A TREATISE

ON

THE LAW

OF

PUBLIC OFFICES AND OFFICERS

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BY

FLOYD R. MECHEM

AUTHOR OF "A TREATISE ON THE LAW OF AGENCY"

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CALLAGHAN AND COMPANY
1890

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TO THE

Hon. FRANK A. HOOKER

JUDGE OF THE FIFTH JUDICIAL CIRCUIT

OF MICHIGAN

AN ABLE JUDGE, AN HONEST MAN AND A VALUED FRIEND

THIS VOLUME IS RESPECTFULLY DEDICATED

not alone as a token of his great public worth,
but also in grateful remembrance of his
continued kindness, encouragement and friendship to
the writer

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PREFACE.

The exceedingly kind reception given to the writer's previous work upon the law of Agency has encouraged him to offer also the following, which is, in some respects, a companion volume to the other.

While engaged upon the other work, the writer was constantly impressed with the great number of important questions, similar to those he was then considering, but relating to the law of public agents or officers, and which had never been fully treated. A few of them had, it is true, been made the subject of special treatises, such as the subjects of elections, sheriffs, official bonds, and the application of extraordinary remedies like mandamus, quo warranto and injunction. A few others had been incidentally considered in relation to other subjects. There was still, however, a large class of important questions which had never been specially considered in any treatise, and no attempt had ever been made by any author, English or American, so far as the writer is aware, to give a connected and continuous discussion of the whole subject. There seemed to him, therefore, to be a real need for such a book, and he has attempted to supply it.

He has endeavored to begin at the beginning, showing what are public offices and who are public officers, and to give in consecutive chapters a view of the whole field, showing who are eligible to public office; how they may be elected or appointed, and qualified; how they may surrender, abandon or forfeit their rights and authorities; what authority they possess; how they should execute it; what liabilities attach to their acts; what rights they possess and what rights are possessed by the public; and finally by what remedies their duties and liabilities may be enforced.

The work is divided into five parts or books, and each book is subdivided into consecutive chapters. The arrangement adopted

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may not be the best possible, but it seemed to the writer to be convenient and reasonably adapted to the purpose in view. No little difficulty has been experienced in determining the proper limits to be fixed to the work, and it may be that others would not agree with those upon which the writer has finally determined.

In a few cases the subject has run so closely parallel to that of agency, that the writer has reproduced a few sections from his work upon that subject, while the chapters upon the liability of public officers to private actions are an enlargement of the sections devoted to that subject in the former work. With these exceptions, the contents of this work are entirely new.

In this work the writer has pursued the plan, which has been generally approved in the other, of giving in the text or notes quite full illustrations and quotations from leading and characteristic cases upon the subject. He has also added parallel references to the American Decisions, American Reports, and American State Reports, as well as to the various Reporters. Particular attention has been given to the latest cases, and these, it is believed, have been quite fully cited.

In treating certain of the special questions, the writer has derived much assistance from the previous labors of those who have devoted treatises to what he has been compelled to compress into chapters, and to such treatises the reader must be referred for fuller discussions. These are particularly Judge McCrary's standard work upon Elections, Mr. High's excellent treatise upon Extraordinary Legal Remedies, and Judge Cooley's valuable work on Torts.

The writer desires also to acknowledge his indebtedness to his publishers, Messrs. Callaghan & Co., of Chicago, who, in this instance as in the former, have spared no pains that the book might not fail for want of proper mechanical execution, and who have treated the writer with uniform courtesy and consideration.

Hoping, therefore, that this volume may be found not less worthy than the other of the generous judgment of the profession, the writer submits it to their consideration.

FLOYD R. MECHEM.

Detroit, December 1, 1889.

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THE LAW

OF

PUBLIC OFFICES AND OFFICERS.

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THE LAW

OF

PUBLIC OFFICES AND OFFICERS.

BOOK I.

OF THE OFFICE AND THE OFFICER; HOW OFFICER CHOSEN AND QUALIFIED.

CHAPTER I.

DEFINITIONS AND DIVISIONS.

§ 1. Public Office and Officer defined.
2. How Office differs from Employment.
3. Office differs from a Contract.
4. Office involves Delegation of sovereign Functions.
5. Office is created by Law and not by Contract.
6. Oath a usual but not a necessary Criterion.
7. Salary or Fees not a necessary Criterion.
8. Duration or Continuance as Criterion.
9. Scope of Duties as a Criterion.
10. Designation of Place as "Office" as a Criterion.
§ 11. Authority to appoint to Office constitutes a public Officer.
12. Authentication by chief Executive not necessary.
13. Lucrative Office — Office of Profit.
14. Office coupled with an Interest.
15. Honorary Office.
16. Office of Trust.
17. Place of Trust or Profit.
18. Executive Officers.
19. Legislative Officers.
20. Judicial Officers.
21. Ministerial Officers.
22. Military Officers.
23. Naval Officers.
24. Civil Officers.
25. Officer *de Jure*.
26. Officer *de Facto*.

§ 1. **Public Office and Officer defined.**—A public office is the right, authority and duty, created and conferred by law, by

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which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.[1] The individual so invested is a public officer.[2]

[1] An office, says BLACKSTONE, is "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging." 2 Com. 36.

"An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer." COOLEY, J. in Throop v. Langdon, 40 Mich. 673.

"Lexicographers generally define office to mean public employment, and I apprehend its legal meaning to be an employment on behalf of the government in any station or public trust, not merely transient, occasional or incidental. In common parlance, the term 'office' has a more general signification. Thus we say the office of executor or guardian; or the office of a friend." PLATT, J. in Matter of Oaths, 20 Johns. (N. Y.) 492.

"Whether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold, or to be in, office." DANFORTH, J. in Rowland v. Mayor, 83 N. Y. 376.

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties." SWAYNE, J. in United States v. Hartwell, 6 Wall. (U. S.) 385, 393.

For other definitions and illustrations see: Hamlin v. Kassafer, 15 Ore. 456, 3 Am. St. Rep. 176; State v. Stanley, 66 N. C. 59, 8 Am. Rep. 488; where PEARSON, C. J., says "A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This we consider to be the true definition of a public officer in its original broad sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the State;" Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169; Matter of Dorsey, 7 Port. (Ala.) 293; Miller v. Supervisors, 25 Cal. 98; Wood's Case, 2 Cow. (N. Y.) 29, note; People v. Hayes, 7 How. (N. Y.) Pr. 248; People v. Stratton, 28 Cal. 388; State v. Valle, 41 Mo. 31; Eliason v. Coleman, 86 N. C. 235; Opinion of Judges, 3 Greenl. (Me.) 481; Hill v. Boyland, 40 Miss. 618; Hall v. State, 39 Wis. 85; People v. Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Henly v. Mayor, 5 Bing. 91; Foltz v. Kerlin, 105 Ind. 221, 55 Am. Rep. 197; Smith v. Moore, 90 Ind. 294; People v. Common Council, 77 N. Y. 503, 33 Am. Rep. 659; Commonwealth v. Gamble, 62 Penn. St. 343, 1 Am. Rep. 422.

[2] "The term 'office,'" says ALLEN, J. in Matter of Hathaway, 71 N. Y. 238, 243, "has a very general signification, and is defined to be that function by virtue whereof a person has some employment in the affairs of

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As here used, the word office is to be distinguished from its application to such positions as are at most *quasi* public only, as the charge or office of an executor, administrator or guardian, and from the offices of private corporations.

§ 2. **How Office differs from Employment.**—A public office differs in material particulars from a public employment, for, as was said by Chief Justice MARSHALL, "although an office is an employment, it does not follow that every employment is an

another; and it may be public, or private, or *quasi* public, as exercised under public authority, but yet affecting only the affairs of particular individuals. The presidency of a bank is spoken of as an office, and a trustee of a private trust is, in ordinary parlance, said to hold the office of trustee; and the term office is applied to an executor or guardian, etc. A referee, for the trial and decision of actions, is an officer exercising judicial powers under public authority. So receivers appointed by the courts, and commissioners for the appraisal of damages for lands taken for public use, are officers; and strictly and technically exercise the functions of an office. But they are not 'public officers' within the inhibition of the Constitution (which prohibited judges from exercising "any power of appointment to public office)." * * * While the duties of the class of officers last named, referees, etc., were of a public nature, and in a sense concerned the public and the administration of justice, and were exercised under authority derived from the State directly, and not from individuals, still they related especially to particular individuals and a specific litigation; and their authority is restricted to specific matters, and no general powers are conferred upon them authorizing to act in respect to all like cases, or in any case or matter other than specified and named in their appointment. They owed no duty to the public, and could perform no service for the public. The trust they exercise and the duties they perform are 'transient and occasional.' They are not called upon to take the constitutional oath of office, and are not entitled to the emoluments of the office, except such as grow out of and pertain to the duties actually performed. Judge PLATT defines the legal meaning of the term 'office' to be 'an employment on behalf of the government in any station or public trust, not merely transient, occasional or incidental.' (*In re* Attorneys, etc., 20 Johns. (N. Y.) 492). When 'public' is the prefix of 'officer,' the definition is very apt, and clearly and with precision marks the limit of the constitutional prohibition. * * * 'Public office,' as used in the constitution, has respect to a permanent trust to be exercised in behalf of the government, or of all citizens who may need the intervention of a public functionary or officer, and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law."

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office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer." [1]

"We apprehend that the term 'office,'" said the judges of the supreme court of Maine, "implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments and sometimes to another; still it is a legal power which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the exercise of any standing laws which are considered as rules of action and guardians of rights." [2]

"The officer is distinguished from the employee," says Judge COOLEY, "in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or non-feasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases, other distinctions will appear which are not general." [3]

§ 3. **Office differs from a Contract.**—An office also differs

[1] United States *v.* Maurice, 2 Brock. (U. S. C. C.) 96.

[2] Opinion of Judges, 3 Greenl. (Me.) 481.

[3] Throop *v.* Langdon, 40 Mich. 673, 682.

"An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power or for a fixed term with a successor elected or appointed. An employment is an agency for a temporary purpose, which ceases when that purpose is accomplished." Cons. Ill., 1870, Art. 5, § 24.

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from a contract, for, as has been said, "the latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."[1]

§ 4. **Office involves Delegation of Sovereign Functions.**—The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public;—that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.[2]

§ 5. **Office is created by Law and not by Contract.**—In distinguishing between an office and an employment, the fact that the powers in question are created and conferred by law, is an important criterion. For though an employment may be created by law, it is not necessarily so, but is often, if not usually, the creature of contract. A public office, on the other hand, is never conferred by contract, but finds its source and limitations in some act or expression of the governmental power. Where, therefore, the authority in question was conferred by a contract, it must be regarded as an employment and not as a public office.[3]

[1] United States *v.* Hartwell, 6 Wall. (U. S.) 385, 393; United States *v.* Maurice, 2 Brock. 103; Matter of Oaths, 20 Johns. (N. Y.) 493; Vaughn *v.* English, 8 Cal. 39; Sanford v. Boyd, 2 Cranch. (U. S. C. C.) 78.

[2] Bunn *v.* People, 45 Ill. 397; Eliason *v.* Coleman, 86 N. C. 235; United States *v.* Lockwood, 1 Pin. (Wis.) 359; Commonwealth *v.* Swasey, 133 Mass. 538; Doyle *v.* Aldermen, 89 N. C. 133, 45 Am. Rep. 677; Opinion of Judges, 3 Greenl. (Me.) 403; Miller *v.* Supervisors, 25 Cal. 98; State *v.* Kirk, 44 Ind. 401; 15 Am. Rep. 239; Hill *v.* Boyland, 40 Miss. 618; Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; People *v.* Nichols, 52 N. Y. 478, 11 Am. Rep. 734; United States *v.* Germaine, 99 U. S. 508; United States *v.* Smith, 124 U. S. 525; United States *v.* Mouat, 124 U. S. 303.

[3] Hall *v.* Wisconsin, 103 U. S. 5; United States *v.* Maurice, 2 Brock. (U. S. C. C.) 102; United States *v.* Hartwell, 6 Wall. (U. S.) 385; Brown *v.* Turner, 70 N. C. 93; Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169; Opinion of Judges, 3 Greenl. (Me.)

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§ 6. **Oath a usual but not a necessary Criterion.** — Public officers are usually required by law to take the oath of office, and this fact goes far in determining the character of the duty.[1] But the taking of the oath is not an indispensable criterion and the office may exist without it, for, as has been said, the oath is a mere incident and constitutes no part of the office.[2]

§ 7. **Salary or Fees not a necessary Criterion.** — Like the requirement of an oath, the fact of the payment of a salary or fees may aid in determining the nature of the position, but it is not conclusive, for while a salary or fees are usually annexed to the office, it is not necessarily so.[3] As in the case of the oath, the salary or fees are mere incidents and form no part of the office.[4] Where a salary or fees are annexed, the office is often said to be "coupled with an interest"; where neither is provided for it is a naked or honorary office, and is supposed to be accepted merely for the public good.[5]

§ 8. **Duration or Continuance as Criterion.**—The term office, it is said,[6] embraces the idea of tenure and duration, and certainly a position which is merely temporary and local cannot ordinarily be considered an office.[7] "But," says Chief Justice Marshall,

481; Bunn *v.* People, 45 Ill. 406; People *v.* Nostrand, 46 N. Y. 381.

"Certainly where an individual has been appointed or elected in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public assigned to him by law, he must be regarded as a public officer." JENKINS, J. in Bradford *v.* Justices, 33 Ga. 336.

[1] State *v.* Wilson, 29 Ohio St. 347; Kavanaugh *v.* State, 41 Ala. 399; Lindsey *v.* Attorney General, 33 Miss. 508; Sweeny *v.* Mayor, 5 Daly (N. Y.) 274.

[2] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488; Howerton *v.* Tate, 68 N. C. 547.

[3] As has been seen in the note to § 1, "the right to take the fees and emoluments thereof" constitutes a portion of several of the definitions of an office, but it is not a *sine qua non*.

[4] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488; Howerton *v.* Tate, 68 N. C. 547; State *v.* Kennon, 7 Ohio St. 546; United States *v.* Hartwell, 6 Wall. (U. S.) 385

[5] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488; Throop *v.* Langdon, 40 Mich. 673, 682.

[6] SWAYNE J. in United States *v.* Hartwell, 6 Wall. (U. S.) 385, 393.

[7] United States *v.* Hartwell, 6 Wall. (U. S.) 385; United States *v.* Maurice, 2 Brock. (U. S. C. C.) 103; Bunn *v.* People, 45 Ill. 397; State *v.* Wilson, 29 Ohio St. 347; Hill *v.* Boyland, 40 Miss. 618; United States *v.* Hatch, 1 Pinn. (Wis.) 182; Commonwealth *v.*

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"if a duty be a continuing one, which is defined by rules prescribed by the government and not by contract, which an individual is appointed by government to perform, who enters on the duties pertaining to his station without any contract defining them, if those duties continue though the person be changed,—it seems very difficult to distinguish such a charge or employment from an office or the person who performs the duties from an officer." [1]

At the same time, however, this element of continuance can not be considered as indispensable, for, if the other elements are present "it can make no difference," says PEARSON, C. J., "whether there be but one act or a series of acts to be done,—whether the office expires as soon as the one act is done, or is to be held for years or during good behavior." [2]

§ 9. **Scope of Duties as a Criterion.**—"Any man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits; for it is the duty of his office and the nature of that duty which make him an officer, and not the extent of his authority." [3]

Sutherland, 3 Serg. & R. (Penn.) 149; Sheboygan County *v.* Parker, 3 Wall. (U. S.) 93; People *v.* Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Throop *v.* Langdon, 40 Mich. 673.

So it is said that the term office means "an employment on behalf of the government in any station or public trust, *not merely transient, occasional or incidental.*" *In re* Attorneys, 20 Johns. (N. Y.) 492.

Commissioners appointed for an indefinite time are not public officers. McArthur *v.* Nelson, 81 Ky. 67.

A person employed for a special and single object, in whose employment there is no enduring element, nor designed to be, and whose duties when completed, although years may be required for their performance, *ipso facto* terminate the employment, is not an officer in the sense in which that term is used in the constitution of Illinois. Bunn *v.* People, 45 Ill. 397.

"In every definition given of the word 'office,' the features recognized as characteristic, and distinguishing it from a mere employment, are the manner of appointment, and the nature of the duties to be performed; whether the duties are such as pertain to the particular official designation, and are continuing and permanent, and not occasional or temporary." State *v.* Board of Public Wks., — N. J. —, 17 Atl. Rep. 112.

[1] In United States *v.* Maurice, 2 Brock. (U. S. C. C.) 103, quoted with approval in Bunn *v.* People, 45 Ill. 397.

[2] In State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488. See also Commonwealth *v.* Evans, 74 Penn. St. 124; Vaughn *v.* English, 8 Cal. 39.

[3] Carth. 479; 7 Bac. Abr. 280; State

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§ 10. **Designation of Place as "Office" as a Criterion.**—The fact that the place is designated, in the law providing for its creation, as an *office*, affords some reason for determining it to be such.[1]

§ 11. **Authority to appoint to Office constitutes a public Officer.**—The authority and duty of appointing others to office, of themselves constitute the person vested with that authority and duty a public officer, and it is immaterial that such person is not designated as an officer and takes no oath and receives no fees.[2]

§ 12. **Authentication by chief Executive not necessary.**—Where an individual has been appointed or elected, in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public assigned to him by law, he must be regarded as a public officer, and it can make no difference whether he be commissioned by the chief executive officer with the authentication of the seal of state or not. Where that is given it is but evidence of his title to the office, and this evidence may in some cases be of greater and in others of less solemnity.[3]

§ 13. **Lucrative Office, or Office of Profit.**—An office to which salary, compensation or fees are attached is a lucrative office, or, as it is frequently called, an office of profit.[4] The amount of the salary or compensation attached is not material. The amount attached is supposed to be an adequate compensation and fixes the character of the office as a lucrative one, or an office of profit.[5]

v. Valle, 41 Mo. 31; Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169; Vaughn *v.* English, 8 Cal. 39.

[1] Bradford *v.* Justices, 33 Ga. 332; State *v.* Wilson, 29 Ohio St. 347; United States *v.* Tinklepaugh, 3 Blatchf. (U. S. C. C.) 430.

[2] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488; Hoke *v.* Henderson, 4 Dev. (N. C.) L. 1, 25 Am. Dec. 677; Howerton *v.* Tate, 68 N. C. 547; State *v.* Kennon, 7 Ohio St. 546.

[3] Bradford *v.* Justices, 33 Ga. 332.

[4] Dailey *v.* State, 8 Blackf. (Ind.) 329; State *v.* Kirk, 44 Ind. 401, 15 Am. Rep. 239; State *v.* Vallè, 41 Mo. 29; People *v.* Whitman, 10 Cal. 38; Crawford *v.* Dunbar, 52 Cal. 36; Kerr *v.* Jones, 19 Ind. 351; State *v.* De-Gress, 53 Tex. 387; *In re* Corliss, 11 R. I. 638, 23 Am. Rep 538; Foltz *v.* Kerlin, 105 Ind. 221, 55 Am. Rep. 197.

[5] Dailey *v.* State, 8 Blackf. (Ind.) 329. In this case it is said: "Pay, supposed to be an adequate compensation, is attached to the performance of their duties. We know of no other

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§ 14. **Office coupled with an Interest.**—An office to which a salary or fees are attached is often said to be an office "coupled with an interest." [1]

§ 15. **Honorary Office.**—So an office to which no compensation attaches is frequently called a naked or honorary office, and is supposed to be accepted merely for the public good.[2]

§ 16. **Office of Trust.**—An office whose duties and functions require the exercise of discretion, judgment, experience and skill is an office of trust, and it is not necessary that the officer should have the handling of public money or property, or the care and oversight of some pecuniary interest of the government.[3]

§ 17. **Place of Trust or Profit.**—The term place of trust or profit is frequently used to designate positions which approximate to, but are not strictly offices, and yet occupy the same general level in dignity and importance.[4]

§ 18. **Executive Officers.**—"Executive officers are those whose duties are mainly to cause the laws to be executed." [5]

§ 19. **Legislative Officers.**—"Legislative officers are those whose duties relate mainly to the enactment of laws, such as members of Congress and of the several state Legislatures." [6]

§ 20. **Judicial Officers.**—"Judicial officers are those whose duties are to decide controversies between individuals and accusations made in the name of the public against persons charged with a violation of the law." [7]

test for determining a 'lucrative office' within the memory of the constitution. The lucrativeness of an office—its net profits—does not depend upon the amount of compensation affixed to it. The expenses incident to an office with a high salary may render it less lucrative, in this latter sense, than other offices having a much lower rate of compensation."

[1] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488.

[2] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488.

[3] *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538. See Doyle *v.* Raleigh, 89 N. C. 133, 45 Am. Rep. 677.

[4] See Doyle *v.* Aldermen of Raleigh, 89 N. C. 133, 45 Am. Rep. 677.

[5] Bouvier's Law Dictionary, title "Officer."

[6] Bouvier's Law Dictionary, title "Officer."

[7] Bouvier's Law Dictionary, title "Officer."

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§ 21. **Ministerial Officers.**—"Ministerial officers are those whose duty it is to execute the mandates, lawfully issued, of their superiors." [1]

§ 22. **Military Officers.**—"Military officers are those who have command in the army." [2]

§ 23. **Naval Officers.**—"Naval officers are those who are in command in the navy." [3]

§ 24. **Civil Officers.**—"Any officer who holds his appointment under the government, whether his duties are executive or judicial, in the highest or the lowest departments of the government, with the exception of officers of the army and navy, is a civil officer." [4]

§ 25. **Officer de Jure.**—An officer *de jure* is one who is, in all respects, legally appointed and qualified to exercise the office.[5] The distinction between an officer *de jure*, an officer *de facto*, and a mere intruder, is one of great importance and will be fully considered hereafter. [6]

§ 26. **Officer de Facto.**—"An officer *de facto*," in the comprehensive language of Chief Justice BUTLER of Connecticut, "is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:—

First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be;

Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some

[1] Bouvier's Law Dictionary, title "Officer."

[2] Bouvier's Law Dictionary, title "Officer."

[3] Bouvier's Law Dictionary, title "Officer."

[4] Rawle Const. 213; Story Const. § 790.

[5] Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574.

[6] See *post*, § 317.

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precedent requirement or condition, as to take an oath, give a bond, or the like;

Third, under color of a known election or appointment, void, because the officer was not eligible or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public;

Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."[1]

The full discussion of this question is reserved for a subsequent section.[2]

[1] In State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

[2] See *post*, § 317.

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CHAPTER II.

WHO ARE PUBLIC OFFICERS.

§ 27. Purpose of this Chapter.
28. Assessors.
29. Attorneys at Law.
30. Attendants upon Courts.
31. Clergymen.
32. Clerks.
33. Collectors.
34. College Professors.
35. Commissioners.
36. Contractors.
37. Court Crier.
38. Deputies.
39. Health Officers.
40. Judges and Justices.
41. Mail Carriers.
42. Medical Superintendent.
43. Members of Municipal Boards and Bodies.
44. Messengers.
45. Merchant Appraisers.
46. Navy Officers.
47. Notary Public.
48. Pension Agents.
49. Pilots.
50. Postmaster.
51. Public Printer.
52. Receivers.
53. Referees.
54. Representatives in Legislatures.
55. School Officers.
56. Selectmen.
57. Special Commissioners.
58. State and other Treasurers.
59. Surgeons.
60. Superintendents of Canals.
61. Trustees of State Institutions.
62. Watchmen of Public Buildings.

§ 27. **Purpose of this Chapter.**— Having in the preceding chapter, ascertained the definitions, divisions and distinctions which govern this question, it will be now attempted to show, by practical illustrations, how they have been applied, particular reference being paid to those cases which lie upon debatable or doubtful ground.

§ 28. **Assessors.**—Assessors of taxes are independent public officers with duties prescribed by law.[1]

§ 29. **Attorneys at Law.**— "An attorney at law," says GRAY, C. J.,[2] "is not indeed, in the strictest sense, a public officer. But he comes very near it. As was said by Lord Holt,[3] 'the office

[1] Lorillard v. Town of Monroe, 11 N. Y. 392, 62 Am. Dec. 120.

[2] In Robinson's case, 131 Mass. 376, 41 Am. Rep. 239. See also *Ex parte* Yale, 24 Cal. 241, 85 Am. Dec. 62, to like effect.

[3] White's case, 6 Mod. 18.

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of an attorney concerns the public, for it is for the administration of justice.'" And RYAN, C. J., says "that attorneys and counsellors of a court, though not properly *public* officers are *quasi* officers of the State whose justice is administered by the court." [1] In a few cases, however, they have been held to be public officers.[2] An attorney at law does not hold a lucrative office nor an office of profit and emolument under the government.[3]

§ 30. **Attendants upon Courts.**— Whether attendants upon courts are public officers is a question upon which there has been a difference of opinion, and one to be determined largely by reference to the duties involved and by a construction of the particular statutes creating them. In some cases such attendants have been spoken of as mere servants of the court,[4] but in certain later cases, it has been held that an attendant upon a court whose duty it is to be present at its sittings, to execute its commands, secure order and attend on juries, is a public officer.[5]

§ 31. **Clergymen.**— A clergyman in the administration of marriage is a public civil officer, and his acts in the celebration of marriage are admissible as *prima facie* evidence of his official character.[6] But the office of a clergyman is a merely spiritual or ecclesiastical one where no temporal right, such as the enjoyment of an endowment or emolument, is attached to it; and the wrongful exclusion from such an office does not involve any legal right of which a court of law can take cognizance.[7] Where

[1] In matter of Mosness, 39 Wis 509, 20 Am Rep 55. See also, Bradley's case, 7 Wall. (U. S.) 364, 378, 379; Thomas *v.* Steele, 23 Wis. 207; Cothren *v.* Connaughton, 24 Wis. 134; Austin's case, 5 Rawle (Penn.) 191, 28 Am. Dec. 657.

[2] Wood's case, 2 Cow. (N. Y.) 29, note; Seymour *v.* Ellison, 2 Cow. (N. Y.) 29; Matter of Wood, 1 Hopk. Ch. (N. Y.) 7; Richardson *v.* Brooklyn, &c. R. R. Co. 22 How. Pr. (N. Y.) 368. But see Matter of Oaths, 20 Johns. (N. Y.) 492; Matter of Dorsey, 7 Port. (Ala.) 293.

[3] Leigh's case, 1 Munf. (Va.) 468, 483.

[4] See Sweeney *v.* Mayor, 58 N. Y. 625; Holley *v.* Mayor, 59 N. Y. 166; Brennan *v.* Mayor, 62 N. Y. 365; Wines *v.* Mayor, 9 Hun (N. Y.) 659; Rowland *v.* Mayor, 44 N. Y. Super. Ct. 559.

[5] Rowland *v.* Mayor, 83 N. Y. 372; Moser *v.* Mayor, 21 Hun (N. Y.) 163.

[6] Goshen *v.* Stonington, 4 Conn. 209, 10 Am. Dec. 121.

[7] Union Church *v.* Sanders, 1 Houston (Del.) 100, 63 Am. Dec. 187.

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any temporal right is attached, however, which is affected by such exclusion, a legal right is involved, and where no other adequate remedy is furnished, *mandamus* will lie to restore him to his office.[1]

§ 32. **Clerks.**—A clerk in the office of an assistant treasurer of the United States, appointed by the assistant treasurer with the approbation of the secretary of the treasury pursuant to law and whose compensation is fixed by law and whose duties are continuing and permanent, is a public officer.[2] A clerk of the fractional currency counter in the treasury department appointed with the approbation of the secretary and charged with the safekeeping of public funds is an officer of the United States.[3]

A clerkship in the treasury department and one in the attorney-general's office, are offices, within a provision forbidding one person from drawing the salary of two different offices.[4] A clerk in the office of the secretary of state is an officer,[5] and so is an assistant clerk of the board of aldermen of New York city, appointed by authority of a statute.[6]

A paymaster's clerk, appointed by a paymaster in the navy, with the approval of the secretary of the navy, but there being no statute authorizing the secretary of the navy to appoint such a clerk, nor any act requiring his approval of such an appointment, is not an officer of the United States;[7] nor is a clerk of the collector of customs, holding his position at the will of the latter and discharging only such duties as may be assigned to him by that officer.[8]

A clerk of the United States district court is an "inferior"

[1] Union Church *v.* Sanders, 1 Houston (Del.) 100, 63 Am. Dec. 187; Runkel *v.* Winemiller, Gen'l Ct. 4 H. & McH. (Md.) 429, 1 Am. Dec. 411.

[2] United States *v.* Hartwell, 6 Wall. (U. S.) 385.

[3] United States *v.* Bloomgart, 2 Ben. (U. S. D. C.) 356. But see United States *v.* Smith, 124 U. S. 525; United States *v.* Mouat, 124 U. S. 303.

[4] Talbot *v.* United States, 10 Ct. of Cl. 426.

[5] Vaughn *v.* English, 8 Cal. 39.

[6] Collins *v.* Mayor, 3 Hun (N. Y.) 680.

[7] United States *v.* Mouat, 124 U. S. 303.

[8] United States *v.* Smith, 124 U. S. 525.

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officer;[1] but the enrolling clerk of the house of representatives of a state is not a public officer.[2]

The chief clerk in the office of the assessor of the city of Detroit was held not to be a public officer.[3]

§ 33. **Collectors.**—Collectors of taxes are independent public officers, whose duties are prescribed by law.[4]

§ 34. **College Professors.**—A professor in a state university is not a public officer.[5]

§ 35. **Commissioners.**—A levee commissioner in Mississippi is a "civil officer under the State;"[6] a commissioner for the construction of a public highway, is a public officer,[7] and so is a commissioner appointed by an act of the legislature to lay out and build a public road,[8] and so are commissioners appointed by the governor to construct a public building.[9]

But a commissioner appointed to make a State survey under an act authorizing the governor to enter into a contract with the commissioner for doing the work, is not a public officer;[10] nor are commissioners appointed to superintend the erection of a state house;[11] nor are commissioners to fund a city debt;[12] nor are commissioners appointed for an indefinite time.[13] Canal commissioners are not "civil officers;"[14] nor are commissioners to make a survey of state land offices in contemplation of a statute forbidding judicial officers from holding any other office of profit.[15] Commissioners appointed to conduct a lottery are not public officers;[16] nor are bank commissioners appointed for the

[1] *Ex parte* Hennen, 13 Pet. (U. S.) 230.

[2] State *v.* Gardner, 43 Ala. 234.

[3] Throop *v.* Langdon, 40 Mich. 675.

[4] Lorillard *v.* Town of Monroe, 11 N. Y. 392, 62 Am. Dec. 120; Morse *v.* Lowell, 7 Metc. (Mass.) 152; People *v.* Bedell, 2 Hill (N. Y.) 196; State *v.* Walton, 62 Me. 106.

[5] Butler *v.* Board of Regents, 32 Wis. 124.

[6] Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

[7] People *v.* Nostrand, 46 N. Y. 381; People *v.* Hurlburt, 24 Mich. 59, 9 Am. Rep. 103.

[8] People *v.* Hayes, 7 How. Pr. (N. Y.) 248.

[9] People *v.* Comptroller, 20 Wend. (N. Y.) 595.

[10] Hall *v.* Wisconsin, 103 U. S. 5; overruling 39 Wis. 79.

[11] Bunn *v.* People, 45 Ill. 397.

[12] People *v.* Middleton, 28 Cal. 603.

[13] McArthur *v.* Nelson, 81 Ky. 67.

[14] United States *v.* Hatch, 1 Pinn. (Wis.) 182.

[15] Shepherd *v.* Commonwealth, 1 Serg. & R. (Penn.) 1.

[16] State *v.* Platt, 4 Harr. (Del.) 154.

