing a constitutional provision[4] vesting in the governor the power to call an extraordinary session of the legislature, held in a two-to-one opinion that the governor could revoke such call in his discretion, prior to the meeting and organization of the legislature. The Court of Appeals of Kentucky in the case of Royster, Clerk v. Brock,[5] by a four-to-three opinion reached just the opposite result in construing a constitutional provision[6] similar to that the Nebraska Court had under consideration.

The constitutions of both Nebraska and Kentucky specifically vest in the governor the power of convening an extraordinary session of the general assembly. Neither constitution specifically provides for the revocation of such call. The Nebraska Court finds that the chief executive, having the authorized power to convene the general assembly, has the implied power to revoke such call. The Kentucky Court finds that no such implied power exists. The majority opinion in the Nebraska Court and the minority opinion in the Kentucky Court indicate that the fact that the governor is constituted chief executive of the State should have some weight in determining whether such power could be exercised. The majority of the Kentucky Court, on the

[9] Churchill Downs Distilling Co. v. Churchill Downs, Inc., 262 Ky. 567 at 575, 90 S. W. (2d) 1041 at 1045 (1936).
[1] Taylor v. Beckham, 108 Ky. 278, 56 S. W. 177.
[2] 263 P. 635, 56 A. L. R. 706.
[3] People v. Parker, 3 Neb. 409, 19 Am. Rep. 634.
[4] Neb. Const., Sec. 9.
[5] 258 Ky. 146, 79 S. W. (2d) 707.
[6] Ky. Const., Sec. 80.

contrary, are of the opinion that the fact that the governor is constituted the chief executive has no weight in determining the question; saying in this respect: "The right to convene the assembly does not inhere to the office of governor, nor is it a necessary incident to the office. The statement of the Kentucky Court seems to be correct, both from a historical standpoint and the interpretation placed on the inherent powers of the chief executive by the courts, or as stated in Richardson v. Young:[7] "The chief executive has no perogative powers as in monarchial governments but only such as are vested in him by the fundamental law." It seems to be a sound conclusion to state that the constitutional provision making the governor the chief executive confers on him no specific power to convene or revoke a special session of the legislature, although that office seems to be the natural repository of the power to issue a call for a special session as shown by the unanimity by which the governor is given such power under the various state constitutions.

In fact, under rules of constitutional construction, there is no occasion to construe the provision constituting the governor the chief executive with the provision vesting in him as governor the right to call a special session of the legislature, as they do not relate to the same subject or make different provisions concerning the same subject.

In the matter of deciding whether the Kentucky Court reached the correct decision in this case certain rules for the construction of constitutional provisions are of little or no benefit. For instance there is no basis historically for vesting in the governor such power, nor is there the slightest trace of contemporaneous construction vesting in the governor such power.

Nor does it seem that the cases cited in the opinion of the Kentucky Court denying the governor the power to revoke or recall his signature to a bill, or denying him the right to remove an officer in certain cases, or denying him the right to revoke a pardon, are of any material benefit in arriving at the correct solution of the problem involved, except insofar as they show the strictness of the courts in construing constitutional provisions, and their averseness to extending the power of the governor by implication. The holding in those cases was reached through the construction of constitutional provisions wholly dissimilar from the one the court had under consideration in this case. In those cases the act of the governor was considered final and irrevocable because the rights of third persons had vested previous to the attempted revocation. Our question here is whether the act is final and irrevocable. If it is, the problem is solved.

As stated, since many of the usual rules of arriving at the proper construction of this constitutional provision have no application, resort must be had to the words of the provision itself and the purpose of the people in formulating and adopting the provision, as indicated by those words, in order to reach the proper decision.

[7] 122 Tenn. 471, 125 S. W. 664, 669.

If we are correct in the premise that the governor has no inherent power to call a special session of the general assembly, the question narrows down to whether the express grant of power to call an extraordinary session carries with it, by implication the power to revoke such a call before it is acted upon; or in short, whether the power of the governor is exhausted when the call is issued. The Kentucky Court in this respect held[8] that the governor exhausted his power when he completed the last act which he had the authority to perform, i. e., the issuance of the call; that his right to call the general assembly is a delegated and limited power which derives from the constitution, and he can act only in the specified manner and can exercise only the power granted to him.