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liquidation of insolvent banks;[1] nor are commissioners appointed to determine upon the purchase by the State of interesting relics.[2] The office of commissioner of loans of a county is a county office;[3] but commissioners appointed by the State to sign city treasury warrants which were to circulate as money, were held to be State and not city officers;[4] and commissioners appointed by the legislature to lay city pavements are not officers of the city;[5] nor are special commissioners appointed by the legislature to act for counties in aiding railroads, county officers.[6] The office of county commissioner is a "lucrative" one;[7] and the office of a commissioner of the United States Centennial Commission is an "office of trust."[8]

§ 36. **Contractors.**—As has been seen,[9] persons whose powers and duties are conferred and created by contract, are not public officers. A contractor for carrying the mail is, therefore, not a public officer.[10]

§ 37. **Court Crier.**—A court crier appointed by the court under statutory authority, his salary being payable by the board of supervisors, is a public officer.[11]

§ 38. **Deputies.**—Whether deputies appointed by public officers are to be regarded as public officers themselves, depends upon the circumstances and method of their appointment. Where such appointment is provided for by law, and *a fortiori* where it is required by law, which fixes the powers and duties of such deputies, and where such deputies are required to take the oath of office and to give bonds for the performance of their duties, the deputies are usually regarded as public officers. Thus deputy postmasters appointed and qualified according to law,

[1] Conrey *v.* Copland, 4 La. Ann. 307.

[2] People *v.* Nichols, 52 N. Y. 478, 11 Am. Rep. 734.

[3] Matter of Carpenter, 7 Barb. (N. Y.) 30.

[4] Garnier *v.* St. Louis, 37 Mo. 554.

[5] Greaton *v.* Griffin, 4 Abb. Pr. N. S. (N. Y.) 310.

[6] Sheboygan County *v.* Parker, 3 Wall. (U. S.) 93. See also, Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24.

[7] Dailey *v.* State, 8 Blackf. (Ind.) 329.

[8] *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538.

[9] See *ante*, § 5.

[10] Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

[11] Ricketts *v.* New York, 67 How. Pr. (N. Y.) 320.

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are public officers.[1] So a deputy marshal is an officer of the United States,[2] and deputy sheriffs are recognized by the statutes of most States as independent public officers.[3]

But where the deputy is appointed merely at the will and pleasure of his principal to serve some purpose of the latter, he is not a public officer but a mere servant or agent.[4] So a special deputy employed only in a particular case is not a public officer.[5]

§ 39. **Health Officers.**—The health officer of a port does not become an officer of the United States by virtue of the surrender to him, by the United States naval authorities, of an infected vessel.[6]

§ 40. **Judges and Justices.**—Judges of courts[7] and justices of the peace[8] are public officers.

§ 41. **Mail Carrier.**—A mail carrier is not a public officer but the private agent of the contractor for carrying the mail.[9]

§ 42. **Medical Superintendent.**—The medical superintendent of an asylum for the insane, holding a position whose powers and duties are provided for by statute is a public officer.[10]

§ 43. **Members of Municipal Boards and Bodies.**—The members of municipal boards, like a board of public works, are public officers.[11] So are members of a common council.[12]

[1] Lane *v.* Cotton, 1 Ld. Raym. 646; Schroyer *v.* Lynch, 8 Watts (Penn.) 453; Wiggins *v.* Hathaway, 6 Barb. (N. Y.) 632; Dunlop *v.* Monroe, 7 Cranch (U. S.) 242; Bolan *v.* Williamson, 1 Brev. (S. C.) 181; Maxwell *v.* McIlvoy, 2 Bibb. (Ky.) 211; See Conwell *v.* Voorhees, 13 Ohio 523, 42 Am. Dec. 206.

[2] United States *v.* Martin, 17 Fed. Rep. 150; United States *v.* Tinklepaugh, 3 Blatch. (U. S. C. C.) 430.

[3] Eastman *v.* Curtis, 4 Vt. 616; Dayton *v.* Lynes, 30 Conn. 351; Towns *v.* Harris, 13 Tex. 507.

[4] Kavanaugh *v.* State, 41 Ala. 399; Sawyer *v.* Corse, 17 Gratt. (Va.) 243, 94 Am. Dec. 445. Deputy clerkship is not an office. Jeffries *v.* Harrington, — Colo. — 17 Pac. Rep. 505.

[5] Kavanaugh *v.* State, 41 Ala. 399.

[6] Delano *v.* Goodwin, 48 N. H. 203. But see Cox *v.* United States, 14 Ct. of Cl. 512.

[7] Commonwealth *v.* Gamble, 62 Penn. St. 343, 1 Am. Rep. 422.

[8] People *v.* Ransom, 58 Cal. 558.

[9] Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

[10] State *v.* Wilson, 29 Ohio St. 347. See also Dullam *v.* Willson, 53 Mich. 392, 51 Am. Rep. 128.

[11] People *v.* Hurlburt, 24 Mich. 59, 9 Am. Rep. 103.

[12] State *v.* Anderson, — Ohio St. —, 12 N. E. Rep. 656.

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§ 44. **Messengers.**—A "messenger to the president of the board of aldermen" in the city of New York is not a public officer, there being no statute creating such an office or defining its duties.[1]

§ 45. **Merchant Appraisers.**—A merchant appraiser is not a public officer.[2]

§ 46. **Navy Officers.**—Navy officers are officers of the United States.[3]

§ 47. **Notary Public.**—A notary public is a public officer.[4]

§ 48. **Pension Agents.**—A pension agent of the United States, not being required to take an oath of office or to perform any other services than such as are confided to him by the war department, is not an officer of the United States.[5]

§ 49. **Pilot.**—Pilots are not public officers.[6]

§ 50. **Postmaster.**—A United States postmaster is a public officer.[7]

§ 51. **Public Printer.**—It is entirely competent for the legislature to make the public printer a state officer, and where they have expressly done so he will be so considered;[8] but where the public printing is by law to be "contracted for" the person employed is not a public officer.[9]

§ 52. **Receivers.**—The receiver of a national bank, appointed in accordance with an Act of Congress, is an officer of the United States,[10] and receivers of public money are public officers.[11]

§ 53. **Referees.**—Referees appointed to examine witnesses,

[1] Smith *v.* Mayor, 67 Barb. (N. Y.) 223.

[2] Auffmordt *v.* Hedden, 30 Fed. Rep. 360.

[3] Armstrong *v.* United States, Gilp. (U. S. D. C.) 399.

[4] Kirksey *v.* Bates, 7 Port. (Ala.) 529, 31 Am. Dec. 722; Governor *v.* Gordon, 15 Ala. 72.

[5] Lindsey *v.* Attorney General, 33 Miss. 508.

[6] Dean *v.* Healy, 66 Ga. 503.

[7] Spence *v.* Harvey, 22 Cal. 336, 83 Am. Dec. 69.

[8] Ellis *v.* State, 4 Ind. 1.

[9] Brown *v.* Turner, 70 N. C. 93. See Detroit Free Press Co. *v.* State Auditors, 47 Mich. 135.

[10] Platt *v.* Beach, 2 Ben. (U. S. D. C.) 303.

[11] Commonwealth *v.* Evans, 74 Penn. St. 124.

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hear and determine cases, etc., are not public officers within the meaning of the constitution of New York.[1]

§ 54. **Representatives in Legislature.**—Representatives in state legislatures are public officers,[2] and so are representatives in Congress.[3]

§ 55. **School Officers.**—School directors, treasurers and trustees are public officers.[4]

§ 56. **Selectmen.**—A New England selectman is a public officer.[5]

§ 57. **Special Commissioners, etc.**—Special commissioners, referees, appraisers, receivers, elisors and other similar officers, appointed for a special purpose and to act on a special occasion, are not public officers.[6]

§ 58. **State and other Treasurers.**—State treasurers,[7] deputy state treasurers[8] and school treasurers[9] are public officers.

§ 59. **Surgeons.**—Civil surgeons appointed by the commissioner of pensions are not officers of the United States.[10]

§ 60. **Superintendents of Canals.**—Superintendents of repairs on a New York state canal are public officers.[11]

§ 61. **Trustees of State Institutions.**—The trustees and directors of state institutions, such as universities, prisons and asylums, appointed or elected in pursuance of the statutes of the state, are public officers.[12] But trustees appointed by authority

[1] Matter of Hathaway, 71 N. Y. 238, 244.

[2] Morril *v.* Haines, 2 N. H. 246.

[3] People *v.* Common Council, 77 N. Y. 503, 33 Am. Rep. 659.

[4] McCoy *v.* Curtice, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113; Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429; Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502; Commonwealth *v.* Morrisey, 86 Penn. St. 416.

[5] State *v.* Boody, 53 N. H. 610.

[6] Matter of Hathaway, 71 N.Y. 238, 244; McArthur *v.* Nelson, 81 Ky. 67.

[7] People *v.* McKinney, 10 Mich. 54.

[8] State *v.* Brandt, 41 Iowa, 593.

[9] Commonwealth *v.* Morrisey, 86 Penn. St. 416.

[10] United States *v.* Germaine, 99 U. S. 508.

[11] Adsit *v.* Brady, 4 Hill (N.Y.) 630, 40 Am. Dec. 305; Shepherd *v.* Lincoln, 17 Wend. (N.Y.) 250.

[12] Dullam *v.* Willson, 53 Mich. 392, 51 Am. Rep. 128; Nichols *v.* McKee, 68 N. C. 429; Welker *v.* Bledsoe, 68 N. C. 457.

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of the legislature to act for cities in giving aid to railroads are not public officers.[1]

§ 62. **Watchmen of public Buildings.**—A night watchman of a federal postoffice building, appointed by the Federal treasury department and receiving a monthly salary, does not "hold an office of trust or profit under the United States."[2]

[1] Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24.

[2] Doyle v. Aldermen of Raleigh, 89 N. C. 133, 45 Am. Rep. 677.

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CHAPTER III.

WHO MAY BE PUBLIC OFFICERS.

§ 63. Purpose of this Chapter.

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64. Not a natural Right.
65. May be controlled by Constitution.
66. In other cases Legislature may prescribe.
67. Right usually co-extensive with that of Suffrage.

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97. Where no constitutional Prohibition, Legislature may change Qualifications.
§ 98. Legislature cannot make political Opinions a Qualification.
99. Nor can religious Opinions be made a Test.

§ 63. **Purpose of this Chapter.**—Having considered in the preceding chapters what constitutes a public office and officer, and having given some illustrations of the application of the rules discovered, attention will now be given to the question of who are eligible to become public officers.

I.

OF ELIGIBILITY IN GENERAL.

§ 64. **Not a natural Right.**—The right to hold a public office under our political system is not a natural right. "While many rights are consecrated as universal and inviolable, the right of eligibility to office is not so secured." [1] It exists, where it exists at all, only because and by virtue of some law expressly or impliedly creating and conferring it.

§ 65. **May be controlled by the Constitution.**—It is entirely competent for the people, in framing their governments, to declare what shall be the qualifications which shall entitle one to hold and exercise a public office, and in many of the constitutions this has been done with more or less certainty and precision. Constitutional provisions, which are exclusive in their nature, are, of course, supreme, and it is not within the power of legislatures to supersede, evade or alter them.[2]

§ 66. **In other Cases Legislature may prescribe.**—Where, however, the constitution does not prescribe the qualifications, it is the province and the right of the legislature to declare upon what terms and subject to what conditions the right shall be conferred. And where the constitution has made some provision, but not

[1] Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322.

[2] See *post*, §§ 96, 97.

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exclusive ones, the legislature may add such others as are reasonable and proper.[1]

§ 67. **Right usually co-extensive with that of Suffrage.**—Where no limitations are prescribed, however, the right to hold a public office under our political system is an implied attribute of citizenship, and is presumed to be co-extensive with that of voting at an election held for the purpose of choosing an incumbent for that office; those and those only who are competent to select the officer being deemed competent also to hold the office.[2] But this is not an universal rule,[3] and many cases exist where it does not apply; there are also many other conditions which, by express rule or necessary implication, limit the right of eligibility, the chief of which must be considered.

II.

CAUSES OF DISQUALIFICATION.

§ 68. **In general, with Subdivisions.**—The disability to hold a public office may arise from a variety of causes. Thus a person may be disqualified by—

1. Mental incapacity;
2. Insufficient age;
3. Sex;
4. Lack of citizenship;
5. Holding prior office;
6. Criminal character;
7. Property qualifications;
8. Insufficient residence;
9. Want of professional attainments;
10. Preference given to veteran soldiers;
11. Requirement of civil service examination.

Each of these will be separately considered.

1. *Mental Incapacity.*

§ 69. **Idiot or insane Person ineligible.**—From the very nature of the case, an idiot or other person *non compos mentis* is

[1] State *v.* Covington, 29 Ohio St. 102; Darrow *v.* People, 8 Colo. 417.

[2] State *v.* Smith, 14 Wis. 497; State *v.* Murray, 28 Wis. 96, 9 Am. Rep. 489.

[3] Darrow *v.* People, *supra*.

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incapable of accepting or holding a public office, and the constitutions of some States so declare.[1]

§ 70. **Ability to read and write may be required.**—In some of the States ability to read and write is necessary to eligibility,[2] and such a requirement may lawfully be made, where there is no constitutional prohibition,[3] as there is in Alabama.[4]

2. *Insufficient Age.*

§ 71. **What Offices may be held by Infants.**—Offices where judgment, discretion and experience are essentially necessary to the proper discharge of the duties they impose, can not be held by infants. But where the duties to be performed are ministerial merely, requiring nothing more than skill and diligence, an infant, otherwise competent, may be the officer.[5]

Thus, an infant can not be a judge,[6] or a justice of the peace,[7] or a burgess,[8] or a juror,[9] or a clerk of court;[10] but he may, at common law, hold the office of notary public,[11] or act as a special deputy sheriff,[12] or as a register[13] or as a captain in the army.[14]

§ 72. **Constitutional Limitations as to Age.**—It is common for the constitution of the States as of the United States to require the attainment of a certain age to render one eligible to offices of importance. Thus the constitution of the United States provides that no person shall be eligible to the office of president who shall not have attained the age of thirty-five years,[15] nor

[1] No insane person or idiot can, by the constitutions of Georgia, Alabama and Louisiana, hold any State office. Stimson's Am. Stat. Law, § 223.

[2] As in New Mexico, L. 1889, c. 12, p. 18; Arizona Act of March 21, 1889.

[3] State *v.* Covington, 29 Ohio St. 102

[4] Stimson's Am. Stat. Law, § 222.

[5] Moore *v.* Graves, 3 N. H. 408; Golding's Petition, 57 N. H. 146, 24 Am. Rep. 66.

[6] Scambler *v.* Waters, Croke Eliz. 636; Coke Litt. 3, b and note 15. T. Jones, 127; 2 Lev. 245.

[7] Golding's Petition, 57 N. H. 146, 24 Am. Rep. 66.

[8] Rex *v.* Carter, Cowp. 220.

[9] Coke, Litt. 157 *a*.

[10] United States *v.* Bixby, 9 Fed. Rep. 78.

[11] Claridge *v.* Evelyn, 5 B. & Ald. 81.

[12] Moore *v.* Graves, 3 N. H. 408.

[13] Young *v.* Stoell, 4 Croke, 279; Young *v.* Fowler, 4 Croke, 555.

[14] See Hands *v.* Slaney, 8 D. & E. 578.

[15] Art. II. Sec. 1, subdiv. 5.

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senator until he shall have attained the age of thirty years,[1] nor representative in Congress until he shall have attained the age of twenty-five years.[2]

So it is not uncommon to provide that persons who have passed a certain age shall not be eligible to given offices, as that no person shall hold the office of judge who is over the age of seventy years.[3]

3. *Sex.*

§ 73. Women generally not eligible. — As a general rule, women, though citizens in the broad and most comprehensive sense, are not possessed of any political power, and cannot, in the absence of an enabling statute, be considered eligible to public office.[4] "By the law of England," says Chief Justice GRAY,[5] "which was our law from the first settlement of the country until the American Revolution, the crown, with all its inherent rights and prerogatives, might indeed descend to a woman or to an infant; but, under the degree of a queen, no woman, married or unmarried, could take part in the government of the State. Women could not sit in the House of Commons or the House of Lords, nor vote for members of Parliament.[6] They could not take part in the administration of justice, even as judges or jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy." [7]

[1] Art. I, Sec. 3, subdiv. 3.

[2] Art. I. Sec. 2, subdiv. 2.

[3] A constitutional provision that no person shall hold the office of judge of any court after he has attained the age of seventy years does not apply to justices of the peace. Kenniston v. State, 63 N. H. 37, 56 Am. Rep. 486. But *contra*, under New York statute, People v. Mann, 32 Hun (N. Y.) 410. A surrogate in New York is not a judge or justice within the prohibition of such a provision. People v. Carr, 100 N. Y. 236, 53 Am. Rep. 161.

[4] Bouvier's Law Dictionary, title "Women;" Robinson's case, 131 Mass. 376, 41 Am. Rep. 239; Minor v. Happersett, 21 Wall. (U. S.) 162, Bradwell v. Illinois, 16 Wall. (U. S.) 130; Wheeler v. Hall, 6 Allen (Mass.) 558; Jackson v. PHILLIPS, 14 Allen (Mass.) 539. Women can not hold the office of jailer in Kentucky. Atchison v. Lucas, 83 Ky. 451.

[5] In Robinson's case, 131 Mass. 376, 41 Am. Rep. 239.

[6] Citing 4 Inst. 5; Countess of Rutland's case, 6 Rep. 52 b; Chorlton v. Lings, L. R. 4 C. P. 374, 391, 392.

[7] Citing 2 Inst. 119, 121; 3 Bl. Com 362; 4 *Id* 395; WILLES, J., in L. R. 4 C. P. 390, 391.

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Thus it has been held that a woman could not hold the office of a justice of the peace,[1] nor, generally, the *quasi* public office of an attorney at law.[2]

On the other hand, it has been said by the same court that "the common law of England, which was our law upon the subject, permitted a woman to fill any local office of an administrative character, the duties attached to which were such that a woman was competent to perform them," and hence that a woman is eligible, in Massachusetts, to be a member of a school committee.[3] So women have frequently held the office of postmaster, and, in some instances, of pension agent,[4] and certain administrative offices which could be executed by a deputy.[5]

[1] Opinion of Judges, 107 Mass. 604.

[2] Mechem on Agency, § 804. Robinson's case, 131 Mass. 376, 41 Am. Rep. 239; *In re* Leonard, 12 Oreg. 93, 53 Am. Rep. 323. But see *contra* Matter of Hall, 50 Conn. 131, 47 Am. Rep. 625; Matter of Goodell, 48 Wis. 693.

[3] Opinion of Judges, 115 Mass. 602.

[4] See per PARK, C. J. in Matter of Hall, 50 Conn. 131, 47 Am. Rep. 625.

[5] "The office of sheriff," says GRAY, C. J. in Robinson's case, 131 Mass. 376, 41 Am. Rep. 239, "was partly judicial and partly ministerial; the judicial functions could not be delegated, but the ministerial duties, including that of attendance upon the judges, might be performed by deputy. Dalton's Sheriff, chs. 1, 4; Bandal's case, Noy 21; Bacon's Use of the Law, 4 Bacon's Works, (Ed. 1803) 97; WILLES, J., in L. R. 4 C. P. 390. When such an hereditary office descended to a woman she might exercise the office by deputy (at least with the approval of the crown), but not in person; nor could it be originally granted to any woman because of her incapacity of executing public offices. Duke of Buckingham's case, Jenk. Cent. 6 pl. 14; s. c. Dyer, 285 b. pl. 39; Keilw. 17; 4 Inst. 128; Coke Litt. 107 b. 165 a; Case of the Great Chamberlain of England, 2 Bro. P. C. (2d ed.) 146, s. c. 36 Lords Journal 302. Women were permitted to hold the office of keeper of a castle or jail, governor of a workhouse, forester or constable, for the reason that each of those offices might be executed by a deputy. Lady Russell's case, Cro. Jac. 17, 2 Inst. 382; Anon. 2 Ld. Raym. 1014, s. c. 3 Salk. 2, 4 Inst. 311; 2 Hawk. ch. 10, § 37; WILLES, J., in L. R. 4 C. P. 389. They were decided to be capable of voting for and of being elected to the office of sexton of a parish upon the ground that this was not an office that concerned the public. Olive *v.* Ingram, 2 Stra. 1114, s. c. Vin. Abr. Feme A. pl. 7, 8; 7 Mod. 263, 273, 274. And we are not aware of any public office, the duties of which must be discharged by the incumbent in person, that a woman was adjudged to be competent to hold without express authority of statue, except that of overseer of the poor, a local office of an administrative character, in no way connected

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It is, of course, competent for the people by their State constitutions, or by their legislatures where no constitutional prohibition intervenes, to remove these disabilities, and such is the constant tendency.[1]

4. *Lack of Citizenship.*

§ 74. **Aliens can not hold Office.**—It is a general principle that an alien can not hold a public office.[2] In all independent, popular governments, as is said by Chief Justice Dixon of Wisconsin, "it is an acknowledged principle, which lies at the very foundation, and the enforcement of which needs neither the aid of statutory nor constitutional enactments or restrictions, that the government is instituted by the citizens for their liberty and protection, and that it is to be administered, and its powers and functions exercised only by them and through their agency."[3]

In accordance with this principle it is held that an alien can not hold the office of sheriff.[4]

§ 75. **Restriction to "Inhabitant" or "Voter."**—Where by law, an "inhabitant" of a certain district is eligible to office within it, one who is such an inhabitant may hold such an office although he may not be a "citizen." The words "inhabitant" and "citizen," when so used, are not necessarily synonymous.[5] So where a "voter" or "elector" may hold an office under the State, he is not disqualified by not being a citizen of the United States.[6]

5. *Holding Prior Office.*

§ 76. **Constitutional Prohibitions.** — For various reasons of

with judicial proceedings. The King *v.* Stubbs, 2 T. R. 395."

A woman may hold a deputy clerkship in Colorado. Jeffries *v.* Harrington, — Colo. — 17 Pac. Rep. 505.

[1] Huff *v.* Cook, 44 Iowa, 629. Under a statute that no person shall be precluded or debarred from any occupation, profession or employment on account of sex, a woman may be a master in chancery. Schuchardt *v.* People, 99 Ill 501, 39 Am. Rep. 34.

[2] State *v.* Smith, 14 Wis. 497; State *v.* Murray, 28 Wis. 96, 9 Am. Rep. 489.

[3] In State *v.* Smith, 14 Wis. 497.

[4] State *v.* Smith, 14 Wis. 497; State *v.* Murray, 28 Wis. 96, 9 Am. Rep. 489.

[5] State *v.* Kilroy, 86 Ind. 118.

[6] McCarthy *v.* Froelke, 63 Ind. 507.

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public policy it is frequently provided in state constitutions that a person holding one office shall not be eligible to certain others deemed to be inconsistent or incompatible with the one already held. Thus, as in the constitution of California, it is sometimes declared that "no person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under this State;"[1] or, as in Indiana, "that no person elected to any judicial office shall, during the term for which he was elected, be eligible to any office of trust or profit under the State, other than a judicial one;"[2] or, as in Louisiana, that more than one office of trust,[3] or, as in Indiana, more than one lucrative office, shall not be held at the same time;[4] or, as in Vermont, "that no person holding any office of profit or trust under the authority of Congress, shall be eligible to any appointment in the legislature, or of holding any executive or judiciary office under this State;"[5] or, as in Mississippi, that "no senator

[1] This provision refers to the capacity to hold as well as to be elected to office, and consequently a person who was duly eligible and elected to a civil office of profit under the State can no longer hold that office after he has accepted and is in the incumbency of a lucrative federal office. People *v.* Leonard, 73 Cal. 230, 14 Pac. Rep. 853. An inspector of customs, with a salary of one thousand dollars per year, holds a lucrative office, and is hence ineligible to the office of school superintendent when the latter is an office of profit. Crawford *v.* Dunbar, 52 Cal. 36.

The same provision is found in Nevada. State *v.* Clarke, 3 Nev. 566.

[2] Under this provision, one elected with his consent, to a judicial office, but who does not accept the office, may, under Indiana constitution, § 176, be afterwards elected to an office, not judicial, the term of which will run during the judicial term to which he was elected. Smith *v.* Moore, 90 Ind. 294. Where the term of a justice of the peace expired at midnight of the 16th of a month he was held to be ineligible to the office of township trustee which began on the same day. Vogel *v.* State, 107 Ind. 374.

[3] Where the constitution forbids the holding of more than one office of trust at the same time, the legislature can not defeat it by making the incumbent of one office *ex officio* the incumbent of the other. Bouanchaud *v.* De Hebert, 21 La. Ann. 138.

[4] Offices of county recorder and county commissioner are lucrative offices within the meaning of the constitution. Dailey *v.* State, 8 Blackf. (Ind.) 329. The office of colonel of volunteers and the office of reporter of supreme court decisions are lucrative offices, and can not both be held by the same person. Kerr *v.* Jones, 19 Ind. 351. But office of councilman in a city, though lucrative in the ordinary sense, is not a lucrative office within this provision, as it is not a state office. State *v.* Kirk, 44 Ind. 401, 15 Am. Rep. 239.

[5] Office of postmaster is an office of trust and profit under the authority of

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or representative shall be appointed to any civil office of profit under this State." [1]

6. *Criminal Practices.*

§ 77. **By engaging in Duel.**—The constitution of Virginia provides that "no person who, while a citizen of this State, has since the adoption of this constitution, fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, either within or beyond the boundaries of this State, or knowingly conveyed a challenge, or aided or assisted in any manner in fighting a duel, shall be allowed to vote or hold any office of honor, profit or trust under this constitution." Under this provision it was held that one who had been so engaged may be removed from office by *quo warranto* without a previous conviction of the offense in criminal proceedings.[2]

But in Kentucky where the constitution provides that such an offender "shall be deprived of the right to hold any office, post or trust under the authority of the State," it was held that a person willing to take the requisite oath upon entering the office could not be proceeded against until he had been tried and convicted of the offense.[3]

Provisions of this nature are found in other States, and are within the constitutional power of the State legislatures.[4]

Congress, and a justice of the peace holds a judiciary office, and both can not therefore be held by the same person. McGregor *v.* Balch, 14 Vt. 429, 39 Am. Dec. 231.

[1] Office of levee commissioner is a civil office under the state, and can not be held by a member of the legislature. Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

The constitutions of the several States prescribe a great many disqualifications of this nature, which are too extensive to be given here. They may be found in Stimson's Am. Stat. Law, § 220.

[2] Royall *v.* Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335. See also Moseley *v.* Moss, 6 Gratt. (Va.) 534; Brooks *v.* Calloway, 12 Leigh (Va.) 466.

[3] Commonwealth *v.* Jones, 10 Bush (Ky.) 725. See also Morgan *v.* Vance, 4 Bush (Ky.) 323.

[4] Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322. See also Anderson *v.* State, 72 Ala. 187; State *v.* Buckman, 18 Fla. 267; Barker *v.* People, 20 Johns. (N. Y.) 457.

The constitutions of the various States contain many other provisions disqualifying for the commission of crimes therein specified. These are too extensive to be summarized here, but they will be found in Stimson's Am. Stat. Law, § 223.

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§ 78. **By Bribery or Fraud.**—The constitution of Pennsylvania provides that "any person who shall, while a candidate for office, be guilty of bribery, fraud or willful violation of any election law, shall be forever disqualified from holding any office of trust or profit in this Commonwealth." Under this provision, it was held that the word "guilty" was used in its ordinary or popular signification, and that it was not necessary that the offender should have been convicted of the offense before proceedings were begun for his removal.[1]

§ 79. **By being a Defaulter.**—It is provided by the constitution of Illinois that any person who has been a collector or holder of public moneys, and shall not have accounted for and paid them over according to law, shall be ineligible to any office of profit or trust. Under this provision it was held that while it might be that if such a defaulter should be elected or appointed, and enter into office, he could be ousted by *quo warranto*, yet that until his default was judicially ascertained, his acts as such officer would be valid and binding, and his sureties would be liable for them.[2]

Provisions similar to that of Illinois are found in several of the States.[3]

§ 80. **By engaging in Rebellion.**—It is also a somewhat common provision that no person who has voluntarily borne arms or engaged in rebellion against the United States shall be eligible to office, and such an act constitutes a complete disability until removed.[4]

7. *Property Qualifications.*

§ 81. **Property Qualifications may be required.**—It is not infrequently provided, especially in municipal offices, that he only shall be eligible to certain offices who is a freeholder, tax-payer and the like, and such a provision, where it does not conflict with any constitutional guaranty, will be enforced.[5]

[1] Commonwealth *v.* Walter, 83 Penn. St. 105, 24 Am. Rep. 154. See State *v.* Humphreys, — Tex. —, 12 S. W. Rep. 99.

[2] Cawley *v.* People, 95 Ill. 249.

[3] See Brady *v.* Howe, 50 Miss. 607; Taylor *v.* Governor, 1 Ark. 21; Pucket *v.* Bean, 11 Heisk. (Tenn.) 600.

[4] Privett *v.* Bickford, 26 Kans. 52, 40 Am. Rep. 301; State *v.* Watkins, 21 La. Ann. 631; Hudspeth *v.* Garrigues, 21 La. Ann. 684.

[5] Darrow *v.* People, 8 Colo. 417. A negative provision that "no person, except a qualified elector, shall be elected or appointed to any civil or

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In some of the States, however, property qualifications are prohibited by the constitution.[1]

8. *Insufficient Residence.*

§ 82. **Period of Residence usually required.**—It is a common, if not an invariable, requirement that candidates for public office shall for some period have been residents of the district or locality to be represented.

Under such a provision in Nebraska it is held that the period required must be complete before the election, and that it is not sufficient that it has matured before the commencement of the term,[2] and the same rule prevails in Minnesota.[3]

9. *Want of Professional Attainments.*

§ 83. **Necessary professional Attainments may be required.**—So there are certain offices which can be properly filled only by persons possessing peculiar fitness or professional attainments, and it is common, in the laws creating the office, to require that the incumbent shall possess such qualifications. And though no written law requires it, such necessity may be deduced from the established custom or the evident necessity of the case. Thus it has been held that no person, who has not previously been admitted to practice as an attorney at law, is eligible to the office of prosecuting attorney.[4]

10. *Preference to Veteran Soldiers.*

§ 84. **Such Preference may be enforced.**—It is provided in

military office in the state," does not conflict with a provision which requires a supervisor or alderman to be also a tax-payer. *Id.*

[1] The constitution so provides in Minnesota, Kansas, Delaware, North Carolina, South Carolina, California, Alabama and Mississippi. Stimson's Am. Stat. Law, § 222.

[2] State *v.* McMillen, 23 Neb. 385, 36 N. W. Rep. 587.

[3] Parker *v.* Smith, 3 Minn. 240, 74 Am. Dec. 749.

[4] People *v.* May, 3 Mich. 598.

So no minister or preacher of any religious denomination can be a member of the legislature in Maryland, Delaware, Kentucky or Tennessee, or be governor in Kentucky, or hold any civil office in Delaware. Stimson's Am. St. Law, § 223, sub. I.

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New York that "in every public department and upon all public works of the state of New York, and of the cities, towns and villages thereof, and also in non-competitive examinations under the civil service laws, rules or regulations of the same, whenever they apply, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment. Age, loss of limb or other physical impairment, which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved." [1] Provisions similar to this are found in other States,[2] and are enforced by the courts in proper cases.[3]

§ 85. **But not where it conflicts with constitutional Powers.** —Such a requirement, however, can not, it is held, operate to destroy the right of selection of his subordinates which the constitution has confided to a superior officer.[4]

11. *Civil Service Examination.*

§ 86. **Statutory Provisions for Examination.**—Statutes have also been enacted, notably in New York, having for their purpose the improvement of the civil service, and requiring that no person shall be appointed to public offices of certain grades until he has passed an examination intended to ascertain his fitness. Where no constitutional prohibitions intervene, laws of this nature are valid, and will be enforced.[5]

[1] Laws 1887, ch. 464.

[2] See Opinion of Judges, 145 Mass. 587, 13 N. East Rep. 15.

[3] People *v.* Adams, 6 N. Y. Supplement, 128; People *v.* French, 5 *Id.* 712; People *v.* Adams, 4 *Id.* 522; *In re* Wortman, 2 *Id.* 324.

[4] People *v.* Durston, 3 N. Y. Supplement 522; People *v.* Angle, 109 N. Y 564, 17 N. East Rep. 413.

[5] See Peck *v.* City of Rochester, 3 N. Y. Supplement 872; Rogers *v.* City of Buffalo, 2 *Id.* 326.

In Peck *v.* Rochester, *supra*, ANGLE, J., says: "Civil service examinations, as a prerequisite to entering upon the duties of office, appear to have been known to the common law of England more than 500 years ago. In the city of London, in a tower which is thought to have been one of the earliest portions of Westminster Abbey, is a room where there are 6 horse shoes and 61 nails, which, by ancient custom, the Sheriffs of London were compelled to count when they were sworn in. In the time of Edward II., when this custom was established, (1308–1327), it was a proof of education, as only

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§ 87. **Cannot defeat constitutional Discretion.**—But provisions of this nature can not operate to defeat the right to select his own subordinates according to his discretion, which the constitution has conferred upon a superior officer, as a superintendent of public works, and so far as they conflict with such constitutional right, these laws are unconstitutional and void.[1]

§ 88. **Statute prescribing Qualifications is directory merely.**—It has been held that a statute prescribing qualifications to an office is merely directory, and although an appointee does not possess the requisite qualifications, his appointment is not therefore void, unless it is expressly so enacted.[2]

III.

REMOVAL OF DISABILITY.

§ 89. **Effect of Removal of Disability before Term begins.**—What effect shall be given to a removal of the disability after the election or appointment but before the term begins is a question upon which the authorities are in conflict.

In a recent case in Indiana[3] it appeared that one Smith had been elected justice of the peace in April, 1878, for a term of four years, ending November 29, 1882. In April, 1882, he was re-elected for another term but refused to accept or qualify. On

well instructed men could count up to 61. At the same time, it was ordained that the sheriff, in proof of his strength, should cut a bundle of sticks. The custom (the abolition of which has been vainly attempted) still exists, but a bundle of matches is now provided. The original knife is always used. 2 Hare. Walks in London (N. Y. Ed. 1878) 272, 273. To secure the theological qualifications of the sheriff, they were required, not only to take the oaths of allegiance and supremacy, as well as the statutory oath of office, but to make a declaration against transubstantiation, and to receive the sacrament within three months after entering upon office, in the presence of two witnesses and one church warden, and get a certificate that they had done so, signed by the minister and one church warden, and the two witnesses must also make affidavit of the fact. 14 Petersd. Abr. (N. Y. Ed. 1831) 429, note."

[1] People *v.* Angle, 109 N. Y. 564; People *v.* Durston, 3 N. Y. Supplement, 522.

[2] St. Louis County Court *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355.

[3] Smith *v.* Moore, 90 Ind. 294.

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November 7, 1882, and while he was still serving under his first election, he and one Moore were candidates for the office of county treasurer for the term beginning August 15, 1883, and Smith received a majority of the votes and, if eligible, was elected. The constitution of Indiana provides that "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the State other than a judicial office." Under this provision it was claimed that Smith, being a judicial officer at the time of the election, was ineligible to the office of county treasurer, and the court below so held, and Smith appealed. It was contended on the part of Smith, the appellant, that the ineligiblity refers to the capacity to *hold* the office and not merely to the right to be elected to it, and that the appellant's incapacity was removed by the expiration of his term as justice several months before his term as treasurer would begin. In deciding the case, the court say: "After a careful and full examination, we have reached the conclusion that the position of appellant is the correct one in this case, and that the court below erred in its conclusions of law, so far as they relate to the ineligibility of appellant.

'Legally qualified' is the meaning that should be given to the word eligible, as used in the section of the constitution under consideration.

'Office' has been defined to mean public employment, and its legal meaning to be, an employment on behalf of government in any station of public trust; a place of trust, by virtue of which a person becomes charged with the performance of certain public duties.[1] With this definition of the words 'eligible' and 'office,' the constitutional provision may be read as follows: No person elected to any judicial office shall, during the term for which he shall have been elected, be legally qualified to be employed on behalf of government in any station of public trust, other than a judicial office. In other words, be legally qualified as an officer, to perform the duties of a public office, other than judicial. * * *

When appellant entered upon his term as justice of the peace on the 29th day of November, 1878, he became, during the con-

[1] Citing 5 Waits Actions and Defenses, p. 1 *et seq.*

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tinuance of that term, disqualified to hold and perform the duties of any public office except a judicial one. But while he could not, during that term, hold or perform the duties of a public office other than judicial, it does not follow that he might not, during that term, be legally voted for and chosen to an office, the term of which would not begin until after the expiration of the judicial term as justice." [1]

§ 90. **Same Subject—Wisconsin Cases.**—So in a leading case in Wisconsin [2] it appeared that one Schuet was, if eligible, duly elected on the 8th day of November, 1870, to the office of clerk of the board of supervisors for the term of two years to commence on the first Monday in January, 1871. At the time of the election, he was duly qualified for the office except that he was an alien and had not declared his intention to be a citizen of the United States. The supreme court had previously held that an alien could not hold office in Wisconsin.[3] In the present case, however, Schuet's disability was duly removed, by proper proceedings six days after the election, and it was contended that, notwithstanding the previous decision, he was now eligible to assume and hold the office when the term arrived.

"The precise question under consideration, is," said LYON, J., "a new one, and we are left free to decide it upon what we deem to be sound principles. We have already seen that the grounds upon which a person not an elector is excluded from holding public office is, that the powers, and functions of a free and independent government must be exercised by those by whom such government was instituted, that is, by the electors thereof. So if a person who is not an elector attempts to exercise the functions of a public office, the courts, upon proper proceedings being instituted for that purpose, will oust him. This is one thing. But to hold that a person qualified to hold such office when the term for which he was elected commences, is dis-

[1] ELLIOTT, J., dissented. For earlier cases in Indiana upon this and cognate subjects see Waldo *v.* Wallace, 12 Ind. 569; Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49; Carson *v.* McPhetridge, 15 Ind. 327; Jeffries *v.* Rowe, 63 Ind. 592; Howard *v.* Shoemaker, 35 Ind. 111; Reynolds *v.* State, 61 Ind. 392; State *v.* Bieler, 87 Ind. 320. See also Vogel *v.* State, 107 Ind. 374.

[2] State *v.* Murray, 28 Wis. 96, 9 Am. Rep. 489.

[3] State *v.* Smith, 14 Wis. 497.

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qualified merely because he was not an elector when he was elected, two months before, is another and very different thing.

What then is the nature and effect of the disqualification under consideration? In my judgment it is not that a person who is not an elector only because of some disqualification which he has the power to remove at any time, is thereby rendered ineligible *to be elected* to a public office for a term which is to commence at a future time; but it is that a person thus disqualified shall not be eligible *to hold* such office. Such disqualification does not relate to the *election to* but to the *holding of*, the office. I think this principle is substantially asserted in Cushing's Law and Practice of Legislative Assemblies. Section 78 is to the effect that in cases where the disqualification is not derived from the personal character of the individual, or inflicted by way of punishment, and where it is that the individual 'shall be incapable of holding' the office, until the disqualification is removed, this does not render him incapable of being elected, but only prevents him from exercising the functions of the office until it is removed."[1]

§ 91. **Same Subject—Kansas Cases.**—The same result was also reached in Kansas[2] under a provision of the constitution that no person who had voluntarily borne arms against the government of the United States should be qualified "to hold office" in the state, until such disability should be removed. At the time of the election plaintiff labored under this disability, but before the returns were canvassed, the disability had been removed, and the question was as to plaintiff's right to the office.

"Upon this question," says the court by HORTON, C. J., "the

[1] And the same result was reached in the subsequent case of State *v.* Trumpf, 50 Wis. 103. But in this case RYAN, C. J., while concurring in the opinion on the ground of *stare decisis*, said "I regret the rule in State *v.* Murray, 28 Wis. 96 (9 Am. Rep). I think it would have been more in accord with the doctrine of State *v.* Smith, 14 Wis. 497, and with principle, to have held that one receiving votes for office should then be eligible, so that the validity or invalidity of the votes should not be dependent on subsequent accident, but should then, so to speak, attach to him. I cannot but think the distinction taken in that case between eligibility to election to office and eligibility to hold office too nice to enter into a rule of judicial decision."

[2] Privett *v.* Bickford, 26 Kans. 52, 40 Am. Rep. 301.

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weight of authority seems to be, and in our opinion it is the better doctrine, that where the disability concerns the holding of the office, and is not merely a disqualification to be elected to an office, a person who is ineligible at the election will be entitled to enter upon and hold the office, if his disability be removed or cured before the issuance of the certificate, and before entering upon the discharge of the duties of the office for which he is elected."

§ 92. **Same Subject—Other similar Considerations.**—So it has been held in Iowa[1] that the right to hold an elective office may be conferred upon a woman even by a retrospective statute passed to confirm her election, and the fact that, before the statute was passed, an inferior court had declared her to be ineligible would not deprive her of the office.

Under this view disabilities in age or residence at the time of the election would not incapacitate if they were removed before the term of office began.[2]

Under such a constitutional provision as that in Indiana, however, a judicial officer can not, "during the term for which he shall have been elected," remove his disability by resigning the office.[3]

§ 93. **Same Subject—The contrary View.**—But the contrary view as to the meaning of the word "eligible" has also been adopted. Thus the constitution of California provided that "no person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under the State." One Grow was a candidate for election to the office of sheriff, and, if eligible, was elected. At the time of the election he held the office of postmaster, but he resigned this office and qualified as sheriff before the term of sheriff began. In a contest over the office it was contended for Grow that under the constitutional provision he was only forbidden to take a civil state office while so holding the other, and that he

[1] Huff *v.* Cook, 44 Iowa. 639.

[2] State *v.* Murray, 29 Wis. 96, 9 Am. Rep. 489. But *contra* see Searcy *v.* Grow, 15 Cal. 117; Parker *v.* Smith, 3 Minn. 240.

[3] Waldo *v.* Wallace, 12 Ind. 570; Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49.

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was capable of receiving votes cast for him so as to give him a right to take the state office upon or after resigning the Federal office. But the court said:[1] "We think the plain meaning of the words quoted is the opposite of this construction. The language is not that the Federal officer shall not *hold* a state office while he is such Federal officer, but that he shall not, while in such Federal office, be *eligible* to the state office. We understand the word 'eligible' to mean capable of being chosen,—the subject of selection or choice. The people in this case were clothed with this power of choice; their selection of the candidate gave him all the claim to the office which he has; his title to the office comes from their designation of him as sheriff. But they could not designate or choose a man not eligible, *i. e.*, not capable of being selected. They might select any man they chose, subject only to this exception, that the man they selected was capable of taking what they had the power to give."

And the same construction was adopted in Nevada under a constitutional provision in the same words, and the court went further, saying: "But instead of restricting the meaning of the word 'eligible,' as defendant contends, we think, to carry out the intention of the constitutional convention, we ought rather to give it a more extended signification than is generally given, and hold that it means both 'incapable of being legally chosen,' and 'incapable of legally holding.'"[2]

So in Minnesota under a statute requiring residence in the state for a certain period in order to be eligible to office, the court said: "This qualification of residence should be consummate at the time of the election, and it will not do that the period of probation is completed before the party qualifies or enters upon the duties of the office;"[3] and the same ruling has been made in Nebraska.[4]

§ 94. **Disability arising after Election.**—The effect of a disability arising after the election will be considered in a subsequent section.

[1] Searcy *v.* Grow, 15 Cal. 117, and to the same effect see Miller *v.* Board, 25 Cal. 93; People *v.* Sanderson, 30 Cal. 160; see also People *v.* Leonard, 73 Cal. 230.

[2] State *v.* Clarke, 3 Nev. 566.

[3] Parker *v.* Smith, 3 Minn. 240, 74 Am. Dec. 749.

[4] State *v.* McMillen, 23 Neb. 385, 36 N. W. Rep. 587.

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IV.

CHANGES IN QUALIFICATIONS.

§ 95. **State vs. Federal.**—Under our political system, the State, within its province, is supreme, and the qualifications which it prescribes for those who shall be eligible to office under it, are conclusive, and can not be altered, added to, or defeated by Federal authority. So, on the other hand, no State can add to or in any manner change the qualifications prescribed by the constitution and laws of the United States for a Federal office.

§ 96. **Power of Legislature to affect constitutional Qualifications.**—Where the constitution has prescribed the qualifications, the possession of which shall entitle an individual to hold office under the state, it is not within the power of the legislature to change or add to them, unless such power be given to the legislature either in express terms or by necessary implication.[1]

A negative provision, however, as that a person not an elector shall not be appointed or elected to an office in the state, does not preclude the legislature from adding other reasonable and proper requirements.[2]

§ 97. **Where no constitutional Prohibition, Legislature may change Qualifications.**—Where, however, no constitutional prohibition intervenes, the legislature may fix the qualifications and may alter or add to them at pleasure.[3]

§ 98. **Legislature can not make political Opinions a Qualification.**—But under our republican form of government, the legislature can not make the holding of any particular political opinion a test of the right to hold office.[4] Thus an act which provides for the appointment of four officers "two members

[1] Thomas *v.* Owens, 4 Md. 189, 223; Page *v.* Hardin, 8 B. Mon. (Ky.) 648, 661.

[2] State *v.* Covington, 29 Ohio St. 102, 118, as that he shall be able to read and write the English language; Darrow *v.* People, 8 Colo. 417, or be a tax-payer.

[3] See *post*, § 465.

[4] Attorney General *v.* Common Council, 58 Mich. 213, 55 Am. Rep. 675; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Baltimore *v.* State, 15 Md. 376; Brown *v.* Haywood, 4 Heisk. (Tenn.) 357; Evansville *v.* State, 118 Ind. 426.

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thereof to be from each of the two leading political parties" is unconstitutional and void.[1]

§ 99. **Nor can religious Opinions be made a Test.**—So it is well settled that religious beliefs or opinions can not be made a test of political rights and privileges.[2]

[1] Attorney-General *v.* Common Council, 58 Mich. 213, 55 Am. Rep. 675.

[2] People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Attorney-General *v.* Common Council, 58 Mich. 213, 55 Am. Rep. 675.

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CHAPTER IV.

OF APPOINTMENT TO OFFICE.

§ 100. Necessity of Appointment or Election.
101. Purpose of this Chapter.
102. What is meant by Appointment.
103. Where Power of Appointment lies.
104. Appointment to Office is an executive Act.
105. Exceptions to the Rule.
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§ 136. Appointments to fill Vacancies occurring during Session, but left unfilled.
137. Same Subject—Rule in United States Courts.
§ 138. Same Subject—Rule in New Jersey.
139. Same Subject — Appointee holds only until Close of next Session.

§ 100. **Necessity of Appointment or Election.**—In a leading case in Michigan, it is said, "It is difficult to perceive by what process a public office can be obtained or exercised without either election or appointment. The powers of government are parceled out by the constitution, which certainly contemplates some official responsibility. Every officer not expressly exempted is required to take an oath of office as a preliminary to discharging his duties. It is absurd to suppose that any official power can exist in any person by his own assumption, or by the employment of some other private person; and still more so, to recognize in such an assumption a power of depriving individuals of their property. Such claims are inconsistent with any idea of government whatever. And it is plain that the exercise of such a power is an act in its nature public and not private." [1]

§ 101. **Purpose of this Chapter.**—It is the purpose of this chapter to discuss the question of appointment to office, reserving the question of election for the following chapter.

§ 102. **What is meant by Appointment.**—By *appointment*, as here used, is meant the act of designation by the executive officer, board or body, to whom that power has been delegated, of the individual who is to exercise the functions of a given office. In this use it is to be distinguished from the selection or designation by a popular vote.

§ 103. **Where Power of Appointment lies.** — The power of appointing public officers rests primarily with the people. By their constitutions, however, they delegate it to their representatives, and we find it usually vested in the chief executive of the nation, state or municipality by which the officer's authority is created, but it is sometimes conferred upon legislatures, boards, committees or councils. The Constitution of the United

[1] CAMPBELL, J., in Ames *v.* Port Huron Log Driving Co., 11 Mich. 139, 83 Am. Dec. 731.

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States provides that the president "shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law," [1] and the constitutions of the states confer more or less of appointing power upon their respective governors.

§ 104. **Appointment to Office is an executive Act.**—So it is said that appointments to office, whether made by judicial, legislative or executive officers or bodies, are in their nature intrinsically executive acts.[2]

§ 105. **Exceptions to this Rule.**—But while it is generally true that the appointment to office is an executive function, it must be conceded "that it is not every appointment to office which involves the exercise of executive functions; as, for instance, the appointments made by judicial officers in the discharge of their official duties, or the appointments made by the general assembly of officers necessary to enable it to properly discharge its duties as an independent legislative body, and the like. Such appointments by the several departments of the state government are necessary to enable them to maintain their independent existence, and do not involve an encroachment upon the functions of any other branch." [3]

§ 106. **What Power of Appointment may be exercised by the Legislature.**—Where the people have, by their constitutions, expressly conferred the power of appointment of other officers upon the legislature, it may properly and lawfully be exercised within the limits so prescribed. But in other cases than the two above mentioned,—those authorized by necessity and those expressly authorized by the constitution—it is clear that the legislature has, under our political systems, no general appointing power. That, as has been stated, belongs generally and properly

[1] Art. II. sec. 2, subd. 2.

[2] State *v.* Barbour, 53 Conn. 76, 55 Am. Rep. 65; Taylor *v.* Commonwealth, 3 J. J. Marsh. (Ky.) 401; Ackley's case, 4 Abb. Pr. (N. Y.) 35; Marbury *v.* Madison, 1 Cranch (U. S.) 137; Heinlen *v.* Sullivan, 64 Cal. 378.

[3] State *v.* Denny, 118 Ind. 449, 21 N. E. Rep. 252.

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to the executive department. At the same time, the exact limit of the power of the legislature is exceedingly difficult to define.[1] But if it be conceded that the power exists, independent of express constitutional grant, to appoint some state officers of general authority to be exercised for the benefit of the State at large,[2] it is well settled that it is not, as will be seen,[3] within the power of the legislature to make permanent appointments to fill purely local municipal offices.[4]

§ 107. **Same Subject—Power to prescribe Manner of Appointment not equivalent to Power to appoint.**—So where the constitution provides that all officers whose appointment is not otherwise provided for in the constitution shall be chosen in such manner as may be prescribed by law, it is held that, while this provision authorizes the legislature to provide by law for the appointment or election of such officers, it does not authorize the legislature itself to make such appointment or election.[5] To make good such a claim, it is said,[6] "it must be made to appear that the power to direct the 'manner,' the mode, the way, in which an act shall be done, and the power and authority to do the act itself, are one and the same thing. But that they are not identical or equivalent to each other is too clear for argument, and almost too clear to admit of illustration. To prescribe the manner of election or appointment to an office is an ordinary legislative function. To make an appointment to office is an administrative function. And under a constitution in which the philosophical theory of a division of the powers of government

[1] See elaborate considerations of these questions in State *v.* Denny, 118 Ind. 449, 21 N. E. Rep 252; Hovey *v.* State, — Ind. —, 21 N. E. Rep. 21; Hovey *v.* State, — Ind. —, 21 N. E. Rep. 890; Evansville *v.* State, 118 Ind. 426, 21 N. E. Rep. 267.

[2] Hovey *v.* State, *supra*, where, upon grounds of acquiescence and at least colorable constitutional authority, the power of the legislature to appoint trustees of asylums for the insane and the blind was sustained.

[3] See *post*, § 123.

[4] State *v.* Denny, 118 Ind. 449, 21 N. E. Rep. 252; Evansville *v.* State, 118 Ind. 426, 21 N. E. Rep. 267; People *v.* Hurlbut, 24 Mich 44, 9 Am. Rep. 103; People *v.* Detroit, 28 Mich. 228; People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278; People *v.* Lynch, 51 Cal. 15, 21 Am Rep. 677; People *v.* Albertson, 55 N. Y. 55; People *v.* Porter, 90 N. Y. 68.

[5] State *v.* Denny, 118 Ind. 449, 21 N. E. Rep. 252; Evansville *v.* State, 118 Ind. 426, 21 N. E. Rep. 267.

[6] BRINKERHOFF, J., in State *v.* Kennon, 7 Ohio St. 560.

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into legislative, executive and judicial should be exactly carried out in detail, the power of prescribing the manner of making appointments to office would fall naturally and properly to the legislative department, while the power to make the appointments themselves would fall as naturally and properly to the executive department."

And this disability extends as well to filling a vacancy as to making an original appointment.[1]

§ 108. **Authority of Executive to appoint must be conferred by sovereign Power.**—But the power to appoint officers, excepting, perhaps, those who are to assist him in the discharge of his personal executive duties, is not inherent in the chief executive, but must exist, if it exist at all, by virtue of the authority conferred upon him by the sovereign power.[2]

§ 109. **Power which created Authority can take it away.**— It is obvious also that the same power which created the authority to appoint can, in the absence of constitutional limitations, take it away again. Thus an office of legislative creation can be modified, controlled or abolished by the same power, or the mode of appointments thereto can be changed.[3]

§ 110. **Power may be absolute or conditional.**—The power of appointment may be absolute or conditional. Where it is absolute, the choice of the appointing power, if it falls upon an eligible person, is conclusive. But frequently the power of appointment is conditional, and may be exercised, as in the case of the President of the United States, "by and with the consent of the senate" or some other body only, and this requirement of assent or confirmation is found in all grades of municipal offices.

§ 111. **At what time the Power may be exercised.**—Where power is given to appoint an officer "at" the expiration of the term of his predecessor, an appointment made on the day on which the term expires is not invalid.[4]

[1] **Evansville** *v.* State, 118 Ind. 426, 21 N. E. Rep. 267.

[2] State *v.* Noble, 118 Ind. 350, 21 N. E. Rep. 21, citing Mayor *v.* State, 15 Md. 376, 74 Am. Dec. 572; State *v.* Swift, 11 Nev. 128; State *v.* Irwin, 5 Nev. 111; Commonwealth *v.* Hanley, 9 Penn. St. 513; Collins *v.* State, 8 Ind. 344.

[3] Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331; State *v.* Bell, 116 Ind. 1.

[4] People *v.* Blanding, 63 Cal. 333.

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§ 112. **Can not appoint himself to an Office.**— It is contrary to the public policy to permit an officer, having the power to appoint to an office, to exercise that power in his own interest by appointing himself.[1]

§ 113. **Power once exercised is exhausted till Vacancy occurs.**—Where power has been given to appoint to an office and the same has been exercised, any subsequent appointment to the same office will be void unless the prior incumbent has been removed or the office has otherwise become vacant.[2]

§ 114. **What constitutes Appointment.**— Where the power of appointment is absolute, and the appointee has been determined upon, no further consent or approval is necessary, and the formal evidence of the appointment, the commission, may issue at once. Where, however, the assent or confirmation of some other officer or body is required, the commission can issue or the appointment be complete only when such assent or confirmation is obtained.[3]

In either case the appointment becomes complete when the last act required of the appointing power is performed.[4]

[1] People *v.* Thomas, 33 Barb. 287. As where a board appointed one of its own number, and the vote of the appointee was necessary to the appointment. State *v.* Hoyt, 2 Oreg. 246.

[2] Thomas *v.* Burrus, 23 Miss. 550, 57 Am. Dec. 154; See People *v.* Woodruff, 32 N. Y. 355.

[3] People *v.* Bissell, 49 Cal. 407.

[4] State *v.* Barbour, 53 Conn. 76, 55 Am. Rep. 65. In this case, CARPENTER, J., said: "An appointment is complete when the last act required of the appointing power has been performed. The signing of a commission by the president of the United States, when the appointment was made by him, and the law required a commission, was held to be the last act. Marbury *v.* Madison, 1 Cranch (U. S.) 137. Also a writing signed by the mayor of a city making a nomination to be confirmed by the common council under the erroneous belief that such confirmation was necessary, although it was not required by law. People *v.* Fitzsimmons, 68 N. Y. 514. In the case of a judicial appointment, a declaration in open court, when the law does not require the appointment to be in writing, has been held to be final. Hoke *v.* Field, 10 Bush (Ky.) 144, 19 Am. Rep. 58. In Achley's case, 4 Abb. Pr. (N. Y.) 35, it was held that the appointment was made when both branches of the common council concurred in the passage of a resolution making the appointment. So also in People *v.* Stowell, 9 Abb. N. C. (N. Y.) 456. In Conger *v.* Gilmer, 32 Cal. 75, the law required that justices of the peace appointed by the board of supervisors should receive a commission signed by the officers of the board and sealed with its seal; it was

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In cases where a commission is required, the appointment is complete when the commission is signed by the executive, and sealed if necessary, and is ready to be delivered or transmitted to the appointee.[1] After this event, the death of the executive does

held that a commission so signed and sealed was the only evidence of an appointment. If, however, such formal act is to be performed by some other than the appointing power, it constitutes no part of the appointment. Marbury *v.* Madison, *supra;* People *v.* Stowell, *supra.* Such formal acts in such cases are mere ministerial acts."

In this case (State *v.* Barbour, *supra*) a city charter provided that the common council in joint convention should appoint a prosecuting attorney, but gave no directions as to the mode of appointment, and the convention had no power of removal. The convention met for the purpose of making the appointment, and voted "to proceed to ballot for a prosecuting attorney." A ballot was taken, and the relator, Coogan, had a clear majority of all the votes cast, and of the whole convention, and the result was announced by the presiding officer. A resolution declaring relator elected was then proposed and lost. Two resolutions were then offered and passed, one of which declared the ballot taken to be void by reason of errors in it, (which it was found did not exist) and the other declaring the defendant, Barbour "elected and appointed prosecuting attorney." The court held that relator Coogan was duly elected and entitled to the office.

[1] Justices *v.* Clark, 1 T. B. Mon (Ky.) 82, United States *v.* LeBaron, 19 How. (U. S.) 73; Marbury *v.* Madison, 1 Cranch (U. S.) 137; People *v.* Murray, 70 N. Y. 521.

In United States *v.* LeBaron, *supra*, CURTIS, J., says: "When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the Executive; all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete.

The transmission of the commission to the officer is not essential to his investiture of the office. If, by any inadvertence or accident, it should fail to reach him, his possession of the office is as lawful as if it were in his custody. It is but evidence of those acts of appointment and qualification which constitute his title and which may be proved by other evidence, where the rule of law requiring the best evidence does not prevent."

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not revoke the appointment, although the appointee must give a bond and take an oath before he possesses the office.[1]

But "on general principles," as is said by WOODBURY, J.,[2] "the *choice* of a person to fill an office constitutes the essence of his appointment.[3] After the choice, if there be a commission, an oath of office, or any ceremony of inauguration, these are forms only which may or may not be necessary to the validity of any acts under the appointment, according as usage and positive statute may or may not render them indispensable."

§ 115. **Necessity of written Appointment.**—Whether an appointment to a public office can be made by parol without writing is a question not well settled by the authorities. In a leading case[4] in New York involving the title of certain city officers under a statute by which the authority to appoint them was in the mayor alone, and the assent or approval of the common council was not required,[5] it appeared that the officers in question were verbally nominated by the mayor to the common council and that that body had passed a resolution confirming the appointment. But this action by the council, and the record of it, not being required, were held by the court to be *ultra vires* and without efficiency. "They add nothing to the verbal decla-

1 Continuing, Judge CURTIS says: (United States *v.* LeBaron, *supra*), "It follows from these premises, that when the commission of a postmaster has been signed and sealed, and placed in the hands of the Postmaster General to be transmitted to the officer, so far as the execution is concerned, it is a completed act. The officer has then been commissioned by the President pursuant to the constitution; and the subsequent death of the President, by whom nothing remained to be done, can have no effect on that completed act. It is of no importance that the person commissioned must give a bond and take an oath before he possesses the office under the commission; nor that it is the duty of the Postmaster General to transmit the commission to the officer when he shall have done so. These are acts of third persons. The President has previously acted to the full extent which he is required or enabled by the constitution and laws to act in appointing and commissioning the officer; and to the benefit of that complete action the officer is entitled, when he fulfills the conditions on his part, imposed by law."

2 In Johnston *v.* Wilson, 2 N. H. 205, 9 Am. Dec. 50.

3 Citing Marbury *v.* Madison, 1 Cranch (U. S.) 137; Craig *v.* Norfolk, 1 Mod. 122.

4 People *v.* Murray, 70 N. Y. 521.

5 Laws of 1870, Ch. 175, § 2. People *v.* Gates, 56 N. Y. 387: People *v.* Fitzsimmons, 68 N. Y. 514.

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ration and statement of the mayor," said the court by ALLEN, J., "and the claim is that such nomination was a verbal appointment of the persons named to the office, the completed act of the mayor making the appointment; that an appointment by parol without writing is a valid exercise of the power to appoint, and this proposition must be sustained or the respondents cannot hold their judgment. In the People v. Fitzsimmons[1] we held, with considerable hesitation and not without great doubts, that a nomination of the mayor of Albany to the common council of that city, and for their action, of individuals for office under the same statute, *in writing*, signed by the mayor officially and filed with the clerk of the common council, in the absence of any statute prescribing the form of the appointment or of the commission to be issued, followed by the taking of the oath of office by the persons named before the mayor, was a sufficient appointment by the mayor under the statute. No stress was laid upon the action of the common council. The paper writing signed by the mayor officially, although addressed to the common council and in the form of a nomination of the persons to that body, was an official appointment to the office by the mayor, and a substantial compliance with the statutes. Judge EARL says: 'No further commission was necessary. That document containing or evidencing the appointment would answer the purpose of a commission, if one was necessary.' He says also: 'It cannot be denied that much can be said in opposition to the conclusion we have thus reached.' There is certainly great force in the dissent of Judge RAPALLO. It is nowhere intimated in the opinion that anything less than a formal paper writing, signed by the official with whom the power of appointment rests, showing clearly his intent to appoint the persons named, and his belief that such writing is that required by the statute, and his intention to make that the final act on his part in perfecting the appointment, will constitute an appointment conferring the office upon the appointees, and such was the paper signed by the mayor in that case, as interpreted and construed by this court. *There is no color in the opinion, or in any statute of this state, or any custom or usage of which we have knowledge, for claiming that an appointment to any civil office*

[1] 68 N. Y. 514.

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can be made verbally or without a proper writing evidencing the fact.[1]

It would be unfortunate if the title to office of one upon whose official acts public interests and private rights hinged, did or could be made to depend upon the verbal declarations and statements of the person having the power to make the appointment, to be proved by parol and liable to be forgotten, misunderstood or misreported, subject to all the contingencies and infirmities which are incident to verbal evidence, or evidence by parol, so pregnant of mischief and misfortune as to have led to the enactment of the statute of frauds. It will not be presumed that the Legislature, while making void contracts involving trifling pecuniary interests, unless evidenced by some writing, intended that important civil offices should be conferred without a commission or any writing, but simply by a verbal statement of an individual in any form which by the bystanders should be understood as expressing a present intent to make the appointment; and a liberal interpretation will be given to the statutes bearing upon the subject if necessary to avoid any such conclusion. * * * *

The constitution and the laws of the state create or provide for the creation of all offices, and prescribe the mode of election or appointment, the terms and duration of office, as well as regulate the duties and emoluments. Offices, in certain cases, may be for a term of years, during the pleasure of the appointing power, or during good behavior; but whatever may be the term or tenure of office, the appointment must be in conformity with the statutes of the state. An appointment, in the general sense of the term, may be by deed, or in writing without seal, or verbal, depending upon the subject-matter of the appointment and the terms of the authority under which it is made. *But an appointment to office by the person or persons having authority therefor, as distinguished from an election, can only be made verbally, and without writing, when permitted by the terms of the statute conferring the power.*[1] Affecting the public, and not merely private rights, and being done under the authority of the sovereign power and not under individual authority, it should

[1] The italics are the author's.