In the case of Field v. People,[9] the Illinois Court well stated the rule for the determination of constitutional powers by implication, saying: "When the constitution gives a general power, or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other. The implication under this rule, however, must be a necessary, not a conjectural or argumentative one." The courts seem to give the word "necessary", as used in the rule as laid down by the Illinois Court for the determination of powers by implication, great flexibility of meaning, ranging from mere convenience to that which is indispensable to the accomplishment of a purpose.[10]

If the purpose to be accomplished is merely the promulgation of the call for a special session of the legislature, the governor can clearly accomplish that purpose even though the power to revoke the proclamation is denied him. To hold that this is the purpose of the power does not seem to be reasonable. The evident purpose was to vest in the governor the power to call a special session in situations where the governor deemed an emergency existed that required action on the part of the legislature. If the emergency ceased to exist before the call was acted upon is it reasonable to assume that the framers of the constitution intended the mere issuance of the call to be a final and irrevocable act? As pointed out in the minority opinion of the Kentucky Court, an emergency could exist at the time of the call and through unforeseen events not exist before the convention of the legislature. For instance a previous legislature had enacted a tax measure and the collection of the tax was prevented by the taxpayers through an injunction granted on the theory that the measure was unconstitutional. This created a situation where additional revenue was deemed by the governor to be essential, and he issues a call for a special session to enact a revenue measure. After the call and before it is acted upon the Supreme Court dissolves the injunction and declares the tax measures valid, thereby relieving the emergency and

[8] Note 5, *supra.*
[9] 2 Scam. (3 Ill.) 79.
[10] 43 Ill. 307; 19 So. 202; 4 Wheat. 414.

making a special session of the legislature altogether unnecessary. Even so under the decision of the Kentucky Court the legislature would have to convene as the governor when he issued the call performed the last act he was authorized to perform.

Suppose the governor decides to issue a call for a special session and accordingly has the proper proclamation drawn up and executes it. Later in the day he learns that he had not been correctly informed as to the true status of the matter for which the proclamation was to issue and therefore decides not to issue the call. However, he leaves the proclamation lying on his desk and his secretary, not being advised, sends the proclamation out. Can the governor revoke the call here? Presumably not under the decision of the Kentucky Court.

The Kentucky Court, although they do not base their decision upon it, present the theory that if the governor was allowed to revoke the call, even though urgent reasons existed for such call, he might be subjected to such pressure by interests that would be affected thereby that he would cancel the call. This argument would be just as effective the other way. That is the governor might be induced by special interests to convene the legislature, and upon sane reflection decide that a special session would be an unnecessary expense. However, this is all beside the point for if the power exists the fact that it might be abused would not deprive the governor of the power.

Of course occasions for the exercise of such power seldom arise, but there are many instances that could occur in which on the basis of reason the governor should have such power, and it seems to me that in many instances such power would be necessary for the governor to effectually carry out the power granted to him. The court in arriving at the proper construction of a section of the constitution must consider the reason for and the purpose of its adoption.[11] There is no way of determining the purpose of the adoption of this provision except through reasoning from the provision itself, but it should be given a practical interpretation,[12] rather than an impracticable one.

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POWER OF APPOINTMENT—APPOINTED PROPERTY AS ASSETS OF THE DONEE

A devised Blackacre to B for life with an express provision giving B a right to dispose of Blackacre by will. In the event B failed to dispose of Blackacre by will A made other provisions for its disposition. B devised Blackacre to C for life with remainder to C's issue. On her death B's creditors seek to subject Blackacre to the satisfaction of their debts. In the case of St. Matthews Bank v. De Charette,[1] the Kentucky Court held that B's creditors had no claim to Blackacre, even though B was given a general power of appointment by will and had exercised that power in favor of volunteers, viz., C and C's issue.

[11] 153 Ky. 604, 156 S. W. 154, 44 L. R. A., N. S. 989.
[12] 234 Ky. 473, 28 S. W. (2d) 745.
[1] 259 Ky. 802, 83 S. W. (2d) 471 (1935).