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be authenticated in a way that the public may know when and in what manner the duty has been performed."[1]

[1] Proceeding, the learned Judge further says: "A right to an office by election may be perfect when the votes have been cast and canvassed, and the result certified according to law, but then a commission, or the duly authenticated certificate of the result, as the substitute for a commission is the highest and best evidence of the title. An appointment by the Executive by and with the advice and consent of the Senate, is only evidenced by the commission; as the Executive may decline to make the appointment and to issue the commission notwithstanding the advice and consent of the Senate. 2 Story on Const. § 1546.

It is quite evident that no verbal declaration of the Executive would perfect the appointment. The nomination is but the naming of the person as suitable to be appointed; the action of the Senate is merely the advice and consent of that body that the appointment be made; and the appointment is then made and is evidenced by the commission. The act of signing the commission completes the appointment as well as perpetuates the evidence of it. From that time only is the act irrevocable. 1 R. S. 117, §§ 11-14; Marbury *v.* Madison, 1 Cranch (U. S.) 137. The statute (1 R. S. 118, § 19) clearly contemplates a commission, the form of which is not prescribed, which shall be the conclusive evidence of an appointment to a civil office. The article in which the section is found is entitled 'Of nominations to offices and the commissions of officers,' and after making provision for officers appointed by the Governor and Senate, and by the Governor, and all the elective officers, and commissioners of deeds (then appointed by the county judges and boards of supervisors in joint convention) it provides in the last section that 'the commissions for all other offices, when no special provision is made, shall be signed by the presiding officer of the board or body, or by the person making the appointment.' The language includes every civil office within the State, not excepted from its operation by statute, and was clearly intended to prescribe the mode of appointment. The appointment under this delegated authority is inchoate until the last act to be done by the appointing power is completed, and that is the signing of the writing or the commission. The appointment is then, and not before, 'evidenced by an open unequivocal act.' Ch. J. MARSHALL in Marbury *v.* Madison, 1 Cranch 137, says: 'Some point of time must be taken when the power of the Executive over an officer not removable at his will must cease; that point of time must be when the constitutional power of appointment has been exercised; when the last act required from the person possessing the power has been performed. The last act is the signature of the commission.' It is not discretionary with a person having the power to appoint to office, whether there shall be a commission; the signing of the commission is an integral part of the duty of the delegated power, and necessary to a perfect and complete execution of the power entitling the appointee to assume the duties of the office. People *v.* Van Slyck, 4 Cow. (N. Y.) 297, does not bear upon the question in

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§ 116. **Same Subject — The contrary View.**—But where a statute authorized "the county judge of the Jefferson county

hand. It related to the designation of one of several town inspectors of election to act as a messenger to deliver the canvass to the board of county canvassers, and it was held that the authority should have been respected on several grounds, none of which by the remotest analogy sanctions the validity of a verbal appointment to office, or gives color to the idea that the mayor of Lockport, meeting three reputable freeholders of the city, might say to them: 'I appoint you three gentlemen commissioners of excise for this city. Go take the oath of office and enter upon its duties,' and that this would be a good appointment in virtue of which the incumbents could be ousted. Saunders *v.* Owen (2 Salk. 467, 12 Mod. 199, reported in the Common Pleas as Owen *v.* Saunders, 1 Ld. Raym. 158) is relied upon to sustain the title of the relators to the office in dispute. The facts of the case are more nearly like those in People *v.* Fitzsimmons (68 N. Y. 514) than to the case before us. The Earl of Winchelsea, as *custos rotulorum*, having the power to appoint a clerk of the peace for the county of Kent, had, by writing under his hand and seal, appointed the plaintiff to be clerk of the peace, *durante bene placito*, which the justices of the peace at the sessions refused to recognize, the validity thereof being disputed, whereupon, at the next general session of the peace, the Earl came into court and the writing was read in court, and the Earl without reference to the writing said: 'I do nominate and appoint the said P. Owen to be the clerk of the peace according to the act of Parliament,' and Owen was admitted; but upon the death of the Earl of Winchelsea, the Earl of Runney, as the then *custos rotulorum*, appointed Saunders to the office of clerk of the peace, and it was held that the appointment of Owen was valid as an appointment, not during the pleasure of the Earl of Winchelsea, but *quamdiu bene gesserit*, as required by the act of Parliament (1 W. & M.) regulating the term of office. The King's Bench reversed the judgment of the Common Pleas, but was, in turn, reversed by the House of Lords, and the judgment of the Common Pleas, as reported by Lord Raymond, affirmed. The reasons assigned for judgment are entirely inapplicable to any question that can arise under our system of government. Notice is taken of the use of the two words found in the statute, 'nominate' and 'appoint,' and an argument is based upon the act of nomination, which could be by parol. It is also said, that before the act of 37 H. 8, ch. 1, the clerk of the peace was constituted by parol only, and without deed, as was implied by the preamble using the words 'nominate and appoint.' The origin of the office was said to be very clear, but it was thought probable that, at the first, the conservation of the rolls was committed to one of the justices, who was thereupon called *custos rotulorum*, and that by consent of his brethren he nominated the clerk of the peace. The statute of W. & M., using the same words, 'nominate and appoint,' which were used in 37 Hen. 8, from which it was implied that before that time the nomination had been by parol, was expounded according

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court" to appoint a collector of taxes, it was held by the supreme court of Kentucky that the appointment might be by parol and need not be evidenced by any record or other writing. Said the court:[1] "The power to appoint the collector of back taxes is vested in the judge of the county court. He is to exercise it in his character as judge, and whether the appointment be made in or out of court it is the act of the judge and not of the court. In order, therefore, to make a valid appointment it is not necessary that any memorandum thereof shall be entered upon the order book of the court.

The right of the appointee to be inducted into office depends upon the fact of the appointment, and not upon his ability to establish that fact by the production of an order of court.

to the exposition of the common law; so that, since the new law, a nomination by parol was held good, notwithstanding the office was by it made a freehold. The decision was upon the construction of the statute of Hen. 8, and W. & M., and they were interpreted by references to what was supposed to have been the prior usage. This case certainly throws no light upon the common law, nor aids us in determining what would be a good appointment to office either at common law or under our statutes. It is clearly implied from Hunt v. Ellisden, 2 Dyer 152 b, that an appointment to office by parol, or in any way except by deed, is not valid unless made so by statute or usage. In Curles' case, 11 Coke. 2 b. it was resolved that the nomination by the King, of auditors of the Court of Wards, ought to be under the great seal of England, and not by word, nor by the privy seal, etc.

In Craig v. Norfolk, 1 Mod. 122, the plaintiff claimed under a patent, and the question was upon his seizin in fact of the office in controversy. Statute or usage is necessary to authorize an appointment other than by writing. The common law does not speak upon the subject. The King cannot grant ancient offices in other manner or form than was usual, if the form be not altered by Parliament, as creating by writ, when before it was by patent, Com. Dig. Officer A; Johnston v. Wilson, 2 N. H. 202 (9 Am. Dec. 50) related to an elective office, and Mr. Justice Woodbury says: 'On general principles, the choice of a person to fill an office constitutes the essence of his appointment. After the choice, if there be a commission, an oath of office or any ceremony of inauguration, these are forms which may or may not be necessary to the validity of any acts under the appointment, according as usage and positive statute may or may not render them indispensable.' But in the case of an appointment by one representing the public, the choice can only be made under our statute by the commission by which it is evidenced. That is the making of the choice; the act which is effectual, as unequivocal and final."

[1] Hoke v. Field, 10 Bush (Ky.) 141, 19 Am. Rep. 58.

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The act under consideration does not prescribe the manner in which the judge shall make the appointment, nor does it direct that any written evidence of his action shall be furnished to the person appointed. In such a state of case it is only necessary that the person claiming the office shall show that the officer having the power to appoint has exercised that power, and decided in his favor. This decision must be evidenced by some 'open, unequivocal act.'[1] This act, however, need not be the execution of a writing. The appointment, if made in the presence of the tribunal charged with the duty of taking the bond and administering the oath of office to the appointee, may be by an oral announcement by the judge of his determination.[2] * *

Field claims that he was appointed to the office on the 3d day of March, 1873. The evidence before us shows that the county judge did decide to appoint him, and that he evidenced that decision by open and unequivocal acts and by oral statements publicly made while the county court was in session. It shows that the clerk of that court, with the knowledge and assent, if not in obedience to the directions of the judge, administered to Field the oath of office, and attested a bond executed by him in open court. We need not decide how far the failure of the judge to sign the orders of court entered of record on the 3d of March, 1873, affects the validity of the qualification of Field as an officer. Such failure in no wise affects his right to the office, as that right springs from the appointment and not from any proceeding in court."

§ 117. **Commission is Evidence merely.**—But the commission does not, of itself, constitute the appointment; it is merely evidence of it, and the fact of the appointment may, in collateral inquiries, be shown by other means.[3]

Where one is found acting as a public officer, it is the presumption that he has been duly appointed to the office which he

[1] Citing Marbury *v.* Madison, 1 Cranch (U. S.) 157.

[2] Saunders *v.* Owen, 12 Mod. 209, 2 Salk. 467.

[3] Commonwealth *v.* Tobin, 108 Mass. 426, 11 Am. Rep. 375; Commonwealth *v.* Kane, 108 Mass. 423, 11 Am. Rep. 373; Jeter *v.* State, 1 McCord (S. Car.) 233; State *v.* Lylies, 1 McCord, (S. C.) 238; Hill *v.* State, 1 Ala. 559; Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457; State *v.* Capers, 37 La. Ann. 747.

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assumes to exercise, and all of his acts done by what appears to be public authority are presumed to be rightly done until the contrary is proved.[1]

But where the claimant's title to the office is directly assailed, the commission from the executive would certainly be the best evidence of his right.[2]

§ 118. **When Commission issues.**—Where a statute provides for an office, fixing no date for its beginning, but requiring a commission to be issued, it is presumed that the commission will issue within a reasonable time and the term of office will date from then.[3]

§ 119. **Commission may be revoked if improperly issued.**—Where the executive through mistake erroneously issues the commission to the wrong person, he may revoke it and reissue it to the person lawfully entitled to receive it.[4]

§ 120. **Appointment in other Cases is irrevocable.**—In other cases, however, where the appointing power has not also the absolute power of removal, the exercise of the appointing power is irrevocable, and the appointee will hold during the term, unless otherwise duly removed.[5]

§ 121. **Under what Circumstances appointing Power exercised.**—The power of appointment may be conferred to be exercised in two classes of cases:

1. To fill offices filled only by appointment, or *original appointments.*

2. To fill offices originally filled by election, but made vacant by some cause, or *appointments to fill vacancies*, both of which deserve attention.

[1] Commonwealth *v.* Kane, 108 Mass. 423, 11 Am. Rep. 373; Bank of United States *v.* Dandridge, 12 Wheat. (U. S.) 64; Carter *v.* Sympson, 8 B. Mon. (Ky.) 155; Callison *v.* Hedrick, 15 Gratt. (Va.) 244.

[2] State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367; Beal *v.* Morton, 18 Ind. 346.

[3] Brodie *v.* Campbell, 17 Cal. 11.

[4] Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49; State *v.* Capers, 37 La. Ann. 747.

[5] State *v.* Barbour, 53 Conn. 76, 55 Am. Rep. 65; Marbury *v.* Madison, 1 Cranch (U. S.) 137; Achley's Case, 4 Abb. Pr. (N. Y.) 35; Cole *v.* Chapman, 44 Conn. 601; Putnam *v.* Langly, 133 Mass. 204.

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I.

ORIGINAL APPOINTMENTS.

§ 122. **More often exercised under National than State Governments.**—The method of filling public offices existing under the government of the United States is generally that of appointment by the executive or heads of departments, the only officers who are elective being the president, the vice-president (and these not directly so) and the members of Congress.

Under the State governments, and for obvious reasons, the rule is otherwise. There the large majority of the public officers, and particularly those who are to come in contact with the people directly, are elected at popular elections, and the power of appointment in the first instance exists in but few cases, being chiefly confined to the filling of vacancies, and then usually only until the next regular election.

So, also, where the power of appointment exists, it is, except in the case of purely State officers, usually conferred only upon the executive branch of the local department, municipality or government having jurisdiction over the territory within which the officer's powers are to be exercised.

§ 123. **Local Offices can not be permanently filled by legislative Appointment.**—Indeed this right of *local self-government*, as it has been briefly termed, is held to be an established feature and incident of our political system, and it is not within the power of the legislature of a State to permanently fill by appointment the local offices established by law for purely local purposes.[1]

[1] People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Attorney-General *v.* Lothrop, 24 Mich. 235; Attorney-General *v.* Detroit, 29 Mich. 110; People *v.* Detroit, 28 Mich. 228; State *v.* Denny, 118 Ind. 449, 21 N. E. Rep. 252; Evansville *v.* State, 118 Ind. 426, 21 N. E. Rep. 267.

In People *v.* Hurlbut, *supra*, a case involving the right of the legislature to make permanent appointments of members of a local board of public works, COOLEY, J., says:

"The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and

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Such appointments, however, may, it seems, be made, provisionally only, for the purpose of primary organizations and to serve

would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether. If we look into the several State constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy. The implied restrictions upon the power of the Legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.

The circumstances from which these implications arise are: *First*, that the constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and *second*, that the liberties of the people have generally been supposed to spring from, and be dependent upon that system.

De Tocqueville speaks of our system of local government as *the American system*, and contrasts it forcibly with the French idea of centralization, under the influence of which constitutional freedom has hitherto proved impossible; *Democracy in America, chapter* 5. Lieber makes the same comparison, and shows that a centralized government, though by representatives freely chosen, must be despotic, as any other form of centralization necessarily is. 'Self-government,' he says, 'means everything for the people and by the people, considered as the totality of organic institutions, constantly evolving in their character as all organic life is; but not a dictatorial multitude. Dictating is the rule of the army, not of liberty; it is the destruction of individuality;' *Civil Liberty and Self-Government, chapter* 21. The writer first named, speaking of the New England township government, whose system we have followed in the main, says: 'In this part of the Union the impulsion of

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until others can be chosen by the local authorities in the regular way.[1]

political activity was given in the townships; and it may almost be said that each of them originally formed an independent nation. When the kings of England asserted their supremacy, they were contented to assume the central power of the State. The townships of New England remained as they were before; and, although they are now subject to the State, they were at first scarcely dependent upon it. It is important to remember that they have not been invested with privileges, but that they seem on the contrary, to have surrendered a portion of their independence to the State. The townships are only subordinate to the States in those interests which I shall term *social*, as they are common to all the citizens. They are independent in all that concerns themselves; and among the inhabitants of New England, I believe that not a man is to be found who would acknowledge that the State has any right to interfere in their local interests;' *Democracy in America, ubi supra.* Now, if this author is here speaking of the theory of our institutions, he is in error. It is not the accepted theory that the States have received delegations of power from independent towns; but the theory is,on the other hand, that the state governments precede the local, create the latter at discretion, and endow them with corporate life. But, historically, it is as difficult to prove this theory as it would be to demonstrate that the origin of government is in compact, or that title to property comes from occupancy. The historical fact is, that local governments universally, in this country, were either simultaneous with, or preceded, the more central authority. In Massachusetts, originally a democracy, the two may be said to have been at first identical; but when the colony became a representative government, and new bands pushed out into the wilderness, they went bearing with them grants of land and authority for the conduct of their local affairs. Hutchinson's Massachusetts Bay, ch. 1; Washburn's Jud. Hist. of Mass. ch. 1; Body of Liberties, §§ 62, 66, 72; Elliot's New England, Vol. 4, pp. 425, 427.

But in Connecticut the several settlements originated their own governments, and though these were doubtless very imperfect and informal, they were sufficient for the time being, and the central government was later in point of time; Trumbull's Hist. of Conn. Vol. I., pp. 132, 498; Palfey's New England, Vol. I., p. 454. What the colony did was only to confer charters, under which the town authority would be administered within agreed limits, and possibly with more regularity than before. In Rhode Island, it is also true, that township organization was first in order of time. Arnold's Hist. of R. I. ch. 7. This author justly remarks, that when the charter of Rhode Island was suspended to bring her under the dominion of Andros, '*the American system of town governments*, which necessity had compelled Rhode Island to initiate fifty years before, became the means of preserving the liberty of the individual citi-

[1] State *v.* Swift, 11 Nev. 128; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

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§ 124. **Discretion of appointing Power.**—Where the authority to make appointments is absolute, the appointing power is sub-

zen when that of the State, or colony, was crushed:' Vol. I., p. 487. So in Vermont, the people not only for a time conducted all their public affairs in towns and plantations, through committees, officers and leaders, nominally appointed and submitted to by general consent and approbation, but they carried on their controversy with New York for some years, without any other organization: Williams' Hist. of Vermont, Vol. II., p. 163. In New Jersey, as in Massachusetts, towns were chartered in connection with grants of land, and, in some instances, those which were made by Nichols, adverse to the proprietary, were suffered to remain after his authority was superseded: See instances in Mulford's Hist. of N. J. pp: 143-4. The charter to Lord Baltimore plainly recognized local government in the provision requiring the laws and ordinances established to conform to the laws, statutes or rights of England: Bozman's Hist. of Maryland, p. 270. And county authorities seem to have existed from the very first, though their statutory organization, if any they had, can not be traced: Bozman, pp. 299-303. But it can not be necessary to particularize further. The general fact was, that whether the colonial or local authority should originate first, depended entirely upon circumstances which might make the one or the other the more immediate need. But when both were once established they ran parallel to each other, as they were meant to do, for all time; and what Mr. Arnold says of Rhode Island may be said generally of the eastern and middle States, that the attempt of the last two Stuarts to overthrow their liberties was defeated by means of the local organizations. The scheme tried first in England, to take away the corporate charters in order to make the corporators more dependent on the crown, and to restrain them from political action in opposition to the court party, found, in America, the colonial charters alone within the reach of arbitrary power; and though these were taken away or suspended, it was only with such protest and resistance as saved to the people the town governments. In Massachusetts, it was even insisted by the people's deputies that, to surrender local government was contrary to the sixth commandment, for, said they, 'men may not destroy their political any more than their natural lives.' So it is recorded they clung to 'the civil liberties of New England' as 'part of the inheritance of their fathers.' Palfrey's New England, Vol. 3, pp. 381-383; Bancroft's U. S., Vol. 2. pp. 125-127; Mass. Hist. Col. XXI. 74-81. The whole contest with Andros, as well in New England, as in New York and New Jersey, was a struggle of the people in defense of the right of local government. 'Everywhere,' says Dunlap, 'the people struggled for their rights and desired to be free:' Hist. of N. Y. Vol. I. p. 133; and see Trumbull's Hist. of Conn. Vol. I. ch. 15.

I have confined this examination to the States which have influenced our own polity most; but the same principle was recognized and acted on elsewhere. The local governments, however, were less complete in the States further south, and this, with some of their leading statesmen, was a source of regret. Mr. Jefferson,

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ject to no other condition or qualification than that it shall be exercised at the time, in the manner and to the extent prescribed by law, and that the appointee shall be eligible.[1] Where, however, it can be exercised only by and with the consent and approval of the senate or other similar body, its exercise has no effect unless such consent or approval be given.

writing to Governor Tyler in 1810, speaks of the two great measures which he has at heart, one of which is the division of counties into hundreds. 'These little republics,' he says, 'would be the main strength of the great one. We owe to them the vigor given to our revolution, in its commencement, in the eastern States. Could I once see this, I should consider it as the dawn of the salvation of the republic:' Jefferson's Works, Vol. 5, p. 525. Mr. Jefferson understood thoroughly the truth, so quaintly expressed by Bacon, when he said of a burden imposed as compared to one freely assumed, that 'it may be all one to the purse, but it worketh diversely upon the courage.'

Such are the historical facts regarding local government in America. Our traditions, practice and expectations have all been in one direction. And when we go beyond the general view to inquire into the details of authority, we find that it has included the power to choose in some form the persons who are to administer the local regulations. Instances to the contrary, except where the power to be administered was properly a state power, have been purely exceptional. The most prominent of these was the case of the mayor of New York, who continued, for a long time after the revolution, the appointee of the governor. But this mode of choice originated when the city was the seat of colonial government, and while it constituted a large part of the colony, and the office was afterwards of such dignity and importance, and was vested with so many general powers, that one of the first statesmen of the nation did not hesitate to resign a seat in the senate of the United States to accept it; Hammond's Pol. Hist. of N. Y. Vol. 1, p. 197. Moreover, the first constitution of New York was, in important particulars, exceptional. That State had at the time a powerful aristocratic element, by which its first institutions were in a great measure shaped; and a distrust of popular authority was manifest. It is scarcely needful to say that features of that character disappeared when the constitution was revised.

For those classes of officers whose duties are general—such as the judges, the officers of militia, the superintendents of police, of quarantine, and of po ts, by whatever name called—provision has to a greater or less extent been made by state appointment. But these are more properly State than local officers; they perform duties for the State in localities, as collectors of internal revenue do for the general government; and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general."

[1] Appointments in excess of the number authorized by law are void. Weeks *v.* United States, 21 Ct. Cl. 124.

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II.

APPOINTMENTS TO FILL VACANCIES.

§ 125. **Power may exist in two Classes of Cases.**—The power of appointment to fill vacancies may exist in two classes of cases,—

1. Vacancies in offices originally filled by appointment, and
2. Vacancies in offices originally filled by election.

§ 126. **What constitutes a Vacancy?**—A vacancy exists when there is no person lawfully authorized to assume and exercise at present the duties of the office.[1]

"The word 'vacancy' as applied to an office," it is said in a recent case,[2] "has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event."[3]

§ 127. **Classification of Vacancies.**—Vacancies have been said to be either original, constructive, accidental or absolute. A vacancy is original when an office is created, and no one has been appointed to fill it. It is constructive when the incumbent has no legal right or claim to continue in office, but can be legally replaced by another functionary. It is accidental when, the incumbent having died, resigned or been removed, there is no one *in esse* discharging the duties of the office. It is absolute when, the term of an incumbent having expired and the latter not having held over, no successor is in being who is now legally qualified to assume the office.[4]

[1] See Stocking *v.* State, 7 Ind. 326.

[2] State *v.* Harrison, 113 Ind. 234, 3 Am. St. Rep. 663.

[3] Citing Stocking *v.* State, 7 Ind. 326; Collins *v.* State, 8 *Id.* 344; Akers *v.* State, 8 *Id.* 484; State *v.* Bemenderfer, 96 *Id.* 374; Gosman *v.* State, 106 *Id.* 203; Butler *v.* State, 20 *Id.* 169; People *v.* Tilton, 37 Cal. 614; State *v.* Lusk, 18 Mo. 333; Commonwealth *v.* Hanley, 9 Penn. St. 513.

[4] See State *v.* Rareshide, 32 La. Ann. 934.

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§ 128. **Whether Office filled by prior Incumbent holding over is vacant.**—The constitution of California provided: "When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy by granting a commission which shall expire at the end of the next session of the legislature or at the next election of the people."[1] Under this section it was held that where an act creating an office and fixing the duration of the term provides that the officer shall be elected by the legislature and shall hold his office until his successor is elected and qualified, the failure of the legislature to elect at the expiration of the term does not create such a vacancy as the governor is authorized to fill by appointment, but the incumbent holds until his successor is elected by the legislature. If there was a vacancy, in any proper sense, after the expiration of the term and before the election and qualification of a successor, the statute itself filled the vacancy for the time being by providing that the old incumbent shall hold till a successor shall be elected and qualified.[2]

"It was manifestly the intent of the constitution," said the court, "that the governor should appoint only where there is no party authorized by law to discharge the duties of the office. The object was to prevent a public inconvenience arising from the want of a party authorized for the time being to discharge the duties of a public office. When there is a party expressly authorized by law to discharge those duties temporarily, till the power upon whom the duty of election or appointment is devolved can regularly act, there is no occasion for calling into exercise this extraordinary power vested in the governor to make a merely *temporary* appointment. There is no good reason for appointing a party to temporarily discharge the duties of an office when there is already a party expressly authorized by the constitution or laws to temporarily discharge those duties. The very reason upon which the power is vested in the governor fails, and the case provided for has not arisen. And it can make no difference

[1] Const. Cal. Sec. 8 Art. V.

[2] People *v.* Tilton, 37 Cal. 614, citing People *v.* Mizner, 7 Cal. 519; People *v.* Langdon, 8 Cal. 1; People *v.* Whitman, 10 Cal. 46, and holding People *v.* Reid, 6 Cal 239; overruled by People *v.* Whitman, 10 Cal. 46.

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whether the language expressly authorizing a party to hold over and discharge the duties of an office temporarily till a successor duly elected and qualified appears, is found in the constitution or in the statute. The same construction should be given to the same language used in the same connection, in reference to a similar subject-matter, when used in a statute as when used in the constitution."

The same ruling as to a vacancy was also made in a subsequent case where the term of the incumbent of an office, filled by the governor with the confirmation of senate, had expired, but the incumbent still continued to discharge the duties of the office.[1] Like rulings have also been made in other States,[2] and such seems to be the settled principle of the law.

§ 129. **Whether Failure to elect leaves Office vacant.**—Where an incumbent of an office, elected by the people or some other body, or appointed by the executive with the consent of the Senate, is, by law, entitled to hold over until his successor is elected and qualified, the failure or neglect to appoint or elect his successor, presents the same question considered in the previous section, and, in accordance with the rules there laid down, the office would not be deemed vacant, in such manner as to be filled by the appointment by the executive alone, there being a person authorized by law to continue to exercise the duties and functions of the office until a successor, duly elected and qualified, appears to assume it.[3]

[1] People *v.* Bissell, 49 Cal. 408.

[2] State *v.* Harrison, 113 Ind. 234, 3 Am. St. Rep. 663; State *v.* Howe, 25 Ohio St. 588, 18 Am. Rep. 321; State *v.* Lusk, 18 Mo. 333; Commonwealth *v.* Hanley, 9 Penn. St. 513. See also the following section.

[3] In State *v.* Howe, 25 Ohio St. 588, 18 Am. Rep. 321 it appeared that commissioners of the State reform school were to be appointed by the governor, by and with the advice of the senate, and were to hold their offices for three years and until their successors were appointed and qualified. Howe was duly appointed on April 16, 1872, and on April 9, 1875, the governor, without the advice or consent of the senate (the general assembly not being then in session), appointed Harper as the successor of Howe for the term of three years from April 16, 1875, and Harper took the oath and gave the bond required. The act providing for the commissioners declared that vacancies in the board "shall be filled as the original appointments are made except when the general assembly is not in session, and then by the governor, until the 20th day of the next session of the general assembly."

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Where, however, the incumbent of an office for a definite term has no authority by law to hold over, the failure or neglect to appoint or elect his successor must leave the office vacant.[1]

The court held however that there was no vacancy which the governor could fill by his own appointment, either on the 9th or the 16th of April, 1875, and that Howe was still entitled to the office. People *v.* Tilton, 37 Cal. 614, cited in the previous section, was cited and relied upon. The court further say: "To the same effect is State *v.* Lusk, 18 Mo. 333. The office in controversy in that case was that of 'public printer' created by a statute which fixed the term of office at two years, and until a successor was elected and qualified. The statute also provided that 'if the public printer should die or resign, or if, *from any other cause*, the office should become vacant, the governor shall appoint a public printer who shall give bond and qualify, and shall hold his office for the same time that the printer in whose stead he shall be appointed would have held,' and the constitution of the state provided that 'when any office shall become vacant, the governor shall appoint a person to fill such vacancy,' etc. Lusk was duly elected to the office for a term which expired before the legislature, whose duty it was to elect a successor, had done so. Afterward, there still being no successor elected by the legislature, the governor appointed one Treadway to fill the alleged vacancy. Upon this state of law and fact the court held that the failure of the legislature to elect a successor to Lusk did not create a vacancy which the governor could fill by appointment, but that the incumbent, who was authorized to hold the office until his successor was appointed and qualified, held over.

In Commonwealth *v.* Hanly, 9 Penn. St. 513 the supreme court of Pennsylvania held that the death of the person elected to fill the office of clerk of the Orphans' Court before he had qualified himself according to law, does not create a vacancy, but the incumbent, who is authorized to hold the office until his successor shall be elected and qualified, holds over. The office here in dispute was one created by the constitution of the State, which provided that the incumbent should hold his office for three years, if he should so long behave himself well, and until his successor should be duly *qualified*. Hanly, having been elected to the office in October, 1845, duly qualified and entered upon his term on the 19th of December, 1845. In October, 1848, one Brooks was duly elected as his successor, but died before qualification. Broom, the relator, was appointed by the governor to fill the vacancy, which, it was assumed by his appointment, would occur at the expiration of Hanly's term of three years. The constitution of the State provided that any vacancy occurring in said office should be filled by appointment, to be made by the governor, to continue until the next general election, and until a successor should be elected and qualified. After the expiration of Hanly's term of three years, the Commonwealth, on the relation of Broom, prosecuted a pro-

[1] See State *v.* McLure, 84 N. C. 153.

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Where the constitution limits the term of a public officer to a fixed period, it is held not to be within the power of the Legislature to provide that he shall also hold until his successor qualifies.[1]

§ 130. **Whether Failure to qualify causes Vacancy.**—Within the principles of the preceding section, the failure of the newly elected or appointed officer to qualify as required by law would not, where by law his predecessor held over until his successor was elected and qualified, create a vacancy;[2] but where no such provision was found the office would be vacant.[3]

§ 131. **Whether Election of unqualified Person causes Vacancy.**—Where a person elected to an office is not qualified to enter upon and hold the same at the time fixed by law therefor, and

ceeding in *quo warranto* to oust Hanly and to induct Broom. The judgment was for the defendant, upon the grounds above stated."

See also People *v.* Fitch, 1 Cal. 519; Kimball *v.* Alcorn, 45 Miss. 151; People *v.* Forquer, 1 Ill. 68.

The question was considered, but not decided in People *v.* Parker, 37 Cal. 639.

The question is also considered in the late case of State *v.* Harrison, 113 Ind. 234, 3 Am. St. Rep. 663, where it is said: "Whether or not, as a general principle of the common law, officers are entitled to hold over beyond their prescribed terms without some express provision, is not settled upon authority, although the view adopted by the American courts seems to be that, in the absence of any restrictive provision, the officer is entitled to hold until he is superseded by the election of another in his place. Tuley *v.* State, 1 Ind. 500; People *v.* Runkle, 9 Johns. (N. Y.) 147; Trustees *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; McCall *v.* Bryam Mfg. Co. 6 Conn. 428; State *v.* Fagan, 42 Conn. 32; Sparks *v.* Farmers Bank, 3 Del. Ch. 274; Stratton *v.* Oulton, 28 Cal. 44; People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302; 1 Dillon on Municipal Corporations, Sec. 219. Whatever the rule of the common law may have been, it is quite certain that where, by the constitution or law, officers are elected for a term, and until their successors are elected and qualified, they are thereby authorized to continue to hold and exercise their offices until they are superseded by the election of other persons in their places. Tuley *v.* State, 1 Ind. 500; Miller *v.* Burger, 2 *Id.* 337; Baker *v.* Kirk, 33 *Id.* 517; State *v.* Berg, 50 *Id.* 496; Gosman *v.* State, 106 *Id.* 203; Elam *v.* State, 75 *Id.* 518."

[1] State *v.* Brewster, 44 Ohio St. 589.

[2] Commonwealth *v.* Hanly, 9 Penn. St. 513.

[3] Failure to qualify within a prescribed time is usually declared in express terms to create a vacancy, and in such case the governor may appoint. Opinion of Judges—Fla.—5 S. Rep. 613; State *v.* Wilson, 72 N. C. 155.

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no provision is made for the prior incumbent to hold over, the office is vacant and may be filled by appointment;[1] but such a vacancy would not, within the principles of preceding sections, exist where by law the prior incumbent holds over until the election and qualification of his successor.

§ 132. **Whether newly created Office is vacant.**—Whether a newly created office which has never had an incumbent and which no one is now legally authorized and qualified to assume, can be deemed vacant so as to authorize an appointment to fill it, is a question upon which the authorities are not in harmony, but the weight of authority seems to be that it is to be deemed vacant. Thus it is said in Indiana, "There is no technical or peculiar meaning to the word 'vacant' as used in the constitution. It means empty, unoccupied, as applied to an office, without an incumbent. There is no basis for the distinction urged that it applies only to offices vacated by death, resignation or otherwise. An existing office, without an incumbent, is vacant, whether it be a new or an old one. A new house is as vacant as one tenanted for years, which was abandoned yesterday. We must take the words in their plain, usual sense."[2] The same principle has also been asserted in Nevada,[3] but denied in Mississippi.[4]

§ 133. **When Vacancies anticipated may be filled.** — A prospective appointment to fill an anticipated vacancy in a public office, made by the person or body which, *as then constituted*, is empowered to fill the vacancy when it arises, is, in the absence of express law forbidding it, a legal appointment, and vests title to the office in the appointee.[5] Thus where a public officer re-

[1] People *v.* Curtis, 1 Idaho, 753.

[2] Stocking *v.* State, 7 Ind. 326.

[3] State *v.* Irwin, 5 Nev. 111. See also, People *v.* Mott, 3 Cal. 502; Rhodes *v.* Hampton, 101 N.C. 629, 8 S. E. Rep. 219.

[4] O'Leary *v.* Adler, 51 Miss. 28.

[5] "The almost uniform course of practice for years in this State, without question or objection, strongly implies the legality of an appointment thus made; besides, it seems to me that the question is no longer open to controversy in the courts of this State. In the case of Haight *v.* Love, 10 Vroom (N. J.) 14, 476, by adjudication of this court, as well as by the Court of Errors, on review, an appointment so made was supported. In that case, it is true that the occurring vacancy was anticipated by but a few days, but the principle upon which that appointment was validated is unchanged by the circumstance that as many weeks intervene. The cases cited by the relator

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signs his office to take effect at a future day, and his resignation is accepted, the appointing power being, as then organized, authorized to fill the vacancy when it shall occur, may appoint a successor, the appointment to take effect when the resignation becomes operative.[1]

But the appointing power can not forestall the rights and prerogatives of their own successors by appointing successors to offices expiring after their power to appoint has itself expired. "It is plain," says the court, "that an appointment thus made by anticipation has no other basis than expediency and convenience, and can only derive its binding force and effect from the supposition that there will be no change of person and consequently, of will, on the part of the appointing power between the date of the exercise of that power by anticipation and that of the necessity for the exercise of such power by the vacancy of the office."[2]

§ 134. **Appointments "by and with the Advice and Consent of the Senate."**—It is frequently provided by the constitutions of the States, as by that of the United States, that the executive—the governor or president—shall have power to fill certain vacancies by appointments made "by and with the advice and consent of the senate." Where such a provision exists, the executive can only exercise the appointment without such advice and consent where, since the adjournment of the senate, a vacancy exists or has occurred (words held to mean the same thing[3]) by the death or resignation of the incumbent or by the happening of some other event by reason of which the duties of the office are no longer discharged.[4] If the senate be in session when the vacancy occurs, it can be filled only by and with the advice and consent of that body,[5] unless the senate has adjourned before the vacancy is filled.[6]

in support of an opposite view are not applicable to this case. The case of Biddle *v.* Willard, 10 Ind. 63, went off upon the construction of local statutes. The same is true of the case of People *v.* Wetherell, 14 Mich. 48, and Nooe *v.* Bradley, 3 Blackf. (Ind.) 158;" Whitney *v.* Van Buskirk, 40 N. J. L. 463.

[1] Whitney *v.* Van Buskirk, 40 N.J. L. 463.

[2] Ivy *v.* Lusk, 11 La. Ann. 486. See also, People *v.* Reid, — Colo. —, 17 Pac. Rep. 302.

[3] See *post* §§ 137, 138.

[4] State *v.* Rareshide, 32 La. Ann. 934.

[5] State *v.* Rareshide, 32 La. Ann. 934; People *v.* Fitch, 1 Cal. 519; Kimball *v.* Alcorn, 45 Miss. 151.

[6] See *post* §§ 137, 138.

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If the vacancy is accidental and occurs or exists while the senate is not in session, and the concurrence of the senate has not been had, the appointment is temporary and contingent upon confirmation. In the event that it is not confirmed by the senate at its next session, either because the name was not sent in or was rejected, the appointment becomes inoperative from the moment of the adjournment of that session or from the moment of its rejection, as the case may be.[1]

Where the nomination is approved, the officer's title, rights and authority are held to relate back to the time of his appointment, and do not begin only with his confirmation.[2]

The governor may be excused from the necessity of obtaining the approval of the senate to his appointments, where that body has unlawfully usurped the absolute power of making the appointments on its own motion.[3]

§ 135. **Appointments to fill Vacancies occurring in Offices originally filled by Senate.**— It is also frequently provided, in cases of offices filled by appointment by the senate or other body, that vacancies occurring during the vacation of the senate or other body may be filled by the executive. In such cases the power of the executive to fill by appointment exists only in the contingency named, *i. e.*, a vacancy occurring during vacation.

Thus it was provided in Mississippi that a public printer should be elected by a joint convention of both houses of the legislature, and that vacancies in the office should "be filled in the same manner for the unexpired term, and, in vacation of the legislature, by the governor until such session." Under this provision, it was said, "Primarily, the bestowment of the office is with the legislature; in vacation it is with the governor. If the vacancy occur during the session it must be filled by election of that body. If the vacancy is filled by the governor in the recess, it is 'until such session' of the legislature. We think it clear that the governor cannot fill the office, or nominate to the senate, during the session."[4] And the same construction

[1] State *v.* Rareshide, 32 La. Ann. 934; Kroh *v.* Smoot, 62 Md. 172.

[2] Dyer *v.* Bayne, 54 Md. 87; Shepherd *v.* Haralson, 16 La. Ann. 154.

[3] State *v.* Tate, 68 N. C. 546.

[4] Kimball *v.* Alcorn, 45 Miss. 151. Where an office was created and took effect during a session of the Senate, and a subsequent session of Congress passed without the office being filled,

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was applied in a similar case in California, where the court held that the power of appointment was limited to the filling, during vacation, of a vacancy occurring in vacation. If the vacancy occurs during the session, or, though occurring in vacation, is left unfilled until the session, the power then reverts to the legislature.[1]

§ 136. **Appointments to fill Vacancies occurring during Session, but left unfilled.**—So though a vacancy occur during the session and is left unfilled by the legislature on its adjournment, it can not, it has been held, be filled by the governor, under such a statute, in vacation.[2] But—

§ 137. **Same Subject.—Rule in United States Courts.**—A different construction prevails in the courts of the United States. Section 1769 of the Revised Statutes provides that "The president is authorized to fill all vacancies which may happen during the recess of the senate, by reason of death or resignation or expiration of term of office, granting commissions which shall

it was held that the President could not make a valid appointment to such office in the recess of the Senate. Schenk *v.* Peay, 1 Dill. 267.

[1] People *v.* Fitch, 1 Cal. 519. See 4 Opin. Atty. Genl. 361; 12 *Id.* 457.

[2] People *v.* Forquer, 1 Ill. 68. This question was raised but not decided in Kimball *v.* Alcorn, 45 Miss. 151, 160, where the court say: "Perhaps, too, a liberal interpretation of the statute of 1857, looking rather to its spirit and purpose than its letter, would have authorized the governor to fill in vacation a vacancy which happened during the session, if the legislature failed to elect, on the idea that the vacancy happened every day the office was unfilled. The duties of public printer do not terminate with the session of the Legislature. Many of them (of the most important, too,) must necessarily be performed in vacation. The law contemplates that there shall always be an incumbent. That construction would be narrow and not commensurate with the demands and necessities of the public interests (and should be avoided unless compelled by the terms of the statute) which at any time or under any circumstances would not find competent authority to fill a vacancy.

A vacancy might occur by death or other casualty so shortly before the adjournment of the legislature that the body might adjourn without notice of it. If the governor could not appoint, great public inconvenience would ensue; yet such a vacancy was as complete during the session as if it had happened the first day or the first week. But upon this point it is not necessary that we should express an opinion, and we do not therefore commit ourselves upon it."

See, however, the two sections following.

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expire at the end of their next session." In a case involving the construction of this section, it appeared that one Henry P. Farrow had held the office of district attorney by appointment of the president by and with the advice and consent of the senate, and that his term expired April 19, 1880, during a session of the senate. On April 23, Mr. Justice BRADLEY re-appointed him by virtue of section 793 of the Revised Statutes which provides that "in case of a vacancy in the office of district attorney * * the circuit justice * * may fill the same and the person appointed by him shall serve until an appointment is made by the president and the appointee is duly qualified and no longer." In May the president nominated one John S. Bigby to the office but the senate adjourned on the 16th of June without acting on the nomination. The president, however, issued a commission to Bigby on July 6, and the latter duly qualified.

In an action[1] to determine the title to the office, it was said by WOODS, J.: "The contention is that the vacancy in the office of district attorney, which the president has undertaken to fill by the appointment of Bigby, did not happen during the recess of the senate, and therefore the power to fill it does not reside in the president.

On the other hand it is claimed that the phrase 'vacancies that may happen during the recess of the senate,' when properly construed, means 'vacancies which may happen to exist during the recess of the senate.' In support of this latter view, the practice of the executive department of the government for nearly sixty years is invoked, and the concurring opinions of ten of the distinguished jurists who have filled the office of attorney-general of the United States are cited.

The first opinion given upon this point is that of Mr. William WIRT, attorney-general under President Monroe,[2] in which he argues for the construction claimed in support of the president's action in this case. He says: 'In reason, it seems to me perfectly immaterial when the vacancy first arose, for, whether it arose during the session of the senate or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of

[1] *In re*, Farrow (1880), 3 Fed Rep. 112, 24 Myer's Fed. Dec. § 247.

[2] 1 Op. 631.

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things at the point of time at which the president is called upon to act. Is the senate in session? Then he must make a nomination to that body. Is it in recess? Then the president must fill the vacancy by a temporary commission. This seems to me the only construction of the constitution which is compatible with its spirit, reason and purpose, while at the same time it offers no violence to its language, and these are, I think, the governing points to which all sound construction looks.'

This opinion of Attorney-General Wirt was concurred in by Mr. Roger B. Taney, attorney-general under President Jackson.[1] Mr. Taney says in construing that clause of the constitution under consideration: 'It was intended to provide for those vacancies which might arise from accident, and the contingencies to which human affairs must always be liable; and if it falls out that from death, inadvertence or mistake, an office required by law to be filled is, in recess, found to be vacant, then a vacancy has happened during the recess and the president may fill it. This appears to be the common sense and the natural import of the words used. They mean the same thing as if the constitution had said 'if there happen to be any vacancies during the recess.' It is not necessary to quote from the opinions, upon this question, of the other distinguished jurists who have filled the office of attorney-general. I simply refer to them.' These opinions exhaust all that can be said on the subject." The title of Bigby was therefore confirmed.

§ 138. **Same Subject.—Rule in New Jersey.**—The rule prevailing in the United States courts has also been adopted in a recent case, elaborately considered, in the supreme court of New Jersey.[3]

§ 139. **Same Subject.—Appointee holds only until Close of next Session.**—It is usually provided by the constitution or

[1] See his opinion dated July 19, 1832 (2 Op. 525).

[2] They are the opinions of Mr. Hugh S. Legare, dated October 22, 1841 (3 Op. 673); of Mr. John Y. Mason, dated August 10, 1846 (4 Op. 523); of Mr. Caleb Cushing, dated May 25, 1855 (7 Op. 186); of Mr. Edward Bates, dated October 15, 1862 (10 Op. 356); of Mr. James Speed, dated March 25, 1865 (11 Op. 179); of Mr. Henry Stanberry, dated August 30, 1866 (12 Op. 32); and of Mr. William M. Evarts, dated August 17, 1868 (13 Op. 449).

[3] State *v.* Kuhl. — N. J. —, 17 Atl. Rep. 102.

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statutes that an officer thus appointed by the executive alone shall hold the office until the close of the next regular session of the legislature, unless a successor shall have been sooner appointed. His title, therefore, expires with the next session, even though no successor has been appointed.[1]

Appointments thus made are often required to be submitted to the senate for its approval. In this case, if the senate rejects the nomination, the officer's title, it is said, at once ceases,[2] but even though approved, the officer, unless re-nominated and confirmed during the session, holds only till the end of the session or the earlier appointment of his successor,[3] the approval of the appointment during vacation not being equivalent to an appointment for the remainder of the unexpired term.[4]

[1] Kroh *v.* Smoot, 62 Md. 172; State *v.* Rareshide, 33 La. Ann. 934; State *v.* Kuhl. — N. J. —, 17 Atl. Rep. 102.

[2] State *v.* Rareshide, 32 La. Ann. 934. But see Kroh *v.* Smoot, 62 Md. 172; Gould *v.* United States, 19 Ct. Cl. 593.

[3] State *v.* Rareshide, 32 La. Ann. 934; Kroh *v.* Smoot, 62 Md. 172.

[4] Kroh *v.* Smoot, 62 Md. 172.

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CHAPTER V.

OF ELECTION TO OFFICE.

§ 140. What is meant by Election.
141. Must be exercised in the legitimate Mode.
142. Can be held only by legal Authority.
143. Primary Elections and Nominations may be regulated by Law.
144. Subdivision of the Subject.

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145. Right to vote is neither natural, absolute or vested.
146. State may prescribe Qualifications.
147. In the Territories Congress prescribes Qualifications.

2. *Constitutional Limitations upon the Power.*

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153. Requirements as to Time, Place and Manner must be observed.
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§ 175. Same Subject—Vacancies not required to be so filled.
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202. Perfect Ballot is conclusive Evidence of Voter's Intention.
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204. Plurality of Votes sufficient for a Choice.
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207. Canvassing the Vote.
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211. Board can act but once.
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214. The Tribunal.
215. The Procedure — Statutory Remedies.
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218. Same Subject — The Rule stated.
219. Presumption of Regularity.
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225. Mandatory Provisions must be observed.
226. Effect of Intimidation or Violence.
227. Impeaching the Returns.
228. Correcting the Returns.
229. The Ballots as Evidence.
230. Poll-Books and Tally-Sheets as Evidence.
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233. Same Subject — Legal Voter not compelled to state how he voted.
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236. Same Subject — Evidence of Voter's Statements as to his Vote.
237. Voter not voting not permitted to state how he would have voted.
238. When all Evidence fails, Election must be set aside.

§ 140. **What is meant by Election.**—But by far the largest number of public officers in the United States are selected for their respective positions by the direct choice of the people expressed in the manner, and at the time and place, which they themselves have, by their constitutions and laws, prescribed. This method of choice is ordinarily termed an election. It pervades the entire system of American popular government and may, indeed, be called its leading characteristic.

The government being created by the people and for their own protection and welfare, the power of determining in what manner and by whom its various functions shall be exercised is in the people themselves, and, unless they have expressly delegated to certain representative bodies or individuals the power to select and appoint the public agents, the right and authority of selection remains in them collectively, to be exercised by the accepted method of expressing the popular choice—an election.

§ 141. **Must be exercised in the legitimate Mode.**—"But," as has been well said by Judge Cooley, "this control and direction must be exercised in the legitimate mode previously agreed upon. The voice of the people, acting in their sovereign capacity, can be of legal force only when expressed at the times, and under the conditions which they themselves have prescribed and pointed out by the constitution, or which, consistently with

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the constitution, have been prescribed and pointed out for them by statute; and if by any portion of the people, however large, an attempt should be made to interfere with the regular working of the agencies of government at any other time or in any other mode than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who, for the time being, represent legitimate government." [1]

§ 142. **Can be held only by legal Authority.**—It follows also that the people can be bound and their power delegated, only when they have conferred authority for holding the election, and when the authority is exercised at the time and place and in the manner agreed upon.[2]

§ 143. **Primary Elections and Nominations may be regulated by Law.**—Not only is it the right and province of the State to regulate and control the holding of the final election at which the people's choice is to be expressed, but it is also competent and proper for it to regulate the holding and conducting of the primary conventions and caucuses at which the nominations for office are made.[3]

§ 144. **Subdivision of the Subject.**—In determining the question of the validity and effect of elections, there may be considered: I. Voters and their qualifications. II. The election.

I.

VOTERS AND THEIR QUALIFICATIONS.

I. *The Power to Prescribe Qualifications.*

§ 145. **Right to vote is neither natural, absolute or vested.**—The right to vote or to exercise the privilege of the elective franchise is neither a natural, absolute nor vested right, but is

[1] Cooley's Constitutional Limitations, 5th ed. 747.

[2] "The right to hold an election cannot exist, or be exercised without an express grant of the power to do so by the legislature." Brewer *v.* Davis, 9 Humph. (Tenn.) 208, 49 Am. Dec. 706.

[3] Leonard *v.* Commonwealth, 112 Penn. St. 607; *In re* House Bill, 9 Colo. 631.

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purely conventional, and it may be enlarged or restricted, granted or withheld by the constitutional authorities at pleasure and with or without fault: for outside of society, and disconnected with government, no person either has, or can exercise, the elective franchise as a natural right and he only receives it upon entering the social compact, subject to such qualifications as the State may prescribe.[1]

§ 146. **State may prescribe Qualifications.**—Under our political system, the right and power to determine who shall be qualified to vote at popular elections resides with the people of the States.[2] The constitution of the United States nowhere prescribes the qualifications of voters, nor has it reserved to the Congress the right to legislate upon the subject.[3] It follows, then,

[1] Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

[2] Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248; Minor *v.* Happersett, 21 Wall. (U. S.) 162; United States *v.* Cruikshank, 92 U. S. 542; United States *v.* Reese, 92 U. S. 214; Van-Valkenburg *v.* Brown, 43 Cal. 43, 13 Am. Rep. 136; Anderson *v.* Baker, 23 Md. 531; Huber *v.* Reily, 53 Penn. St. 122; Ridley *v.* Sherbrook, 3 Cold. (Tenn.) 569; State *v.* Staten, 6 Cold. (Tenn.) 233.

In Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248, the court by WAGNER, J., say: "The people, for political purposes, must be considered synonymous with qualified voters, and their very first act in the formation of a State government was to exclude from the right of suffrage more than three fourths of the whole inhabitants. The exclusion of women, children and negroes is purely arbitrary, and fixed and regulated by law. If the power to regulate the internal government and police of the State resided in the people, and was their 'inherent, sole and exclusive right,' the conclusion is inevitable that it was their peculiar and exclusive province to say and determine what should constitute any inhabitant of the State a qualified voter. The power must reside somewhere, and it can only be with the people, and they have always exercised it, both negatively and affirmatively.

It is not perceived that there is any restraint over the power on this subject—certainly not in the constitution of the United States, for there is not to be found in that instrument a single sentence, paragraph or word which gives the national government power over the qualifications of voters in any of the States. But the direct opposite is affirmed, in that clause cited in the former part of this opinion, which declares 'that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the States respectively or to the people.'"

[3] In Minor *v.* Happersett, 21 Wall. (U. S.) 162, 170. Chief Justice WAITE, says: "The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. The

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that it is the peculiar and exclusive province of the States to say and determine what shall constitute any inhabitant of the State a qualified voter.[1]

The only restriction placed by the constitution upon the power of the States thus to fix the qualifications of voters, is that imposed by the fifteenth amendment, that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude." With this exception, the right of the State to limit the right to vote to such persons as it deems expedient is supreme.[2] Nor is this right affected by the four-

members of the House of Representatives are to be chosen by the people of the States, and the electors in each State must have the qualifications requisite for electors of the most numerous branch of the state Legislature, Const. Art. 1, § 2. Senators are to be chosen by the Legislatures of the States, and necessarily the members of the Legislature required to make the choice are elected by the voters of the State. *Ib.* Art. 1, § 3. Each State must appoint, in such manner as the Legislature thereof may direct, the electors to elect the President and Vice-President. *Ib.* Art. 2, § 2. The times, places and manner of holding elections for Senators and Representatives are to be prescribed in each State by the Legislature thereof, but Congress may at any time, by law, make or alter such regulation, except as to the place of choosing Senators. *Ib.* Art. 1, § 4. It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the state laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts."

[1] Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

[2] Kinneen *v.* Wells, 144 Mass, 497, 59 Am. Rep. 105, where DEVENS, J., says:

"The right or privilege of voting is a right or privilege arising under the constitution of each State, and not under the constitution of the United States. The voter is entitled to vote in the election of officers of the United States by reason of the fact that he is a voter in the State in which he resides. He exercises this right because he is entitled to by the laws of the State where he offers to exercise it, and not because he is a citizen of the United States. United States *v.* Anthony, 11 Blatch. (U. S. C. C.) 200. What are the rights of citizens of the United States as such, and not of citizens of particular States, need not be here considered. They have repeatedly been discussed and defined. Corfield *v.* Coryell, 4 Wash. C. C. 371; Paul *v.* Virginia, 8 Wall. (U. S.) 168; Ward *v.* Maryland, 12 Wall. 418, 430; Slaughter House Cases, 16 Wall. 36.

The qualifications of voters are fixed by state legislation. The requisitions as to ownership of property, citizenship, sex and residence, in connection

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teenth amendment. The "privileges and immunities of citizens of the United States" which are thereby protected, do not include the right to vote.[1]

§ 147. **In the Territories Congress prescribes Qualifications.** —But in the territories the rule is different. As is said in a leading case, "It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall participate in the election of its officers or the making of its laws: and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the constitution, to the States and to the people thereof by whom that constitution was ordained and to whom, by its terms, all power not conferred by it upon the government of the United States was expressly reserved. The *personal and civil* rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their *political* rights are franchises which they hold as privileges in the legislative discretion of the United States."[2]

2. *Constitutional Limitations upon the Power.*

§ 148. **State Legislature can not alter or augment Qualifications prescribed by State Constitution.**—Where the qualifications

with the right of voting, vary with the constitutions or laws of the several States. However unwise, unjust, or even tyrranical its regulations may be or seem to be in this regard, the right of each State to define the qualifications of its voters is complete and perfect, except so far as it is controlled by the fifteenth article of the amendments of the constitution of the United States, which provides that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.'"

[1] Minor *v.* Happersett, 21 Wall. (U. S.) 162; Van Valkenburg *v.* Brown, 43 Cal. 43, 13 Am. Rep. 136.

[2] Matthews J., in Murphy *v.* Ramsey, 114 U. S. 15, 44, citing National Bank *v.* County of Yankton, 101 U. S. 129; American Ins. Co. *v.* Canter, 1 Pet. (U. S.) 511; United States *v.* Gratiot, 14 Pet. (U. S.) 526; Cross *v.* Harrison, 16 How. (U. S.) 164; Dred Scott *v.* Sandford, 19 How. (U. S.) 393.

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of a voter have been prescribed by the constitution of the State, it is not competent for the legislature to add to or alter such qualifications, unless the power to do so has been conferred upon it by the constitution itself either expressly or by necessary implication.[1] The specification in the constitution is an implied prohibition against legislative interference.[2]

Thus where the constitution of the State provided that every white male citizen who shall have resided in the State during the six months immediately preceding any election should have the right to vote, a statute which enacted "that no person shall be deemed to have acquired a residence in any township, city or ward, so as to entitle him to vote therein, until he shall have been a *bona fide* inhabitant of such township, city or ward at least twenty days before the day of election," was held to be unconstitutional and void.[3] So where the constitution declared that

[1] Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52; Quinn *v.* State, 35 Ind. 485, 9 Am. Rep. 754; Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; People *v.* Canaday, 73 N. C. 198, 21 Am. Rep. 465; State *v.* Constantine, 42 Ohio St. 437, 51 Am. Rep. 833; Daggett *v.* Hudson, 43 Ohio St. 548, 54 Am. Rep. 832; White *v.* Commissioner, 13 Oreg. 317, 57 Am. Rep. 20, note; Kinneen *v.* Wells, 144 Mass. 497, 59 Am. Rep. 105; State *v.* Corner, 22 Neb. 265, 3 Am. St. Rep. 267; St. Joseph, &c., R. R. Co. *v.* Buchanan County Court, 39 Mo. 485; State *v.* Williams, 5 Wis. 308; State *v.* Baker, 38 Wis. 71; Monroe *v.* Collins, 17 Ohio St. 665; State *v.* Symonds, 57 Me. 148; State *v.* Staten, 6 Cold. (Tenn.) 233; Davies *v.* McKeeby, 5 Nev. 369; McCafferty *v.* Guyer, 59 Penn. St. 109; Clayton *v.* Harris, 7 Nev. 64; Randolph *v.* Good, 3 W. Va. 551; Page *v.* Hardin, 8 B. Mon. (Ky.) 648; Thomas *v.* Owens, 4 Md. 189; State *v.* Tuttle, 53 Wis. 45; United States *v.* Slater, 4 Woods (U. S. C. C.) 356.

"Our government," says McCORMICK, J., in the case last cited, "is founded on the elective franchise. The right to exercise this franchise is declared, defined and guarded by organic provisions superior to any of the departments of the government. The Legislature cannot enlarge or restrict it, and can only regulate it so far as their authority to do so is expressly or by necessary implication given in the constitution. Much less do the courts presume to restrict it by construction. On the contrary, the whole spirit of our institutions constrains the courts to give our organic provisions on the subject of the enjoyment of the right of suffrage such a construction, as will permit the most liberal exercise of this supreme right which is at all reasonably consistent with the terms of those provisions."

[2] Cooley's Constitutional Limitations, 5th ed. 78.

[3] Quinn *v.* State, 35 Ind. 485, 9 Am. Rep. 754; see also State *v.* Williams, 5 Wis. 308; State *v.* Tuttle, 35 Wis. 45.

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every citizen who had resided in the county thirty days should be an elector, a statutory provision requiring ninety days' residence was held unconstitutional.[1] So where by the constitution every citizen with certain qualifications named was entitled to vote, a statute which provided that no person thereafter naturalized,—and by such naturalization becoming *eo instanti* a citizen,—should be entitled to be registered as a voter within thirty days after such naturalization, is void.[2]

Again where the constitution, as construed by the court, gave to each elector the right to vote for each officer whose election is submitted to the electors, a statute providing for the election of four officers but denying the right to any voter to vote for more than two candidates, is unconstitutional.[3] And where the constitution of the State provided that every free white male citizen of the age of twenty-one years who shall have been a resident of the State for six months should be deemed a duly qualified elector, a statute which requires that every voter shall, before voting, take an oath that he has not voluntarily borne arms against the United States or the State, nor aided the confederate authorities since April 18, 1864, can not be sustained.[4] And where the constitution denied the right to vote to one who had been engaged in rebellion, unless an amnesty had been granted him, a statute requiring every voter before registering to take an oath that he had not been voluntarily engaged in rebellion exceeds the constitutional requirements.[5] And an act which requires the voter to be a "taxable inhabitant" is invalid where the constitution does not prescribe a property qualification.[6]

But under a constitution requiring that a voter shall have paid all taxes required of him, a statute requiring him to pay a tax of one dollar in lieu of a poll-tax and to register, is not unconstitutional;[7] nor is an act requiring voters to pay their taxes before voting for certain officers, the offices not being constitutional offices.[8]

[1] People *v.* Canaday, 73 N. C. 198, 21 Am. Rep. 465.

[2] Kinneen *v.* Wells, 144 Mass. 497, 59 Am. Rep. 105.

[3] State *v.* Constantine, 42 Ohio St. 437, 51 Am. Rep. 833.

[4] Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52.

[5] Davies *v.* McKeeby, 5 Nev. 369.

[6] St. Joseph &c. R. R. Co. *v.* Buchanan County Court, 39 Mo. 485.

[7] McMahon *v.* Mayor of Savannah, 66 Ga. 217, 42 Am. Rep. 65.

[8] Buckner *v.* Gordon, 81 Ky. 665.

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A law which requires the voter to take an oath to support the constitution of the United States and of the State does not restrict the right to vote, nor add to the qualifications fixed by the constitution and is not unconstitutional;[1] nor is an act requiring persons offering to vote to answer questions put to determine their qualifications.[2]

3. *The Requirement of Registration.*

§ 149. **Validity of Registration Laws.**—As a means of determining who possess the qualifications of voters, and of regulating the exercise of the right, statutes have been passed in many of the States requiring the names of those entitled to vote to be previously recorded by officers provided for that purpose. These laws are ordinarily known as *registration laws*, and the act of listing the names as *registration*.

Provision is made for such laws in the constitutions of several of the States,[3] but even where no such express provision is so made, it is now generally settled, although not without some dissent, that, in the absence of a constitutional prohibition,[4] it is within the power of the legislature to provide a just and reasonable registration law.[5]

[1] Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52.

[2] State *v.* Lean, 9 Wis. 279.

[3] In Daggett *v.* Hudson, 43 Ohio St. 548, 54 Am. Rep. 832, decided in 1885, ATHERTON, J. says: "Registration laws are in terms either authorized or required to be enacted by the constitutions of the following states: Alabama, Arkansas, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Rhode Island, South Carolina, Virginia and West Virginia. The constitutions of the following states are silent on the question: California, Connecticut, Delaware, Iowa, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, Ohio, Pennsylvania, Tennessee, Texas and Vermont."

[4] As in Texas, Art. VI. § 4.

[5] Capen *v.* Foster, 12 Pick. (Mass.) 485, 23 Am. Dec. 632; Byler *v.* Asher, 47 Ill. 101; Edmunds *v.* Banbury, 28 Iowa, 267, 4 Am. Rep. 177; Auld *v.* Walton, 12 La. Ann. 129; Hyde *v.* Brush, 34 Conn. 454; State *v.* Baker, 38 Wis. 71; Patterson *v.* Barlow, 60 Penn. St. 54; Monroe *v.* Collins, 17 Ohio St. 665; Daggett *v.* Hudson, 43 Ohio St. 548, 54 Am. Rep. 832; State *v.* Butts, 31 Kans. 537; *In re* Polling Lists, 13 R. I. 729; People *v.* Hoffman, 116 Ill. 587, 56 Am. Rep. 793; State *v.* Corner, 22 Neb. 265, 3 Am. St. Rep. 267; People *v.* Kopplekom, 16 Mich. 342; McMahon *v.* Mayor, 66 Ga. 217, 42 Am. Rep. 65; Common-

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Capen v. Foster,[1] decided by the supreme court of Massachusetts in 1832, is the leading case upon this subject, and the principles there laid down by Chief Justice Shaw have been generally approved. "The constitution," said he, "by carefully prescribing the qualifications of voters, necessarily requires that an examination of the claims of persons to vote, on the ground of possessing these qualifications, must at some time be had by those who are to decide on them. The time and labor necessary to complete these investigations must increase in proportion to the increased number of voters; and, indeed, in a still greater ratio in populous commercial and manufacturing towns, in which the inhabitants are frequently changing, and where, of necessity, many of the qualified voters are strangers to the selectmen.

If then, the constitution has made no provisions in regard to the time, place and manner in which such examination shall be had, and yet such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects respecting the mode of exercising the right, in relation to which it is competent to the legislature to make suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right.

And this court is of opinion, that the provision in the general law regulating elections, and that in the act incorporating the city, which require that the qualifications of voters shall be previously offered and proved, in order to entitle them to vote, that their names shall be entered upon an alphabetical register or list of voters, is highly reasonable and useful, calculated to promote peace, order and celerity in the conduct of elections, and as such, to facilitate and secure the most precious right to those who are by the constitution entitled to enjoy it; that it cannot be justly regarded as adding a new qualification to those prescribed by the constitution, but as a reasonable and convenient regulation of the mode of exercising the right of voting, which it

wealth v. McClelland, 83 Ky. 686. *Contra*, Dells v. Kennedy, 49 Wis. 555, 35 Am. Rep. 786; White v. Commissioners, 13 Oreg. 317, 54 Am. Rep. 832, note.

[1] 12 Pick. (Mass.) 485, 23 Am. Dec. 632.

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was competent to the legislature to make, and therefore that these legal enactments, not being repugnant to the constitution, are valid and binding laws, to which both voters and presiding officers at elections are authorized and bound to conform."

"Still," continued the learned judge, "if the provision of this law is such as to afford the voter no opportunity to know seasonably whether his name is on the list or not, and to have it inserted if previously omitted, it would constitute a serious objection to its validity."[1]

§ 150. **Same Subject—Supplying Omissions.**—Most of the registration acts provide for an opportunity of supplying, on the day of election, the failure or omission to register in individual cases where the voter, otherwise qualified, has been unable to register at the time prescribed, and in some cases such a provision has been held essential to the validity of the law.[2] Thus in one

[1] Capen *v.* Foster, 12 Pick. (Mass.) 485, 23 Am. Dec. 632.

[2] State *v.* Corner, 22 Neb. 265, 3 Am. St. Rep. 267, 34 N. W. Rep. 499; Daggett *v.* Hudson, 43 Ohio St. 548; 54 Am. Rep. 832, 3 North E. Rep. 538.

See also Dells *v.* Kennedy, 49 Wis. 555, 35 Am. Rep. 786, 6 N. W. Rep. 246; White *v.* Commissioners, 13 Oreg. 317, 54 Am. Rep. 832, note, 10 Pac. Rep. 484. In Daggett *v.* Hudson (1885), 43 Ohio St. 548, 54 Am. Rep. 832, 3 North E. Rep. 538, ATHERTON, J. gives the following synopsis of the laws of several of the States: "The Massachusetts registration statute, construed and favorably considered in Capen *v.* Foster, (12 Pick. [Mass.] 485, 23 Am. Dec. 631,) required lists to be made of all electors of each ward qualified to vote, and that no person should be entitled to vote whose name was not borne on the list. But it was especially required that the selectmen and assessors should be in session immediately before or on the day of election, so as to give the voter an opportunity to then place his name on the lists if it had been omitted.

The Pennsylvania registry law provided that the assessors, on the first Monday of June, annually, should revise the transcripts received by the county commissioners and strike off those who have died or removed, and add to the list any one entitled. Copies of these lists are to be posted up where the elections are to be held by August 1st, and that an unregistered voter, otherwise qualified, could on election day make an affidavit of his qualifications, and prove by the affidavit of a qualified voter, his residence, and by filing the same could vote at the election. *In re* election of McDonough, 105 Penn. St. 488.

The registry law of Iowa prohibited all persons from voting unless the name appeared upon the registration list, but an elector, unregistered, but otherwise qualified, was permitted to vote upon a proper reason being furnished for not having registered in time, and furnishing the affidavit of

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of the most recent cases it is said: "The true rule undoubtedly is, that the legislature may require registration under reasonable

a registered voter as to his proper residence. Edmonds *v.* Banbury, 28 Iowa, 267, 4 Am. Rep. 177.

The registry law of California, though prohibiting a citizen from voting whose name did not appear on the registry, yet permitted a qualified voter, though unregistered, on furnishing proofs of his right, and on the day of election furnishing the board of registration his affidavit setting forth satisfactory reasons why he did not register prior to the thirty days provided by law for registration before the election. People *v.* Laine, 33 Cal. 55; Webster *v.* Brynes, 34 Cal. 273.

The election law of New York, of 1865, provides that the board of registry shall be in session on the Monday before the election for the purpose of making corrections in and revising the lists of voters, and the act of 1872 provides the registry shall be completed on the Saturday before the election,—but neither of these acts has been subjected to judicial tests as to their constitutional validity.

The election law of Illinois prohibits the ballot of unregistered voters, except that it allows such voters, on making proof of their constitutional qualifications on election day, to vote without even requiring proof of a reason for not registering. Byler *v.* Asher, 47 Ill. 101. (But the law was changed in 1885 and such registration on election day is not permitted. People *v.* Hoffman, 116 Ill. 587, 56 Am. Rep. 793, 5 North E. Rep. 596.)

The election law of Kansas provides for closing the registry ten days before the election, but permits the voter to register at all times during the year except the last ten days. State *v.* Butts, 31 Kans. 537.

The registry act of Missouri requires the registration of voters to be completed ten days before the election, but the same simply follows the requirements of the constitution of the State.

In the State of Maine the selectmen are required to make lists of voters, and in towns of 500 electors the names of legal voters may be added during the three days next preceding the election and to the hour of five of the secular day prior to the election; and in towns of less population the selectmen must be in session on the day of election for the purpose aforesaid. Rev. Stats. of Maine, 95.

In New Jersey, in cities of over 100,000 population, no person is permitted to vote unless registered; but his name may be placed on the registration list upon the personal appearance of the elector before the board, or upon the production of his affidavit, or the affidavit of some other voter in the precinct, showing him to be a legal voter therein. Revision of Statutes of New Jersey, 364 §132.

In Maryland, a list is to be made of all legal voters by registration officers, and such lists are thereafter to be corrected, but the lists so made are declared to be the legal and qualified electors and entitled to vote at all future elections, and annual registration is not required. The statute provides, however, for making additions to and corrections of the lists within three days of the election. Supplement to Maryland code, 240 *et seq.*

In Alabama registration is required

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restrictions as proof of the possession of the qualifications prescribed by the constitution, but that the voter shall have the right to prove himself to be an elector, register and vote at any time prior to the closing of the polls on election day. It would doubtless be competent to require more proof on that day than if the voter had previously registered, but it should be left within his power to furnish such proof, if it existed, and exercise his right."[1]

But in other cases such an opportunity has been held not to be indispensable, and where the law affords reasonable facilities for registration at the time prescribed, and where the time allowed for registration extends as near to the time for actually depositing the votes as is consistent with the necessary preparation for conducting the election in an orderly manner and with a reasonable scrutiny of the correctness of the list, an opportunity for registration upon the day of election can not, by the weight of authority, be considered imperative.[2]

as a condition to vote, but the assistant registers are required to be present on election day, at the election precinct, to register such voters as may have failed to register on any previous day. Code of Alabama, 23, § 233.

In Mississippi registration is required, and the registration lists are to be kept by the Clerk of the Circuit Court, "and any person not on the lists may appear at any time before the clerk and be registered." Code of Mississippi.

The code of Arkansas provides for registration; but if the voter's name does not appear on the lists he may still vote by taking an oath showing to the satisfaction of the election judges he is a qualified voter. Arkansas Stat. 471, § 2,328.

[1] State *v.* Corner, 22 Neb. 265, 3 Am. St. Rep. 267, 34 N. W. Rep. 499.

[2] People *v.* Hoffman,, 116 Ill. 587, 56 Am. Rep. 793, 5 North E. Rep. 596; State *v.* Butts, 31 Kans. 537, 2 Pac. Rep. 618; Patterson *v.* Barlow, 60 Penn. St. 54; *In re* Polling Lists, 13 R. I. 729.

See also Kinneen *v.* Wells, 144 Mass. 497, 59 Am. Rep. 105.

In State *v.* Butts, 31 Kans. 537, 2 Pac. Rep. 618, the court per BREWER J. say: "Requiring a party to be registered is not, in any true sense, imposing an additional qualification, any more than requiring a voter to go to a specific place for the purpose of voting, or requiring him to prove, by his own oath or the oaths of the other parties, his right to vote when challenged, or than requiring a naturalized foreigner to present his naturalization papers. Each and all of these are simply matters of proof, steps to be taken in order to ascertain who are and who are not entitled to vote. Doubtless under the pretense of registration, and under the pretext of securing evidence of voters' qualifications, laws might be framed which would cast so

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§ 151. **Same Subject—Regulations must be reasonable.**—It is, however, well settled that registration laws must be just, reasonable, uniform and impartial, and there is "no warrant for such an exercise of legislative power as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself."[1] And, as is said by the supreme court of Pennsylvania, "it must be regulation purely, not destruction. If this were not

much burden as really to be imposing additional qualifications. As, for instance, suppose the law required all voters in the state to be registered on personal attendance at the state capitol, on the first day of the year, for every election taking place during the year. The legislature can not by in form legislating concerning rules of evidence, in fact overthrow constitutional provisions. County Seat of Linn County, 15 Kans. 500.

But where ample facilities for registering are furnished, and the opportunities for registering are continued down to within a reasonable time of the election day, then it can not be said that mere rules of evidence are abused. Neither is there any magic in the mere day of election. It seems to be conceded that proof can be required, provided only it is required on the day of election. But it is easy to conceive of many requirements in force only on the day of election, which would really be more burdensome, and more in fact like to additional qualifications, than anything contained in the statute in question. Suppose the law required every voter in the county to present himself on the day of election at the office of the county clerk, and obtain from him upon proper proofs a certificate of qualification; or suppose the law required him to remain in attendance at the polls from sunrise to sunset in order to give any one who desired an opportunity to challenge; or even supposing every voter was required to produce a dozen affidavits in writing from as many different persons, showing age and residence, such as are among the qualifications of an elector: all these contemplate action on the day of election, and on that day alone; and they all bear upon the question of having the right to vote; and yet they would be clearly an abuse of rules of evidence. They would be more in the nature of additional qualifications than the simple matter of registry. It is true, isolated instances may occur where a party through absence or sickness is unable to register, and so loses his vote; but the same result may follow where any failure to produce the required evidence occurs. A naturalized foreigner may lose his naturalization papers, and the court where he was naturalized may be at the very extreme of the land, and so, for the lack of the legal evidence of his naturalization, he may lose his vote; but still in both cases, the matter is simply one of a lack of evidence. It is a mistake to suppose that there is any special virtue in the mere day of election. If the legislature has the right to require proof of a man's qualifications, it has a right to say when such proof shall be furnished, and before what tribunal; and unless this power is abused the courts may not interfere."

[1] Capen *v.* Foster, 12 Pick. (Mass.) 485, 23 Am. Dec. 632.

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an immutable principle, elements essential to the right itself might be invaded, frittered away or entirely exscinded under the name or pretense of regulation, and thus would the natural order of things be subverted by making the principal subordinate to the accessory." [1]

Thus in a recent case in Ohio it was held that a law which required registration as a prerequisite to the right to vote, but allowed voters only seven days within the year in which to register and correct the registration, and which made no provision for registration thereafter, nor for any excuse for not registering in time, nor any means whereby absentees could be subsequently registered, is unreasonable and invalid.[2]

So in a late case in Massachusetts a statute providing that no person thereafter naturalized in any court shall be entitled to be

[1] Page *v.* Allen, 58 Penn. St. 338, 98 Am. Dec. 272.

[2] Daggett *v.* Hudson, 43 Ohio St. 548, 54 Am. Rep. 852, "We have been unable to find any case," say the court, "where the registration act has been upheld as constitutional which contained provisions similar to our statutes. The necessary absence of a voter, on the seven days provided in the statute for registration, either by sickness, business, imprisonment or other lawful reason, absolutely forfeits for the time being his constitutional right of suffrage. He can not anticipate expected absence, and register at an earlier period. He can not prove his right by his affidavit, or the affidavit of others, and excuse his personal presence at the place of registration. He can not on the day of election, or within five days prior thereto, by any proof of constitutional qualification, supply the want of former registration.

A foreigner who has taken out his first papers, and made his necessary declaration to become a citizen, and whose rights to full citizenship and the elective franchise will ripen during the five days before or on the day of the election can not secure registration or the right to vote, because he can not prove in advance that the action of the court will naturalize him. * * *

We believe it an easy task so to frame a registry law that, while protecting the election from fraudulent votes, and securing the integrity of the ballot, it will in no practical way impede or injuriously restrain the constitutional right of the voter. But in the language of WELCH, J. in Monroe *v.* Collins, 17 Ohio St. 666, the law must be reasonable, uniform, impartial and calculated to facilitate and secure, rather than to subvert or impede, the exercise of the right to vote. Believing the act in question unnecessarily, unreasonably and injuriously to impair and impede the right of suffrage to the voter who is necessarily absent at the time fixed by the act for registration, we are unanimously of opinion that we are compelled to declare it to be subversive of constitutional rights, and therefore void."

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registered as a voter within thirty days of such naturalization, was held unreasonable and void.[1]

On the other hand, in a very recent case in Illinois, a statute which provided for registration and directed that registration should close three weeks before election was sustained. "If cases can be supposed," said the court, "where the 'three weeks' requirement will deprive qualified electors of the privilege of depositing their votes, cases can also be supposed where one day's requirement will work the same result. This mode of reasoning, carried out to its logical sequence, will make any kind of a registry law unconstitutional. For it would be a physical impossibility for the judges of election to receive the votes and make up the registry at the same time and on the same day. If the Legislature has the power to direct the registry to be completed before election day, and if, in its wisdom and under a sense of its responsibility to the people, it has said that three weeks before election is a reasonable date for the completion of the registry, shall this court substitute its judgment for that of the law-making power and say that a shorter time would have been more reasonable?"[2]

§ 152. **Same Subject—Increasing Period of Residence or other Qualifications.**—In accordance with principles previously considered it is settled that a registry law which, to entitle a person to registration, requires a previous residence at a place or for a time greater, different or other than that fixed by the constitution of

[1] Kinneen *v.* Wells, 144 Mass. 497, 59 Am. Rep. 105. "It undertakes," says the court, "to prevent a single class of citizens, namely, those who are naturalized, possessing all the qualifications established by the constitution of the commonwealth, from exercising the right with which that constitution invests them, for a period of thirty days, by forbidding the registrars of voters to register them during that period. All persons must stand equal before the law, and the statute, assuming them to be citizens, imposes this prohibition upon them as citizens of a specified class. A statute regulating the exercise of the right of suffrage, or the ascertainment of the qualifications of voters, must not only be reasonable in its character, but uniform and impartial in its application. If it were possible to impose a period of probation upon all qualified citizens before they were entitled to exercise the privilege, it certainly is not possible under the constitution to select a single class and impose it on this class alone."

[2] People *v.* Hoffman, 116 Ill. 587, 56 Am. Rep. 793.

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the State, or otherwise increases or changes the constitutional requirements, is unconstitutional and void.[1]

Thus where, by the constitution, a person, otherwise qualified, who had resided in the county for *thirty* days was entitled to vote, a registration law which required a residence of *ninety* days as a prerequisite to registration, was held invalid;[2] and so where the constitution requires but *ten* days' residence, and the registry law demands *twenty* days;[3] and so where the constitution permits all citizens, otherwise qualified, to vote, and the registry law excludes those who have become such by naturalization within thirty days prior to the election.[4]

§ 153. **Requirements as to Time, Place and Manner must be observed.**—The requirements of the statute as to the time, place and manner of effecting the registration must be substantially complied with. Slight variations by which no one was misled or prejudiced would be disregarded, but in matters of substance the method prescribed must be observed.[5]

Thus, says Mr. McCRARY, the removal of the registration "to another place near by, of which all the voters have due notice, and upon which they act, is not fatal. But the removal to a place some distance away, of which sufficient notice is not given, and by means of which a portion of the electors are deprived of their rights, will render the registration void."[6]

§ 154. **Effect of Failure to register.**—The registration law, being found within the principles already considered, to be a valid enactment, it follows that, unless excused by some fact which the law itself deems sufficient, the voter must register if he would exercise his privilege. The fact that he is qualified must be evidenced by the proper registration, and where it is not so evidenced the failure must, where the opportunity for registra-

[1] People *v.* Canaday, 73 N. C. 198, 21 Am. Rep. 465; Page *v.* Allen, 58 Penn. St. 338, 98 Am. Dec. 272, State *v.* Williams, 5 Wis. 308; Kinneen *v.* Wells, 144 Mass. 497, 59 Am. Rep. 105.

[2] People *v.* Canaday, 72 N. C. 198, 21 Am. Rep. 465.

[3] Page *v.* Allen, 58 Penn. St. 338, 98 Am. Dec, 272.

[4] Kinneen *v.* Wells, 144 Mass. 497, 59 Am. Rep. 105.

[5] State *v.* Commissioners, 20 Fla. 859; Newsom *v.* Earnhart, 86 N. C. 391.

[6] McCrary on Elections, § 104; Newsom *v.* Earnheart, 86 N. C. 391.

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tion is afforded, be attributed to the voter's own fault or neglect. As is said by a learned judge, "In such a case, if a voter be disfranchised, he is by his own omission a voluntary party to his disfranchisement." [1]

§ 155. **Effect where no Opportunity for Registration is provided.**—Where the statute requiring registration is imperative and declares that those who are not registered shall not be entitled to vote, the failure to register disqualifies the voter and renders his vote, if cast, of no account, notwithstanding the fact that his failure to register was occasioned by the neglect or refusal of the proper officers to provide the means for registration at the time and place prescribed.[2] All votes, therefore, cast

[1] State *v.* Baker, 38 Wis. 71, 23 Am. Dec. 948, note; State *v.* Hilmantel, 21 Wis. 566; People *v.* Wilson, 62 N.Y. 186.

[2] "It appears from the finding in this case," said GRAVES J., "that there has never been any valid or complete registration of voters, or any legal board of registration in the township of Franklin, in the county of Houghton, since the organization of the township in 1864, and that at the general election on the 6th of November, 1866, in the several townships of said county, whereat the relator and respondent were respectively voted for, for the office of sheriff, a large number of electors, in said township of Franklin, without having been registered, for the reason that there was no acting board of registration, did nevertheless actually vote for the relator, and that the votes thus given, if allowed to him, would secure to him a majority and, if disallowed, would leave him in a minority. The question, and the only question presented, therefore, for our consideration is whether the votes thus given for the relator were legally cast.

It is *admitted* that the act for the registration of voters is valid; but it is argued that no one, otherwise qualified, can be deprived of his vote for being unregistered, when the officers designated to administer the act fail, for any cause, to *provide* a registry.

The essence of the argument is, that the right to vote results from the constitution, and that every provision of this act to preserve the purity of elections, which requires electors to be registered, and prohibits all voting without it, is always to be considered as subject to the tacit exception that the means for registration, in accordance with the act, are certainly provided.

It is not to be disguised that this reasoning has considerable strength, but it has failed, however, to satisfy us.

The statute in question is grounded upon the same article of the constitution which gives the right to vote, and its object, as expressly declared in the title is '*further* to preserve the purity of elections, and guard against the abuses of the elective franchise, by *a registration of electors*.'

In accordance with this declared object, the act proceeds to provide

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by persons unregistered, though their default was owing to the failure by the proper officers to furnish an opportunity for registration, are to be thrown out in determining the result.[1]

The qualified voter may have a remedy by action, in a proper case, against the officers for not permitting him to register, or he may enforce performance of their duty by mandamus, but where the law is imperative, he can not vote if he is not registered.[2]

But not only are the votes of unregistered voters to be thrown out, but it has also been held that the failure to furnish the necessary opportunity for registration would vitiate the entire election, certainly where the number of voters thus practically disfranchised was so great as to materially affect the result.[3] If

for the organization of boards of registration, and to require the electors to register, *and expressly forbids all voting by persons not registered.* The administration of the statute is confided to the local officers elected by the people themselves, for the discharge of other municipal duties, and who may be compelled by law to act. It contemplates general obedience and continuous administration, and nowhere, in terms, makes any provision for its own nullification, either through violence or the negligent or wilful failure of officers to organize or preserve boards. It does not speak the language of a mere offer, or proposition to the electors, to register or not, but utters the language of law; *unconditional, absolute, imperative*; and declares, *that all who do not register shall not vote.*

If the Legislature had *expressly* declared that no one should be deprived of his vote for not registering whenever the means of registration should be unprovided, the statute must have been regarded as equivalent to a legislative proposition to the electors to register or not, as they should see fit; and the introduction of the same idea, by construction, would produce the same result.

That interpretation, then, which to make valid the votes of electors where there has been no registration, would make the act subject to an unexpressed condition, by means of which it could, at any time, be practically extinguished in whole townships, is manifestly opposed to the language and apparent scope, spirit and purpose of the law. Rejecting, then, as we must, this interpretation, we find that those votes upon which the relator has based his claim, were given and received in plain violation of law, and were consequently void." People *v.* Koppikom, 16 Mich. 342.

And the same result was reached in State *v.* Hilmantle, 21 Wis. 566; State *v.* Stumpf, 23 Wis. 630.

But the effect upon the validity of the whole election was not considered in these cases.

See also Zeiler *v.* Chapman, 54 Mo. 502.

[1] State *v.* Hilmantle, 21 Wis. 566; State *v.* Stumpf, 23 Wis. 630; People *v.* Kopp'ekom, 16 Mich. 342; Dale *v.* Irwin, 78 Ill. 170; State *v.* Albin, 44 Mo. 346; Zeiler *v.* Chapman, 54 Mo. 502.

[2] Davis *v.* McKeeby, 5 Nev. 369; People *v.* Koppikom, 16 Mich. 342.

[3] Zeiler *v.* Chapman, 54 Mo. 502;

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this were not so, then dishonest election officers may utterly defeat the will of the people by declining to hold a registration in those localities where they may anticipate an unfavorable result.[1]

No election being thus had, the former officers would, where such is the provision, hold over.

§ 156. **Effect of defective Discharge of Duty by registering Officers.**—But assuming that the opportunity for registration has been provided and the voter has attempted, in good faith, to do what is required upon his part, but, through carelessness, inattention or willful neglect of duty upon the part of the registering officers, the requirements of the law are not complied with, shall the voter be disfranchised or his vote cast out?

Perry *v.* Whitaker, 71 N. C. 475; People *v* Canaday, 73 N. C. 198, 21 Am. Rep. 465; McDowell *v.* Construction Co. 96 N. C. 514; 2 S. E. Rep. 351; State *v.* Albin, 44 Mo. 347.

[1] "We adhere," says the court in Zeiler *v.* Chapman, 54 Mo. 502, 505, "to the decisions of this court heretofore made on this registration law that no votes can be counted where they have not been registered; and therefore the circuit court decided correctly that the contestee was not elected because his majority was the result of counting non-registered votes. The act is peremptory on this subject, and requires registration before voting. But we do not concede that registration officers can defeat the will of the people by absenting themselves from the place of registration or resigning. If this can be done, elections are a farce dependent entirely on the officers selected to carry out the law. They may decline registration in a precinct which they know to be hostile to their views, and thus defeat the votes of all the qualified voters at said precinct. This is not the object of the registration law. We assume that a *bona fide* registration was designed, and every facility is afforded to attain this object.

Whilst, therefore, we hold, with the circuit court, that non-registered votes could not be counted, *we also hold* that the refusal to comply with the law on the part of the officers of registration rendered the election void, and that the contestor in this case was not elected. As the contestee in this case received the certificate of election and was commissioned, *prima facie* he was entitled to the office. A proceeding on the part of the state might have been instituted to oust him. There was really no election, as the officers appointed to supervise the registration failed or refused to perform their duty. It was never intended, we presume, to place it in the power of the registering officers to defeat the will of the electors by refusing or failing to perform the duties imposed on them by law. This would be an outrage on the principle of popular election, which the law concedes. The only effect of no registration in a case such as this, where no registration is possible, is to render the election a nullity."

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In reply to this question it has been said that the provisions prescribing the method in which the registration officers are to perform their duty are to be regarded as *directory* merely and not *mandatory*,[1] and that, therefore, the votes of qualified voters, who have done all required of them to perfect their right, are not to be cast out nor the election rendered void, because the registration officers have omitted some of the details prescribed by law, or were not qualified, or have not acted in the mode required.[2]

Thus in a leading case[3] it appeared that the registers were imperfectly prepared; that the names of the voters were not alphabetically arranged; that their residences were omitted; and that the lists were not certified, filed or posted, as required by law; but these registers were actually used at the polls, were taken there on the morning of the day of election, lay upon the table in the usual manner and were referred to by the inspectors as the registration lists. No person voted whose name was not on the list, and none but legal voters voted under these lists. The court held that these votes were not to be discarded; that voters are not bound to examine the registers, and that voters who are on a register *de facto*, used by the inspectors at the election as official and valid, need not inquire further. "They may accept the registers *de facto*," said the court, "as they accept the inspectors *de facto*, and they are no more bound to inquire into the qualifications *de jure* of the registers than into the qualifications *de jure* of the inspectors. It is enough for voters to find at the election acting inspectors using actual registers *virtute officii*. They need look no further to see if their votes be challenged by statute. The statute can not challenge them without notice. Their constitutional right can not be baffled by latent official failure or defect. And the registry law sets no such trap, authorizes none such, for the constitutional right which it was passed to protect. * * * It would be a fraud on the constitution to hold them disfranchised without notice or fault. They went to the election clothed with a constitutional right of which

[1] People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451.

[2] State *v.* Baker, 38 Wis. 71, 23 Am. Dec. 648 note; People *v.* Wilson, 62 N. Y. 186.

[3] State *v.* Baker, 38 Wis. 71, 23 Am. Dec. 648 note.

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no statute could strip them, without some voluntary failure on their own part to furnish statutory proof of right. And it would be monstrous in us to give such an effect to the registry law, against its own spirit and in violation of the letter and spirit of the constitution."

And so the provisions of a registry act that the board of registry shall organize and appoint a chairman, and that the members shall take the oath of office and shall certify the registers, are directory merely and not jurisdictional; and this is so although one section of the act expressly provides that "no vote shall be received unless the name of the person offering to vote is on the said register made and completed, as hereinbefore provided, preceding the election," and that "this section shall be taken and held by every judicial and other officer as mandatory and not directory; and any vote which shall be received by the said inspectors of election, in contravention of this section, shall be void, and shall be rejected from the count, in any legislative or judicial scrutiny into any result of the election."

"We are of opinion," said the court, "that by the true construction of that section the inspectors are prohibited only from receiving the votes of persons not registered prior to the election. The prohibition was designed to prevent unregistered voters from taking part in the election, and to compel registration to be made before the day of election, and not to make the right to vote, of persons whose names are on the lists prior to the election, to depend upon the fact of the inspectors having observed all the minute directions of the act in preparing the register.

In construing a statute, the intention of the law giver, when ascertained from a consideration of the whole act, is to prevail over the literal sense of particular words or clauses, and an intention is not to be imputed to the legislature which is unreasonable and contrary to justice and equity. To hold that the omission of the inspectors to organize the board of registry in precise accordance with the statute, or their failure to take the oath of office, or to certify the register, were jurisdictional defects which rendered the register void, and the whole vote of the ward illegal, would be to deprive citizens of the most important of their political rights without an opportunity to be heard."[1]

[1] People v. Wilson, 62 N. Y. 186.

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4. *The Qualifications Required.*

§ 157. **Usual Qualifications required.**—"The qualifications of voters," says Mr. McCrary,[1] "are not uniform in all the States, but they are similar. Among those which are generally required are the following:

1. Citizenship either by birth or naturalization.
2. Residence for a given period of time in the State, county and voting precinct.
3. Age. In all the States it is required that a voter shall have reached the age of twenty-one years.
4. In most of the States the right to vote is limited to males.
5. In some States the payment of taxes is made a qualification.
6. And in some States ownership of land.
7. Mental capacity."

It is proposed to notice each of these requirements briefly.

§ 158. **1. Citizenship—How "Citizen" compares with "Inhabitant" and "Resident."**—The word citizen is used under varying circumstances in a variety of significations. In its broad and popular sense it includes all persons who are entitled to the benefit and protection of the laws.[2] Its political signification is somewhat less comprehensive. The fourteenth amendment of the constitution of the United States declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and for the present purpose this definition of "persons born or naturalized in the United States and subject to the jurisdiction thereof," may be accepted as sufficiently precise.

Within the scope of this definition, less than full citizenship is sufficient in many of the States, for it is a common provision that inhabitants of the State who have in good faith declared

[1] McCrary on Elections § 30.

[2] See Robinson's case, 131 Mass. 376, 41 Am. Rep. 239. Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536. In Steketee v. Kimm, 48 Mich. 322, Campbell, J. says "In ordinary parlance all people are citizens."

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their intention to become citizens, may, under certain restrictions as to residence and time, exercise the right to vote.[1]

It is not infrequently provided that one who has been an "inhabitant" or a "resident" of a certain district during a given period shall, if possessing the other qualifications, be considered an elector, and the question becomes important whether these terms necessarily embrace the idea of citizenship as above defined or whether an unnaturalized alien, otherwise qualified, is embraced within such a provision.

This question was elaborately considered in an early case[2] in Illinois and it was there held that the element of citizenship was not involved; that where the constitution declared that "all white male inhabitants, above the age of twenty-one years, having resided in the State six months next preceding election, shall enjoy the right of an elector," a person who has been such an inhabitant is entitled to vote and that it is "wholly unnecessary to enquire whether the elector was a citizen of the United States. Possessing the qualifications declared in the constitution and recapitulated in the law of elections, he should be deemed a qualified voter and admitted to vote, though not a citizen of the United States."

"The term inhabitant," says the court, "is derived from the Latin *habito*, and signifies to live in, to dwell in; and is applied exclusively to one who lives in a place, and has there a fixed and legal settlement. It embraces locality of existence. It refers to the place of a person's actual residence, and excludes the idea of an occasional or temporary residence; and, as used in the section referred to, (refers to) the place where the elector dwells at the time of voting."

And so in another case,[3] it is said "According to the common understanding, there is a plain difference between the meaning of the words *inhabitant* and *citizen*. The word *inhabitant* means one who dwells or resides permanently in a place or who has a fixed residence, as distinguished from an occasional lodger or visitor. A *citizen* is a native or naturalized person."

[1] See State *v.* Smith, 14 Wis. 497; *In re* Wehlitz, 16 Wis. 468; *In re* Conway, 17 Wis. 526.

[2] Spragins *v.* Houghton (1840), 3 Ill. 377.

[3] State *v.* Kilroy, 86 Ind. 118.

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This distinction has been adopted in other cases,[1] and it is certainly reasonable and just that where the people—in whom, as has been seen, rest the right and power of determining the qualifications—have deliberately chosen a term of narrower signification in conferring the right, it should not, for the purpose of defeating the right, be construed as synonymous with a term which demands more extended qualifications.

§ 159. **2. Residence.**—One of the most common requirements is that the person offering to vote shall, for a given period, have been a resident of the district, as the State, county or township, within and for which the election is held.

The question of what constitutes residence is one of no little difficulty, but, in general terms, it may be said that a person's residence is the place of his domicile. Or, as was said in a leading case,[2] it is "that place where the elector makes his permanent or true home, his principal place of business, and his family residence, if he have one; where he intends to remain indefinitely, and without a present intention to depart, when he leaves it he intends to return to it, and after his return he deems himself at home."

Every person is deemed to have a domicile somewhere, and when it has been once acquired in a certain place it will be deemed to continue there until a new one has been acquired.[3] Tempor-

[1] Smith *v.* Moody, 26 Ind. 299; Stewart *v.* Foster, 2 Binn. (Penn.) 110; McCarthy *v.* Froelke, 63 Ind. 507.

In Harvard College *v.* Gore, 5 Pick. (Mass.) 370,—a case involving the question of jurisdiction in the probate of a will—PARKER, C. J. says "The term inhabitant, as used in our laws and in this statute, means something more than a person having a domicile. It imports citizenship and municipal relations, whereas, a man may have a domicile in a country to which he is an alien, and where he he has no political relations."

[2] Fry's Election Case, 71 Penn. 302, 10 Am. Rep. 698. See also, State *v.* Aldrich, 14 R. I. 171; Sturgeon *v.* Korte, 34 Ohio St. 525. As to the sufficiency of the residence in certain cases, see Kellogg *v.* Hickman, — Colo. —, 21 Pac. Rep. 325; State *v.* Graham, 23 Neb. 68; Shepard *v.* Allen, — Ill. —, 17 N. E. Rep. 756.

[3] Harbaugh *v.* Cicott, 33 Mich. 241; Fry's Election Case, 71 Penn. 302, 10 Am. Rep. 698; Preston *v.* Culbertson, 58 Cal. 198; Thompson *v.* Ewing, 1 Brewst. 103.

It does not, however, follow, "because a man must have a domicile somewhere, and that a domicile once gained remains until a new one is acquired, that a man must be entitled to vote somewhere, or that the the right to vote at a particular poll, being once established, is pre-

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ary absences, therefore, although frequent or long continued, will not, while the person has a continuous intention to return, deprive him of his domicile and right to vote,[1] even though he may have unlawfully voted while absent.[2]

Students at college who have taken up their permanent residence at the college town may, of course, vote there like other citizens.[3] So students who have been emancipated from their fathers' families and who have no residence elsewhere may, while residing at the college during the period of instruction, if otherwise qualified, vote there;[4] but if the student has not been emancipated, if he still claims his father's home as his own and expects to return there when his temporary absence at college shall terminate, he will not acquire a residence at the college and cannot vote there.[5]

sumed to continue until the right to vote elsewhere is shown. * * * Abandonment of a residence is instantaneous, and if it be, by a voter, of a residence in one voting district, at a date too near the election for the requisite intervening time of residence to be a voter in another voting district to which he has removed, the voter will be entitled to vote in neither voting district." Kreitz *v.* Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349.

[1] Thus a resident and voter in Florida will not while living temporarily in Washington as a public officer, lose his residence in Florida. Dennis *v.* State, 17 Fla. 389. To like effect, Wheat *v.* Smith, 50 Ark. 266, 7 S. W. Rep. 161.

[2] O'Hair *v.* Wilson, 124 Ill. 351, 13 West. Rep. 882.

[3] Pedigo *v.* Grimes, 113 Ind. 148.

[4] Sanders *v.* Getchell, 76 Me. 158, 49 Am. Rep. 606; Putnam *v.* Johnson, 10 Mass. 488; Lincoln *v.* Hapgood, 11 Mass. 350; Wilbraham *v.* Ludlow, 99 Mass. 587.

[5] Fry's Election Case, 71 Penn. 302, 10 Am. Rep. 698; Vanderpoel *v.* O'Hanlon, 53 Iowa, 246, 36 Am Rep. 216.

In Opinion of Judges, 5 Metc. (Mass.) 589, the court say: "If the student has a father living: if he still remains a member of his father's family; if he returns to pass his vacations; if he is maintained and supported by his father—these are strong circumstances repelling the presumption of a change of domicile. So if he have no father living; if he have a dwelling house of his own, or real estate of which he retains the occupation; if he have a mother or other connections, with whom he has been before accustomed to reside, and to whose family he returns in vacations; if he describes himself of such place, and otherwise manifests his intent to continue his domicile there—these are all circumstances to prove that his domicile has not been changed.

But if having a father or mother, they should remove to the town where the college is situated, and he should still remain a member of the family of the parent; or if having no parent, or being separated from his father's family, not being maintained or sup-

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Contingencies of this nature have in some instances been anticipated by the constitution of the State. Thus it is provided in several States [1] that no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, or while a student in any seminary of learning, or while kept in an almshouse or asylum at the public expense, or while confined in any public prison.

Notwithstanding such a provision as this, however, a person who attends a seminary of learning may gain the right to vote there if he intends to make that place his permanent residence independent of his sojourn there as a student.[2] So in the absence of a statute, a person does not forfeit his residence in a precinct in which he was a voter merely by becoming an inmate of a county poorhouse as a county charge,[3] nor does he acquire a residence at the poorhouse.[4]

In Ohio it was held that resident inmates of "The National Asylum for Disabled Volunteer Soldiers," established by Congress upon land acquired in that State by the United States, were not residents of the State and hence not entitled to vote as such, and that this was so though the inmate had been a resident of Ohio before becoming a resident inmate of the asylum.[5]

§ 160. **3. Age.**—In all of the States the right to vote is limited to those who have attained the age of twenty-one years.[6]

Inasmuch as the law does not regard fractions of a day, an infant is deemed of age during the whole of the last day of his twenty-first year.[7]

ported by him; or if he has a family of his own, and removes with them to such town; or by purchase or lease takes up his permanent abode there without intending to return to his former domicile; if he depend upon his own property, income or industry for support, these are circumstances, more or less conclusive, to show a change of domicile, and the acquisition of a domicile in the town where the college is situated."

[1] As in New York, Illinois, Indiana, California, Michigan, Rhode Island, Minnesota, Missouri, Nevada, Oregon and Wisconsin.

[2] Sanders *v.* Getchell, 76 Me. 158, 49 Am. Rep. 606.

[3] Dale *v.* Irwin, 78 Ill. 170. See upon right of discharged paupers to vote: Opinion of Judges, 124 Mass. 596; *Re* Registry Laws, 10 Phila. 213.

[4] Monroe *v.* Jackson, 1 Bart. 98; Covode *v.* Foster, 2 Bart. 600; Taylor *v.* Reading, 2 Bart. 661; *Re* Election Law, 9 Phila. 497.

[5] Sinks *v.* Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

[6] McCrary on Elections, § 20.

[7] Coke, Lit. 171, b; Bac. Abr. Infantry A; Howard's Case, 2 Salk. 625;

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§ 161. **4. Males only may vote.**—Except where their disability has been removed by statute, the right of suffrage can not be exercised by women. Although women are citizens in the broad sense of that term, yet the right of suffrage is not co-extensive with citizenship.[1]

Neither was the right conferred by the fourteenth amendment of the constitution of the United States, for although it is thereby declared that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside, and that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, yet inasmuch as the constitution does not define nor add to the privileges and immunities of citizens nor declare the right of voting to be one of them, and inasmuch as women did not possess the right before the amendment, it is plain that it is not conferred by the amendment.[2]

So, inasmuch as the right to determine the qualification of voters rests, as has been seen, with the people of the States, an express provision in a State constitution limiting the right to vote to male citizens, is not in conflict with the constitution of the United States.[3]

Statutes have, however, been passed in several of the States removing this disability either in whole or in part.[4]

§ 162. **5. Payment of a Tax.**—In several of the States the right to vote is limited to those who have paid a tax, varying in kind and amount with the several States.

Where the kind is not specified it may be a tax either upon

Fitzhugh *v.* Dennington, 2 Ld. Raym. 1094; Anonymous, 1 Ld. Raym. 480; Herbert *v.* Turball, 1 Keb. 589; Wells *v.* Wells, 6 Ind. 447; Hamlin *v.* Stevenson, 4 Dana (Ky.) 597; State *v.* Clarke, 3 Harr. (Del.) 557.

[1] Minor *v.* Happersett, 21 Wall. (U. S.) 162; Van Valkenburgh *v.* Brown, 43 Cal. 43, 13 Am. Rep. 136; Spencer *v.* Board of Registration, 1 McAr. (D. C.) 169, 29 Am. Rep. 582; Bloomer *v.* Todd, — Wash. —, 19 Pac. Rep. 135.

[2] Minor *v.* Happersett, 21 Wall. (U. S.) 162; Van Valkenburgh *v.* Brown, 43 Cal. 43, 13 Am. Rep. 136.

Nor is it conferred by the fifteenth amendment: Van Valkenburgh *v.* Brown, *supra.*

[3] Minor *v.* Happersett, 21 Wall. (U. S.) 162.

[4] See Belles *v.* Burr, — Mich. —, 43 N. W. Rep. 24.

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real or personal property;[1] but a tax can not be imposed at an irregular or unusual time merely for the purpose of creating the right to vote.[2] That the tax was illegally assessed, however, has been held not to deprive the party paying it of his right to vote;[3] nor does the fact that the tax was not paid by the voter in person if paid by his agent with authority either previously conferred or subsequently duly ratified.[4]

Tax requirements, however, must be uniform and not discriminate between voters by requiring one class to be tax-payers and not requiring it of others.[5]

§ 163. **6. Ownership of Land.**—So that one is a tax payer or free-holder is, in many cases, made a qualification.

§ 164. **7. Mental Capacity.**—It is expressly provided in several of the States[6] that idiots and lunatics may not exercise the right of suffrage, but even in the absence of such a provision it is believed that they are excluded.[7]

Where, however, the person is neither an idiot or lunatic, his vote is not to be rejected simply because he is a man whose mind is greatly enfeebled by age.[8]

As to the degree of proof required upon an allegation of mental unsoundness, the law is not settled, but the opinion has been expressed[9] that the test applied to the question of the competency of a person to make a will would be applicable.[10]

[1] Catlin *v.* Smith, 2 Serg. & R. (Penn.) 267.

[2] Opinion of Judges, 18 Pick. (Mass.) 555.

[3] Humphrey *v.* Kingman, 5 Metc. (Mass.) 162.

[4] Humphrey *v.* Kingman, 5 Metc. (Mass.) 162; *Re* District Attorney, 11 Phila. 645; Gillin *v.* Armstrong, 12 Phila. 626.

[5] Lyman *v.* Martin, 2 Utah, 136.

Upon the general subject see also: *Re* Providence Voters, 13 R. I. 737; *Re* Voting Laws, 12 R. I. 586.

A city law requiring voters to pay a poll tax is not in violation of the constitution as imposing an additional qualification. McMahon *v.* Mayor, 66 Ga. 217, 42 Am. Rep. 65.

[6] As in Alabama, Arkansas, California, Delaware, Florida, Iowa, Kansas, Louisiana, Maryland, Minnesota, Nebraska, Nevada, New Jersey, Ohio, Oregon, Rhode Island, South Carolina, Virginia, West Virginia and Wisconsin.

[7] Sinks *v.* Reese, 19 Ohio St. 306, 2 Am. Rep. 397; Clark *v.* Robinson, 88 Ill. 498. Cooley's Const. Lim. (5th ed.) 753.

[8] Sinks *v.* Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

[9] Mr. McCrary in his work on Elections, § 80.

[10] In Clark *v.* Robinson, 88 Ill. 498, it was held that a person who is capable of doing ordinary work and transacting business, who knows money

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In Connecticut capacity to read is required, and in Massachusetts capacity to read and write.

5. *Forfeiture of Right.*

§ 165. **State may prescribe Forfeiture of Franchise as Punishment for Crime.**—As has been seen in an earlier section, the right and power to determine who shall exercise the right to vote rest with the people of the State.[1] As has also been seen, the right to vote is not a natural or absolute right, nor is it a necessary incident of citizenship.[2] It is, therefore, not only competent for the State to declare to whom it shall be entrusted, but also to provide for its withdrawal for such causes as it deems sufficient.[3] Hence, several of the States have provided that guilt or conviction of certain crimes should operate to exclude the convicted or guilty person from the further exercise of the right.[4]

Thus it has been provided that all persons who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery or other crime punishable by imprisonment in the penitentiary;[5] persons convicted of infamous

and its value, makes his own contracts and does his own trading, or a person vacillating and easily persuaded, or a person who has been laboring under some kind of illusion or hallucination, but not so as to incapacitate him for the general management of business, which illusion or hallucination is not shown to extend to political matters, can not be denied the privilege of the elective franchise on the ground of a want of mental capacity.

[1] See *ante* § 146.

[2] Minor *v.* Happersett, 21 Wall. (U. S.) 162.

[3] Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; Anderson *v.* Baker, 23 Md. 531.

[4] See Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; State *v.* Symonds, 57 Me. 148; Huber *v.* Reily, 53 Penn. 112; Anderson *v.* State, 72 Ala. 187; State *v.* Buckman, 18 Fla. 267; Jones *v.* Registrars, 56 Miss. 766; United States *v.* Barnabo, 14 Blatchf. (U. S. C. C.) 74; Barker *v.* People, 20 Johns. (N. Y.) 457; Cawley *v.* People, 95 Ill. 249; Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52; State *v.* Staten, 6 Cold. (Tenn.) 233; Gandy *v.* State, 10 Neb. 243; People *v.* Cornell, 16 Cal. 187.

[5] Anderson *v.* State, 72 Ala. 187. Under such a provision the grade of a larceny committed is not material. Anderson *v.* State, *supra*; State *v.* Buckman, 18 Fla. 267. See Anderson *v.* Winfree, — Ky. —, 4 S. W. Rep. 351.

Under such a provision it has been held that conviction of a crime "punishable" by imprisonment in the penitentiary forfeits the right to vote whether that punishment be actually inflicted or not. United States *v.*

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crimes;[1] persons who have deserted from the military or naval service of the United States;[2] persons who are defaulters of public money;[3] persons who have participated or aided in fighting duels;[4] and others, shall not be permitted to vote.

§ 166. **This is not a "cruel or unusual Punishment."**—Such a penalty can not be deemed a "cruel or unusual" punishment within the meaning of a constitutional provision prohibiting punishments of that nature.[5]

§ 167. **Evidence required—Conviction—Due Process of Law.**—Where, by the terms of the law, the *conviction* of the voter is to operate as his disfranchisement, the fact of the conviction is a necessary prerequisite to the operation of the law.[6] Where, however, the commission of an act or the being guilty of an offense is the cause prescribed, it is held by the weight of authority that the voter can not be deprived of his right until the existence of the disfranchising fact shall have been established by due course of law.[7] Whether or not the fact exists is a judicial question and can not be determined by the officers of election.[8]

Watkins, 7 Sawy. (U. S. C. C.) 85. But *contra* it has been held that the punishment actually inflicted is the test of the disfranchisement, and not the mere liability to such punishment. Gandy *v.* State, 10 Neb. 243; People *v.* Cornell, 16 Cal. 187.

[1] As to what offenses are infamous, see *Ex parte* Wilson, 114 U. S. 417; Mackin *v.* United States, 117 U. S. 348.

[2] Huber *v.* Reily, 53 Penn. 112; State *v.* Symonds, 57 Me. 148. Deserter must be convicted by court martial. McCafferty *v.* Guyer, 59 Penn. St. 109.

[3] Cawley *v.* People, 95 Ill, 248.

[4] See Barker *v.* People, 20 Johns. (N. Y.) 457; Royall *v.* Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335.

[5] Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; Barker *v.* People, 20 Johns. (N. Y.) 457; Huber *v.* Reily, 53 Penn. 112.

[6] See United States *v.* Watkinds, 7 Sawy. (U. S. C. C.) 85; Commonwealth *v.* Walter, 83 Penn. 105, 24 Am. Rep. 154; Goetcheus *v.* Matheson, 58 Barb. (N. Y.) 152; State *v.* Humphreys, — Tex. —, 12 S. W. Rep 99.

[7] Huber *v.* Reily, 53 Penn. 112; State *v.* Symonds, 57 Me. 148; State *v.* Staten, 6 Cold. (Tenn.) 233.

[8] Burkett *v.* McCarty, 10 Bush (Ky.) 758.

Under the constitution and statutes of Virginia, no person who has engaged or shall engage in a duel is allowed to hold office. *Held*, that one who has been so engaged may be removed from office by *quo warranto* or an information in the nature of *quo warranto* without a previous conviction of the offense in criminal proceedings. Royall *v.* Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335.

So where a state constitution pro-

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§ 168. **Disability may be removed by Pardon.**—An absolute and unconditional pardon granted by the power having the requisite authority relieves the person to whom it is granted from the consequences of his offense and restores him to his civil rights. As is said by a learned judge, "In contemplation of law, it so far blots out the offense that afterwards it can not be imputed to him to prevent the assertion of his civil rights. It gives to him a new credit and capacity and rehabilitates him to that extent in his former position."[1] He may thereafter vote or hold office as before.[2]

II.

THE ELECTION.

§ 169. **In General.**—Having thus determined who are qualified to vote at an election, it now becomes important to consider the time, place and manner of exercising the right and the results that are to ensue therefrom. In this connection it will be obvious that there are a number of questions important to be determined, as—

1. The authority for holding the election;
2. The notice to be given of it;
3. The time of holding the election;
4. The place of holding the election;
5. Election boards and officers;
6. The method of voting;

vided that any candidate for office who should be guilty of bribery should be disqualified from holding office, it was held that an officer might be removed by *quo warranto* for obtaining his election by bribery, without having been first convicted of the offense on an indictment, but *semble* that the defendant had a right to have the issues of fact raised upon the *quo warranto* tried by a jury. Commonwealth *v.* Walter, 83 Penn. 105, 24 Am. Rep. 154.

[1] FIELD, J., in Knote *v.* United States, 95 U. S. 149.

[2] *Ex parte* Garland, 4 Wall. (U. S.) 333; United States *v.* Padelford, 9 Wall. (U S.) 531; United States *v.* Klein, 13 Wall. (U. S.) 128; Carlisle *v.* United States, 16 Wall. (U.S.) 147; Wood *v.* Fitzgerald, 3 Oreg. 568; Jones *v.* Registrars, 56 Miss. 766; Perkins *v.* Stevens, 24 Pick. (Mass.) 277; People *v.* Pease, 3 Johns. (N.Y.) Cases 333; *In re* Deming, 19 Johns. (N. Y.) 233.

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7. What constitutes an election;
8. The canvass and returns;
9. Contested elections.

1. *Authority for Holding the Election.*

§ 170. **Election must be authorized by Law.**—It will be evident from the very nature of the case and the consideration already had, that public rights and authority can be acquired only by virtue and in pursuance of some fundamental law by which the people, who are the source of power, have consented to be bound. Elections can not be held and offices acquired at the mere option of the office seeker. In order, therefore, to the holding of a valid election, authority so to hold it must be found conferred by the people, either directly through the constitution, which they have themselves ordained, or indirectly, through the enactments of their legal representatives, the legislature. Without such authority, no election, except it be one held with the unanimous consent of all persons entitled to participate, can be of any legal importance.[1]

§ 171. **Same Subject—Contingent Elections.**—So if the election be one which is to be held only upon a certain condition or the happening of a given event, as in case of a municipal election only where the proper municipal officers shall decide to hold the election, it is obvious that unless the condition is performed or the contingency happens, as, in the case mentioned, only when the municipal officers do decide to call the election, any election attempted to be held must be of no avail.[2] For the same reason, if an election is to be held only in case of a proclamation to that effect, it can not be held if the proclamation is not made.[3]

[1] Brewer *v.* Davies, 9 Humph. (Tenn.) 208, 49 Am. Dec. 706; McKune *v.* Weller, 11 Cal. 49, 70 Am. Dec. 754; People *v.* Martin, 12 Cal. 409; Sawyer *v.* Haydon, 1 Nev. 75; State *v.* Collins, 2 Nev. 351; State *v.* Robinson, 1 Kans. 17; State *v.* Jenkins, 43 Mo. 261; Matthews *v.* Commissioners, 34 Kans. 606, 9 Pac. Rep. 765.

[2] Opinion of Judges, 7 Mass. 523; Opinion of Judges, 15 Mass. 537.

[3] Stephens *v.* People, 89 Ill. 337; People *v.* Porter, 6 Cal. 26; McKune *v.* Weller, 11 Cal. 49; People *v.* Martin, 12 Cal. 409; Jones *v.* State, 1 Kans. 273; Barry *v.* Lauck, 5 Cold. (Tenn.) 588. "Where the time and place of an election are not fixed by law," says SHELDON, J., in Stephens

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2. *Notice of the Election.*

§ 172. **Necessity of Notice.**—The laws regulating the calling and holding of elections usually provide that notice thereof shall be given in a manner and at a time therein prescribed, and, in general terms, it may be said that notice *of some kind* is essential to the validity of the election.[1]

But whether the exact notice prescribed by the law is indispensable, and whether there is the same necessity for express notice in all classes of elections, are questions to be considered.

§ 173. **General Elections—Time and Place fixed by Law—Provisions directory.**—The time and place of holding general elections are ordinarily fixed by the public laws which authorize them to be held, and of these public laws, and hence of the time and place fixed thereby, the people are bound to take notice and are presumed to have knowledge. Under these circumstances, provisions in the law for giving notice are presumed to be in addition to that which the law itself gives, and designed to give greater publicity to the fact and to act as reminders to the people of rights and duties already known by them.

The right and duty to hold the election in such a case is derived from the law and not from the notice, and it has, therefore, been held in a number of cases that the provisions for giving notice are to be regarded as directory only rather than as jurisdictional, and that the election will not be rendered invalid because of a failure to give the notice as prescribed.[2] Were it otherwise, the power of holding regular elections would be entirely dependent upon the ignorance or lawlessness of the officers charged with the duty of giving the notice.

v. People, 89 Ill. 337, "but the election is only to be called, and the time and place to be fixed, by some authority named in the statute after the happening of some condition precedent, we regard it as essential to the validity of such an election that it be called, and the time and place thereof fixed, by the very agency designated by law and none other."

See also Toney v. Harris, — Ky. —, 3 S. W. Rep. 614.

[1] See State v. Tucker, 32 Mo. App. 620; Bean v. County Court, 33 *Id.* 635.

[2] Stephens v. People, 89 Ill. 337; State v. Orvis, 20 Wis. 235; People v. Hartwell, 12 Mich. 508, 86 Am. Dec. 70; State v. Jones, 19 Ind. 421, 81 Am. Dec. 408; People v. Witherell, 14 Mich. 48.

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§ 174. **Same Subject—Filling Vacancies required to be filled at "next general Election."**—The same rule applies to vacancies which the law requires to be filled at the next general election, the time and place of which are fixed by law. Here though the law declares that notice shall be given specifying the vacancy to be filled, an election at the time and place fixed by law has been held to be valid although no notice was given.[1]

In a leading case in New York it was held that where the vacancy was required to be filled at the next regular election, an election at that time was valid though the vacancy occurred so late that notice could not be given of it, and although only a small portion of the voters knew of the vacancy or cast their votes to fill it.[2]

But in other cases an election to fill a vacancy of which no notice was given, and which was, in fact, known to but few of the voters, has been held void.[3]

Though the notice were not given in the form prescribed by the law, yet if the election has been held, and the great body of the voters had notice *in fact* of the vacancy, this coupled with the fact that they are presumed to know that the law requires the vacancy to be filled at the next election would seem to be sufficient,[4] even though many refrained from voting because of a difference of construction of the law.[5] "But where," as is said by a learned judge, "there was no notice, either by proclamation or in fact, and it is obvious that the great body of the elec-

[1] People *v.* Cowles, 13 N. Y. 350; People *v.* Hartwell, 12 Mich. 508, 86 Am. Dec. 70; Dishon *v.* Smith, 10 Iowa, 212; State *v.* Orvis, 20 Wis. 235; State *v.* Goetze, 22 Wis. 363; State *v.* Jones, 19 Ind. 356, 81 Am. Dec. 403.

[2] People *v.* Cowles, 13 N. Y. 350. This case is considered and denied in People *v.* Weller, 11 Cal. 49, 70 Am. Dec. 754, and distinguished in People *v.* Crissey, 91 N. Y. 616.

[3] Beal *v.* Ray, 17 Ind. 550; People *v.* Porter, 6 Cal. 26; People *v.* Weller, 11 Cal. 49, 70 Am. Dec. 754; People *v.* Martin, 12 Cal. 409; People *v.* Rosborough, 29 Cal. 415; Bolton *v.* Good, 41 N. J. L. 296.

[4] Foster *v.* Scarff, 15 Ohio St. 532. In this case the court say: "We have no doubt that where an election is held in other respects as prescribed by law, *notice in fact* is brought home to the great body of the electors, though derived through means other than the proclamation which the law prescribes, such election would be valid." To same effect:—Commonwealth *v.* Smith, 132 Mass. 289; Dishon *v.* Smith, 10 Iowa 212; State *v.* Skirving, 19 Neb. 497.

[5] Jones *v.* Gridley, 20 Kans. 584.

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tors were misled for want of the official proclamation, its absence becomes such an irregularity as prevents an actual choice by the electors,—prevents an actual election in the primary sense of that word,—and renders invalid any semblance of an election which may have been attempted by a few, and which must operate, if it operate at all, as a surprise and fraud upon the rights of the many."[1]

Certainly in such a case if the body of voters who were unnotified was so great that they might have changed the result, the election ought not to stand.

§ 175. **Same Subject—Vacancies not required to be so filled.**—But where the vacancy is one not required to be filled at the next general election, although it *may* be so filled, it is held that an election held without notice, either such as is prescribed by law or notice in fact, and in which the great body of the voters have not participated, is void.[2]

What was said in the preceding section as to the kind of notice required, would apply here. If the great body of the electors actually had notice and the election were held, it could scarcely be assailed unless the number of voters unnotified were sufficient to change the result.

§ 176. **Special Elections—Notice requisite.**—Where the time and place are not fixed by law, and in the case of special elections not occurring at regular or fixed periods, but only upon the happening of a contingency, notice is indispensable, and an election held without it would be void.[3]

So when a special election is called for a specific purpose, notice of the purpose should also be given.[4]

[1] Brinkerhoff, J., in Foster *v.* Scarff, 15 Ohio St. 532.

[2] Secord *v.* Foutch, 44 Mich. 89; Cook *v.* Mock, — Kans. —, 20 Pac. Rep. 259; Ward *v.* Clark, 35 Kans. 315, 10 Pac. Rep. 827; State *v.* Sherman Co., 39 Kans. 293, 18 Pac. Rep. 179; Jones *v.* State, 1 Kans. 273; Wood *v.* Bartling, 16 Kans. 109.

[3] Kenfield *v.* Irwin, 52 Cal. 164; Morgan *v.* Gloucester, 44 N. J. L. 137; Hubbard *v.* Williamstown, 61 Wis. 397; People *v.* Crissey, 91 N.Y. 616; Haddox *v.* Clarke County, 79 Va. 677.

[4] St. Louis, &c. Ry. Co. *v.* Epperson, — Mo. —, 10 S. W. Rep. 478.

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3. *Time of Holding the Election.*

§ 177. **Time must be fixed by Law.**—It is evident that a fixed and ascertained time for holding the election is indispensable to the full and effectual exercise of the right to vote. And this time must be fixed by authoritative power,—either the people in their constitution and laws in the case of regular elections,[1] or the executive or other designated power in the case of special elections.[2]

§ 178. **Election must be held at Time fixed.**—Enactments declaring the time at which the election shall be held are deemed to be matters of substance and must be substantially observed or the election will be void.[3] At the same time, a substantial observance is sufficient and slight variations will not invalidate.

Thus a failure to hold the election at all until several days after the time fixed,[4] or not opening the polls until two o'clock in the afternoon where the law required them to be opened between the hours of six and seven in the morning;[5] or allowing only forty minutes for voting where the law contemplates three hours,[6] have been held to invalidate the election.

But, on the other hand, closing the polls a few minutes or an hour before the time fixed, will not invalidate where no one offered to vote after the polls were closed;[7] but it will if votes are thereafter offered and rejected, in sufficient numbers that they might have changed the result.[8]

So keeping the polls open a short time after the hour fixed will not invalidate[9] unless enough votes were afterwards received to change the result.[10]

[1] Brodhead *v.* Milwaukee, 19 Wis. 624, 88 Am. Dec. 711; Brewer *v.* Davis, 9 Humph. (Tenn.) 208, 49 Am. Dec. 706.

[2] When the statute prescribes that the date of holding the election shall be fixed by a certain agency, it is essential that the date be fixed by that agency and none other. Stephens *v.* People, 89 Ill. 337.

[3] Dickey *v.* Hurlburt, 5 Cal. 343; Melvin's Case, 68 Penn. 333; People *v.* Murray, 15 Cal. 221; Toney *v.* Harris, — Ky. —, 3 S. W. Rep. 614.

[4] Pratt *v.* Swanton, 15 Vt. 147.

[5] Melvin's Case, 68 Penn. 333.

[6] State *v.* Wollem, 37 Iowa, 131.

[7] Cleland *v.* Porter, 74 Ill. 76, 24 Am. Rep. 273.

[8] State *v.* Wollem, 37 Iowa 131; Cleland *v.* Porter, 74 Ill. 76, 24 Am. Rep. 273.

[9] Swepston *v.* Barton, 39 Ark. 549.

[10] Piatt *v.* People, 29 Ill. 54; Locust Ward Election, 4 Pa. L. J. 341.

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Closing the polls an hour for dinner will not invalidate where no one was thereby denied the right to vote.[1] So where the polls are required to be open between 6 A. M. and 7 P. M. an election held from 7 A. M. to 7 P. M. is not defective.[2] And in general terms it may be said that irregularities which do not affect the result,—which do not deprive a legal voter of his right or admit a disqualified person to vote, which cast no uncertainty on the result and have not been occasioned by the agency of the party seeking to derive a benefit from them,—will be disregarded in determining the question of choice.[3]

§ 179. **Same Subject—Holding of Election prevented by Act of God.**—Where the people of a township were, with few exceptions, prevented by a great "blizzard" or storm from attending and participating in an election on the day fixed for it by law, and an act was afterwards passed by the legislature authorizing the election to be held upon a subsequent day, the persons elected on the latter day were held to have a good title to the offices.[4]

§ 180. **Same Subject—The Rules deduced.**—"From all the somewhat conflicting authorities upon the subject," says Mr. McCrary in his treatise on Elections, "the following may be gathered as the governing rules:—

1. If the statute fixing the hours during which the polls shall remain open expressly declares that a failure in this respect shall render the election void, it must be strictly enforced.

2. But in the absence of such a provision in the statute, it will be regarded as so far directory only, as that, unless the deviation from the legal hours has affected the result, it will be disregarded.

3. If the deviation from the legal hours is great, or even considerable, the presumption will be that it has affected the result and the burthen will be upon him who seeks to uphold the election to show affirmatively that it has not. But if the deviation from the legal hours is but slight, the presumption will be that it has not affected the result, and the burthen will be upon him

[1] Fry *v.* Booth, 19 Ohio St. 25; Du Page County *v.* People, 65 Ill. 360.

[2] Clark *v.* Leathers, — Ky. —, 5 S. W. Rep. 576.

[3] People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451.

[4] State *v.* Quinby, — N. J. —, 17 Atl. Rep. 952.

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who attacks the validity of the election, to show affirmatively the contrary.

4. If the number of votes illegally cast after the legal hours, and the persons for whom cast can be shown, they may be rejected from the count."[1]

4. *Place of Holding the Election.*

§ 181. **Place must be fixed.**—It is also imperative that the place of holding the election shall be fixed, either by the general law or by the proclamation or notice by which the election is called. Without a place fixed and in a locality known to the voters, any attempt to hold an election must be unavailing.

§ 182. **What Deviation invalidates.**—Enactments fixing the place of holding the election are properly to be regarded as mandatory, and any substantial variation must invalidate the election.[2] At the same time, emergencies may arise, as a sudden fire or the destruction of the building, or the inadequacy of the quarters assigned, which will render some change in the location fixed indispensable.[3] And it is well settled that where such a necessity arises and the removal is prompted by proper motives, a removal of the polls to some other appropriate place in the same

[1] § 130.

[2] Melvin's Case, 68 Penn. 333; Walker *v.* Sanford, 78 Ga. 165, 1 S. E. Rep. 424; Dickey *v.* Hurlburt, 5 Cal. 343; Knowles *v.* Yeates, 31 Cal. 82.

In Melvin's Case, *supra*, the court, THOMPSON, C. J., says: "A fixed place, it seems to me, is as absolutely requisite according to the election laws, as in the time of voting. The holding of elections at the places fixed by law, is not directory; it is mandatory, and can not be omitted without error. I will not say that in case of the destruction of a designated building on the eve of an election, the election might not be held on the same or contiguous ground as a matter of necessity, *necessitas non habet legem*. But there the necessity must be absolute, discarding all mere ideas of convenience."

[3] In Brodhead *v.* Milwaukee, 19 Wis. 624, 88 Am. Dec. 711, DIXON, C. J., says: "If the room at which the election is called is small, inconvenient or inaccessible to large numbers, the electors, or a majority of those present, may adjourn to some other place where these objections do not exist, making public announcement thereof, and causing proper notice to be given to voters who shall come afterwards. This power, I have no doubt, is always possessed by the electors assembled on such occasions, unless expressly taken away by statute."

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vicinity, of which adequate general notice is given, will not invalidate the result.[1]

5. *Election Boards and Officers.*

§ 183. **Election must be held by proper Officers.**—The laws providing for the calling and holding of elections usually provide that they shall be conducted by certain officers, elected or chosen by certain methods, and that the result shall be ascertained and published in a manner prescribed.

Regulations of this nature are indispensable to the orderly and efficient conduct of the election, and an election held by persons without any color of authority to do so, or without any attempt to observe the methods prescribed, is invalid.[2]

Where a special election is provided for, but no method of holding it is declared, it will be sufficient if held in the method prescribed for holding general elections.[3]

§ 184. **Regulations are directory and not mandatory.**—But while the manner of holding elections must be regulated, it is obvious that the manner prescribed is intended simply to secure the correct result, and that the manner is clearly subservient to the result. As is said by a learned judge: "In elections the great matter is the result. When this is clearly ascertained, it sweeps away all technicalities. The machinery provided should be observed, but in so far as it is not necessary to determine the

[1] Farrington *v.* Turner, 53 Mich. 72, 51 Am. Rep. 88; Dale *v.* Irwin, 78 Ill. 170; Hawes *v.* Miller, 56 Iowa 395; Foster *v.* Scarff, 15 Ohio St. 535; Simons *v.* People, 119 Ill. 617.

In Dale *v.* Irwin, 78 Ill. 170, an adjournment to a place not more than 100 feet distant, readily seen from the original polling place, and of which the voters had knowledge, did not invalidate, and in Farrington *v.* Turner, 53 Mich. 72, 51 Am. Rep. 88, an adjournment, for the purpose of accommodating the largest number of voters, from a school house in one district to another about eight miles distant, a public announcement being made of the fact and a person being left at the original place to inform all comers of the change, was sustained, it not appearing that that the result was affected. But in another case a removal to a place several miles away was held to invalidate. Knowles *v.* Yeates, 31 Cal. 82.

[2] Daily *v.* Esterbrook, 1 Br. El. Cas. 299; Franklin *v.* Kaufman, 65 Ga. 260.

[3] Wells *v.* Taylor, 5 Mont. 202; People *v.* Dutcher, 56 Ill. 144.

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result, it is directory and not mandatory. Certainly manner and form should not be allowed to defeat the undoubted will of the people clearly expressed. This would be indeed subordinating and sacrificing the substance to the shadow." [1]

In pursuance of this idea, therefore, it is generally held that the regulations prescribed are directory merely, and that a failure to observe them fully will not invalidate the election, where an election has been held in good faith and the irregularities do not affect the result.[2]

Thus the fact that the officers of election were not qualified to hold the position,[3] or that they had not been sworn,[4] or had not filed their oath[5] as required, or that they did not meet in the proper place,[6] nor certify the result in the proper form,[7] or that they were not lawfully chosen,[8] or that one of them could not read,[9] or was an alien,[10] or was the son-in-law of one of the candidates,[11] or was not a freeholder as required,[12] will not invalidate the election. The officers are at least officers *de facto*, and if the result has not been affected by these irregularities no one can complain.[13]

So that the officers have not in all things observed the methods prescribed in receiving the votes or making their returns is immaterial where there has been no fraud and the result is not changed.[14]

[1] SIMPSON, C. J., in Trimmier *v.* Bomar, 20 S. C. 354.

[2] Trimmier *v.* Bomar, 20 S. C. 354; Rounds *v.* Smart, 71 Me 380; Thompson *v.* Ewing, 1 Brewst. 69; Swepston *v.* Barton, 39 Ark. 549; Keller *v.* Chapman, 34 Cal. 635; Taylor *v.* Taylor, 10 Minn. 107; Whipley *v.* McKune, 12 Cal. 352; Sprague *v.* Norway, 31 Cal. 173; Collins *v.* Huff, 63 Ga. 207; Harding *v.* Colquitt, 63 Ga. 588; State *v.* Nicholson, 102 N. C. 465, 9 S. E. Rep. 545; Kellogg *v.* Hickman, — Colo. —, 21 Pac. Rep. 325.

[3] Swepston *v.* Barton, 39 Ark. 549.

[4] Rounds *v.* Smart, 71 Me. 380; Trimmier *v.* Bomar, 20 S. C. 354; Whipley *v.* McKune, 12 Cal. 352.

[5] Trimmier *v.* Bomar, 20 S. C. 354.

[6] Trimmier *v.* Bomar, 20 S. C. 354.

[7] Trimmier *v.* Bomar, 20 S. C. 354.

[8] Thompson *v.* Ewing, 1 Brewst. 69; Rounds *v.* Smart, 71 Me. 380; Keller *v.* Chapman, 34 Cal. 635; Sprague *v.* Norway, 31 Cal. 173.

[9] Sprague *v.* Norway, 31 Cal. 173; State *v.* Bernier, — Minn. —, 38 N. W. Rep. 368.

[10] Keller *v.* Chapman, 34 Cal. 635.

[11] Hardin *v.* Colquitt, 63 Ga. 588.

[12] Collins *v.* Huff, 63 Ga. 207.

[13] Swepston *v.* Barton, 39 Ark. 549; Quinn *v.* Markoe, 37 Minn. 439, 35 N. W. Rep. 263.

[14] Whipley *v.* McKune, 12 Cal. 352, as if they permit the ballot box to be temporarily out of their custody, where no fraud or tampering are

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But the absence of officers, whom the law expressly requires to be present, will invalidate the election.[1]

§ 185. **Same Subject—Depositing Ballot in the wrong Box.**—Where different officers, and particularly where different classes of officers, are to be voted for at the same election, it is common, to avoid confusion, to provide that votes for each officer or class of officers shall be deposited in a separate box.

This, however, is obviously a matter of regulation only, and if by the honest mistake of the voter, or through the error or even the fraud of the inspector, the ballot is deposited in the wrong box, this should not defeat it. The mistake is one easy of correction when the boxes are opened, and, if otherwise perfect, the ballot should be then deposited in the proper box and duly counted.[2]

But the inspectors have no right or authority, on the assertion of a voter that he has voted by mistake in the wrong precinct, to withdraw from the ballot box and destroy a ballot which he professes to identify as the one cast by him.[3]

6. *The Method of Voting.*

§ 186. **State may make reasonable Regulations.**—It is the undoubted right and duty of the State to make such reasonable regulations for the holding of elections and the voting thereat as shall best protect and preserve the right of the elector to exercise

shown: People *v.* Nordheim, 99 Ill. 553, as where the poll-book, by oversight, was not sealed, no advantage having been taken of it: People *v.* Cook, 14 Barb. (N. Y.) 259, as if the voters were sworn on a book other than the Bible, all supposing it to be the Bible: O'Gorman *v.* Richter, 31 Minn. 25, as where the ballots were not sealed up, but had been kept intact: State *v.* Bernier, — Minn. —, 38 N. W. Rep. 368, as where the poll list was not posted as required.

See also State *v.* Burbridge, — Fla. —, 3 South. Rep. 869; Varney *v.* Justice, — Ky —, 6 S. W. Rep. 457; Stemper *v.* Higgins, 38 Minn. 222, 37 N. W. Rep. 95.

[1] Walker *v.* Sandford; 78 Ga. 165, 1 S. E. Rep. 424; Franklin *v.* Kaufman, 65 Ga. 260.

[2] People *v.* Bates, 11 Mich. 362, 83 Am. Dec. 745. See also Lanier *v.* Gallatas, 13 La. Ann 175; McKinney *v.* O'Connor, 26 Tex. 5.

[3] Harbaugh *v.* Cicott, 33 Mich. 241.

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his franchise.[1] Upon this ground, as has been seen, registration laws are enacted and sustained.[2]

Regulations for this purpose must, however, be reasonable in their requirements; they must, as a rule, be general and uniform in their operation, "operating upon all of a certain class, or upon all those who are brought within the relations and circumstances provided in the act;"[3] and they must not have the effect of depriving certain classes of citizens of their constitutional rights.[4]

§ 187. **Voter must vote in Person.**—At the common law voting by proxy was unknown, and this still remains the law unless changed by statute. The voter must, therefore, personally deposit his ballot.[5]

But upon the principle that what is done in one's presence and by his express direction is, in law, his act,[6] an infirm or aged voter may undoubtedly employ another to perform the mechanical act of depositing in the voter's presence the ballot which the latter has himself selected.[7]

§ 188. **Voter must vote but once.**—It is also a fundamental principle in all popular elections that each voter shall vote but once, at any election, for each office or measure to be voted for.

And if the voter has once voted, though by mistake he has voted in the wrong precinct, he has no right to vote again at the same election, and if he does so, his second vote should not be counted.[8]

§ 189. **Voter need not vote the whole Ticket.**—It is entirely optional with the voter whether he will vote at all or not, and, if

[1] See Commonwealth *v.* McClelland, 83 Ky. 686; Davis *v.* School District, 44 N. H. 398, 404; State *v.* Butts, 31 Kans. 537.

[2] See *ante*, § 149.

[3] State *v.* Hunter, 38 Kans. 578, 589; See Wheeler *v.* Philadelphia, 77 Penn. St. 338; People *v.* Squire 107 N. Y. 593; State *v.* Berka, 20 Neb. 375; State *v.* Lawrence Bridge Co. 22 Kans. 438; State *v.* Mitchell, 31 Ohio St. 592; Burkholtz *v.* State, 16 Lea (Tenn.) 71.

[4] Thus a law whose effect is to disfranchise illiterate persons can not be sustained. Rogers *v.* Jacob, — Ky. —, 11 S. W. Rep. 513.

[5] Opinion of Judges, 41 N. H. 551, 11 Am. Law Reg. 742; People *v.* Blodgett, 13 Mich. 127.

[6] See Mechem on Agency, § 96.

[7] Opinion of Judges, *supra:* Clark *v.* Robinson, 88 Ill. 498.

[8] Harbaugh *v.* Cicott, 33 Mich. 241.

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he votes, he need not vote for every office to be filled at that election nor for every one of several joint candidates for the same office, but he may vote for such offices as he chooses and for such of the several persons to be chosen to the same office as he prefers.

§ 190. **Usually required to vote by Ballot.**—Voting for public officers is usually required to be by ballot, but in the absence of such a requirement, a vote *viva voce* or by show of hands or by any other means agreed upon, would undoubtedly be valid.

§ 191. **What constitutes Ballot.**—In the absence of a law prescribing the form, material and method of preparing ballots, voters would be at liberty to choose such appropriate forms, materials and methods as seemed to them most desirable. The word itself originally signified a little ball used in voting,[1] but by common acceptance in modern political elections it has come to mean a piece of paper upon which is written or printed the names of the persons voted for with the title of the respective offices for which they are to be chosen.[2]

Even as thus construed, there is, unless otherwise provided by law, no objection to the voter's choosing for himself the size and style of his ballot, nor need it consist of one piece of paper only, but, if intended in good faith, the voter may select separate pieces for various offices.[3]

The method of voting by ballot, and the word ballot itself so signifies when used in that sense, is the personal deposit by the voter of his ballot in a box or other receptacle provided for that purpose and confided to the charge of the officers of the election.[4]

§ 192. **Ballot implies Secrecy.**—"The distinguishing feature of this mode of voting," says Judge COOLEY, "is that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy in regard to the persons for whom he

[1] See Webster's Dictionary, Bouvier's Law Dictionary, title "Ballot."

[2] "A ballot may be defined to be a piece of paper or other suitable material, with the name written or printed upon it of the person to be voted for." Cushing Leg. Assem. § 103; Williams *v.* Stein, 38 Ind. 89, 10 Am. Rep. 97.

[3] Wildman *v.* Anderson, 17 Kan. 344.

[4] Cushing's Leg. Assem. § 103; Bouvier's Law Dictionary, title "Ballot;" Williams *v.* Stein, 38 Ind. 89, 10 Am. Rep. 97.

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votes, and thus escape the influences which, under the system of oral suffrages, may be brought to bear upon him with a view to overbear and intimidate, and thus prevent the real expression of public sentiment."[1]

This element of secrecy has always been considered to be one of the most important and valuable safeguards of the independence of the voter and of the free and fair exercise of the right to participate in popular elections.[2] In many of the States, statutes have been passed designed to declare and protect it, and reference will be made to these in the following section, but even in the absence of such provisions, it has been held that the right to vote by ballot, as conferred and practiced in the United States, of itself implies absolute and inviolable secrecy, and that the principle is founded in the highest considerations of public policy.[3]

§ 193. **Statutes protecting the Secrecy of the Ballot.**—As stated in the last section, statutes have been enacted in several of the States designed to protect the secrecy of the ballot. These statutes usually forbid the use of other than white paper for the ballots, and the printing or impressing upon the ballots of any device, mark, figure or other sign by which one ballot or ticket may be distinguished from another.

These provisions, however, like others already considered, are intended to regulate and protect the right to vote, and not to impair or impede it, and they will not be extended by a restricted interpretation beyond the reason and purpose of their enactment.[4]

Thus where the statute required ballots to be written or printed on white paper, it was held that ballots should not be rejected because printed on paper having a "bluish ground tinge" placed there by the manufacturer, and not used for the purpose of distinguishing one ballot from another.[5] So where the statute

[1] Cooley's Constitutional Limitations, 760.

[2] See opinion of DENIO, C. J. in People *v.* Pease, 27 N. Y. 45.

[3] Williams *v.* Stein, 38 Ind. 89, 10 Am. Rep. 97; Temple *v.* Mead, 4 Vt. 535; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

[4] See State *v.* Phillips, 63 Tex. 390, 51 Am. Rep. 646; State *v.* Watson, 9 Mo. App. 593; Kirk *v.* Rhoads, 46 Cal. 398; Druliner *v.* State, 29 Ind. 308; Stanley *v.* Manly, 35 Ind. 275.

[5] People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769.

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provided that all ballots should "be printed on plain white paper, without any distinguishing marks or other embellishment thereon except the names of candidates and the offices to be voted for," and that "the inspectors of election shall refuse all ballots offered of any other description," it was held that a ballot might properly have a printed heading, as "Republican ticket" on the same side as the names, and folded inside, these not being "distinguishing marks or embellishments" within the meaning of the statute;[1] and where the statute permitted captions or headings not designed to mislead, it was held that ballots having the heading "Independent" or "Greenback-Labor" were not objectionable;[2] nor are such headings "devices."[3]

So when the statute provided that "all ballots shall be written or printed on plain white paper, without any picture, sign, vignette, device, stamp or mark," except the names, etc., it was held that a diamond-shaped ballot is not a "device" within the prohibition of this statute;[4] nor is a discoloration caused by scratching names from the ballot and substituting others with a pen and ink a "distinguishing mark" within the meaning of a statute forbidding them;[5] nor are "stickers" or "pasters" containing the name of a candidate a "cut or device to distinguish one ballot from another."[6]

But where the statute requires that ballots shall be printed upon paper of a certain size, smaller ballots are to be rejected,[7] and so are those printed upon colored paper where the law forbids its use.[8]

So where the statute required ballots to be printed upon white paper "without any device or mark by which one ticket may be known or distinguished from another," printers' rules or dashes printed beneath the names are such devices or marks as are sufficient to warrant the rejection of the ballots.[9]

So under a by-law forbidding "other things" on the ticket than

[1] Druliner *v.* State, 29 Ind. 308; Millholland *v.* Bryant, 39 Ind. 363.
[2] Shields *v.* McGregor, 91 Mo. 534.
[3] Williams *v.* State, 69 Tex. 368, 6 S. W. Rep. 845.
[4] State *v.* Phillips, 63 Tex. 390, 51 Am. Rep. 646.
[5] Wyman *v.* Lemon, 51 Cal. 273.
[6] Quinn *v.* Markoe, 37 Minn. 439, 35 N. W. Rep. 263.
[7] Reynolds *v.* Snow, 67 Cal. 497.
[8] State *v.* McKinnon, 8 Oreg. 493.
[9] Oglesby *v.* Sigman, 58 Miss. 502; Steele *v.* Calhoun, 61 Miss. 556.

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the names, the figure of an eagle with the motto "*E pluribus unum*," used as a mark to distinguish the tickets of one party, will invalidate the ballot.[1]

The presiding officers of the election have been held to be the sole judges of what constitutes a "distinguishing mark" where such a mark is prohibited, and ballots which they have received and counted, cannot afterwards be rejected by the governor and council.[2]

§ 194. **Statute requiring distinctive Marks is unconstitutional.**—And so zealously do the courts guard the secrecy of the ballot, that it has been held that a statute requiring a distinctive mark to be placed upon each ballot, is unconstitutional and void. Thus where a statute provided that the inspectors of election, on receiving a ballot should number it on the outside to correspond with the voter's number on the poll list, it was held that the constitutional right to vote by ballot necessarily meant a secret ballot and that the act in question was "in palpable conflict not only with the spirit but with the substance of the constitutional provision," and hence was void.[3]

In some of the States, however, such a marking is required by the constitution.[4]

§ 195 **"Written" Ballot includes printed one.**—Where the constitution required all ballots to be "fairly written," it was held that the spirit of this provision justified the use of printed ballots.[5]

§ 196. **Ballot must contain but one Name for each Office.**—It is obvious that where the number of persons to be elected to each office is limited, as to one incumbent to each office, a ballot containing more names than the number limited must be inoperative as to the office named. The very purpose of the voting is that the voter may exercise his choice, and where he names more than the limited number it is impossible to

[1] Commonwealth *v.* Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

[2] Opinions of Judges, 45 Me. 602.

[3] Williams *v.* Stein, 28 Ind. 89, 10 Am. Rep. 97; See also Brisbin *v.* Cleary, 26 Minn. 107.

[4] Pennsylvania Cons. 1873, Art. 8, Sec. 4; Missouri, 1875, Art. 8, Sec. 3; Colorado, 1876, Art. 7, Sec. 8.

[5] Temple *v.* Mead, 4 Vt. 535; Henshaw *v.* Foster, 9 Pick. (Mass.) 312.

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determine which of the number shall be declared elected. And as it is the *voter's* choice which is to be determined, the inspectors of election can not undertake to decide which of the number he intended. There is, therefore, no choice for that office.[1]

But uncertainty of this nature as to one of several offices to be filled, will not invalidate the ticket as to other offices upon it the choice for which is clear.[2]

So if the name of the same candidate is given more than once for the same office, it is to be counted once and not rejected entirely.[3]

§ 197. **Same Subject—Written Evidence supersedes printed.** —So upon the principle that, where written and printed words in the same instrument are in conflict, the special written words shall prevail over the general printed ones, it is held that where the voter writes a name upon the ballot in connection with a certain office, this is a sufficient indication of an intention to vote for the person whose name is so written, although the voter neglects to erase the name printed in connection with the same office.[4] But it is held that the writing prevails only when shown to have been done by the voter himself.[5]

§ 198. **Same Subject—Effect to be given to "Slip" or "Paster."**—But the same effect has been denied to a "slip" or "paster." Thus in the leading case[6] upon the subject, CAMPBELL, J., says: "I think that unless a person has so pasted on his slip as to show beyond question for whom his vote is cast for a particular office, it cannot be counted. Where it is so placed as to show upon the face of the ballot two distinct names for the same office, it comes, I think, within the express provision of the statute[7] concerning double votes, which can seldom be given except by this mode.

[1] People *v.* Loomis, 8 Wend. (N. Y.) 396, 24 Am. Dec. 33; People *v.* Seaman, 5 Den. (N. Y.) 409. See especially Kreitz *v.* Behrensmeyer; 125 Ill. 141, 8 Am. St. Rep. 349.

[2] Attorney General *v.* Ely, 4 Wis. 420; Perkins *v.* Carraway, 59 Miss. 222. *Contra*, under statute, Deloatch *v.* Rogers, 86 N. C. 357.

[3] People *v.* Holden, 28 Cal. 123; State *v.* Pierce, 35 Wis. 93.

[4] People *v.* Saxton, 22 N. Y. 309, 78 Am. Dec. 191; *Contra*, Newton *v.* Newell, 26 Minn. 529. See State *v.* Griffey, 5 Neb. 161.

[5] Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. Rep. 232, 8 Am. St. Rep. 349.

[6] People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

[7] The statute referred to is as follows:

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But if the name is placed above the name of another candidate for the same office, so as to partially obliterate it, I think that would be sufficient to show an intent to vote against the one and for the other." [1]

§ 199. **Names must be clearly expressed.**—The names of the persons intended to be voted for should be clearly and plainly expressed. If part of the name only be given, or if it be so defectively written or printed as to be illegible, it can not be counted.[2]

But errors in spelling will not vitiate the ballot if the sound be the same;[3] nor will the omission of a middle letter,[4] or of a suffix or addition to the name,[5] or the giving of a wrong middle letter,[6] there being no other candidate to whom the name as given would properly apply; nor will the use of well known and commonly adopted abbreviations of the first name;[7] nor, in some cases, the total omission of the first name.[8]

"The ballot shall be a paper ticket, which shall contain, written or printed, or partly written and partly printed, the names of all the persons for whom the elector intends to vote, and shall designate the office to which each person so named is intended to be chosen; but no ballot shall contain a greater number of names of persons, *as designated to any office*, than there are persons to be chosen at the election to fill such office."

[1] The decision in this point is followed in Keeler *v.* Robertson, 27 Mich. 116.

[2] People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

[3] Thus votes for "Finegan" and "Finnigan" are properly counted for "Finnegan." People *v.* Mayworm, 5 Mich. 146. "Kritz," "Krietz" and "Critz" are properly counted for "Kreitz." Kreitz *v.* Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. Rep. 232.

[4] Thus votes for "John Jochim" were held to be properly counted for "John W. Jochim" where the latter was the candidate, and there was no offer to show that there was another person by the name of John Jochim in the district. People *v.* Kennedy, 37 Mich. 67.

[5] People *v.* Cook, 14 Barb. (N. Y.) 259, s. c. 8 N. Y. 67, 59 Am. Dec. 451, where it was found that ballots given for Benjamin Welch were intended for Benjamin Welch, Jr., and it was held that they should be counted for him.

[6] Thus votes cast for Alvin J. Willoughby will be counted for Alvin L. Willoughby, where such was the intention of the voters. State *v.* Gates, 43 Conn. 533. But see Opinion of Judges, 38 Me. 597.

[7] Thus "Geo." will be counted to George, "Jas." to James, "Thos." to Thomas, and the like. People *v.* Tisdale, 1 Dougl. (Mich.) 59.

[8] Thus where Joseph Talkington was the candidate, votes were held properly counted for him which read simply "Talkington." Talkington *v.*

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So, by the weight of authority, a ballot which contains only the initials of the Christian or first name of the candidate is sufficient, where there are not two candidates of the same name and initials for the same office.[1]

Turner, 71 Ill. 234. So votes for "Behrensmeyer" were counted for Charles F. A. Behrensmeyer, where no other Behrensmeyer was a candidate. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349.

In Newton *v.* Newell, 26 Minn. 529, the court, by BERRY, J. say: "With reference to the name by which a candidate may be sufficiently designated, we regard the following rules to be correct: If, for a certain office, there is but one person running of a given name, say the name of Frank E. Newell, a ballot for "Newell" simply, without any Christian name or initial thereof, will pass, and should be counted for Frank E. Newell; and so should a ballot for Frank Newell, or F. E. Newell, or F. Newell. So, if to designate the person voted for, letters are used which do not spell the name 'Newell,' but do spell a word which is *idem sonans*, this should be counted. All these should be counted, for the reason that they designate the person intended to be voted for with reasonable certainty.

But unless the ballot is of one of these kinds, or of equivalent certainty, (as it possibly may be, though we do not now perceive how) it should be rejected. Therefore a ballot for 'Nall,' or 'Null,' or 'Neden,' or 'W. Null' should not be counted for Newell. Neither should a ballot for 'New,' or 'Newt,' or 'Newto,' or 'Newn,' or 'Neto,' be counted for a candidate of the name of Newton. 'Nuton' and 'Newten' may, however, be properly counted for such candidate."

In Missouri, however, where Caleb Gumm and Joel D. Hubbard were the candidates and most of the voters were Germans, ballots for "J. D. Huba," "J. D. Hubba," "Huber" and "J. D. Hub" were counted for Hubbard. Gumm *v.* Hubbard, — Mo. — 11 S. W. Rep 61.

[1] The case which has probably gone the farthest in this direction among the early cases, is Attorney-General *v.* Ely, 4 Wis. 420, where votes cast for "D. M. Carpenter," "M. D. Carpenter," "M. T. Carpenter" and "Carpenter" were allowed to be counted for Matthew H. Carpenter, the jury having found, from the evidence before them, that these votes were, when cast, intended to be for him.

In People v. Ferguson, 8 Cow. (N. Y.) 102, ballots cast for H. F. Yates were held properly be counted for Henry F. Yates, if the jury were of the opinion that they were intended for him. This ruling was followed in People *v.* Seaman, 5 Den. (N. Y.) 409 and People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451. See also in McKenzie *v.* Braxton, 42d Congress; Chapman *v.* Ferguson, 1 Bart. 267; Gunter *v.* Willshire, 43d Congress. See also Clark *v.* Robinson, 88 Ill. 498; Talkington *v.* Turner, 71 Ill. 234; State *v.* Gates, 43 Conn. 533; Wimmer *v.* Eaton, 72 Iowa, 374, 2 Am. St. Rep. 250; State *v.* Williams, 95 Mo. 159, 8 S. W. Rep. 415.

Early cases in Michigan were to the contrary: People *v.* Tisdale, 1 Dougl. 59; People *v.* Higgins, 3 Mich, 233, 61 Am. Dec. 491, but in a subsequent case the majority of the court expressed the opinion that they

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But where the name used is altogether different, or is not *idem sonans*, and is not a mere abbreviation, the ballot cannot be counted.[1]

§ 200. **Slight Irregularities do not vitiate.**—Slight irregularities in the ballot which deceive no one can not vitiate it. If the ballot expresses the intention of the voter with reasonable certainty, it is sufficient, and should be counted.[2]

Thus the omission of the word "for" before the name of the office, is a harmless error.[3] And the fact that the ballot reads "to fill vacancy" where, though a vacancy had existed, it was already filled by temporary appointment;[4] or for "police justice," when it should have been for "police magistrate;"[5] or for trustees of *public* schools when trustees of *common* schools were being elected;[6] or for "superior judge" when it should have been for "judge of the superior court;"[7] or for "circuit clerk" instead of for "clerk of the circuit court;"[8] or "for congress" instead of "for representative in congress,"[9] can deceive no one and the irregularity should be disregarded. So mistakes in the number of the district, where no one is misled, are harmless.[10]

§ 201. **But Ballot must be reasonably certain.**—But at the

were unsound in principle, though they were adhered to on the ground of *stare decisis*. People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141. See also People *v.* McNeal, 63 Mich. 294. See also Opinion of Judges, 64 Me. 596, where it is held that where votes have been returned to the Secretary of State as cast for William H. Smith, W. H. Smith and W. Smith, the governor and council cannot count them all for William H. Smith. See also Clark *v.* County Examiners, 126 Mass. 282, where it was held that votes cast for "L. Clark" could not be counted by the canvassers for Leonard Clark, though it was intimated that on a trial evidence might be adduced to show that they were intended for him.

[1] People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; State *v.* Judge, 13 Ala. 805.

[2] Clark *v.* Commissioners, 33 Kans. 202, 52 Am. Rep. 526; Hawes *v.* Miller, 56 Iowa, 395; State *v.* Elwood, 12 Wis. 551; Detroit, &c. R. R. Co. *v.* Bearss, 39 Ind. 598; State *v.* Metzger, 26 Kans. 395; Cattell *v.* Lowry, 45 Iowa, 478; Holland *v.* Davis, 36 Ark. 446; Peck *v.* Weddell, 17 Ohio St. 271; Brown *v.* McCollom, 76 Iowa 479, 41 N. W. Rep. 197.

[3] People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

[4] State *v.* Mechem, 31 Kans. 435.

[5] People *v.* Matteson, 17 Ill. 167.

[6] People *v.* McManus, 34 Barb. (N. Y.) 620.

[7] Coffey *v.* Edmonds, 58 Cal. 521.

[8] Applegate *v.* Eagan, 74 Mo. 258.

[9] State *v.* Berg, 76 Mo. 136.

[10] Inglis *v.* Shepherd, 67 Cal. 469.

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same time the ballot must indicate the person and the office with reasonable certainty, or it can not be counted.[1] Thus if there are two offices to be filled and the ballot does not indicate for which the persons named are chosen, or if officers are to be elected for different terms and the ballot does not show for which term the officer is chosen, it must be rejected.[2]

So where a legislative act authorizes the submission of a certain question to the electors, without prescribing the form of the ballot to be used, it is necessary in order to render the vote operative, that the ballot of the voter should show that the specific question contemplated by the act was passed upon.[3]

§ 202. **Perfect Ballot is conclusive Evidence of Voters Intent.** —Where the ballot is perfect, containing neither uncertainties, ambiguities nor imperfections, it must be accepted as conclusive evidence of the voter's intention, and evidence *aliunde* can not be received to give the ballot a meaning or effect different from that which appears upon its face.[4] The ballot may be void,

[1] Although a candidate's name is *written* above the name of the office on the ballot, it will be construed as a vote for him where the *printed* name below the name of the office is erased. So votes are held to have been intended for different offices, rather than as two votes for one office, where ballot contains the name of an office and a candidate's name *printed* below it, and below that another name *written* in, followed by the name of another office, the candidate's name under the latter office being erased. But where the *printed* name under the designation of the office is stricken out, and the name of one of the candidates for that office is *written* in below the name of another officer and below the printed name of the candidate for that office, evidence is not admissible to show for what office the name so written in was intended. Kreitz *v.* Lehrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349.

[2] Milligan's Appeal, 96 Penn. 222; *In re* Gilleland, 96 Penn. 224. But voter's intention may be shown to explain. Phelps *v.* Goldthwaite, 16 Wis. 146.

[3] People *v.* Township Board, 14 Mich. 28.

[4] Wimmer *v.* Eaton, 72 Iowa 374, 2 Am. St. Rep. 250. In the case it is said: "If the ballot is found to be perfect, that is, if it expresses a certain intent by the elector, it must be accepted as the exclusive evidence of his intent. Thus if it bears the name of a person who is eligible to the office voted for, it affords the most satisfactory evidence that it was the elector's intention to vote for that person; and it would be contrary to all the analogies of the law to permit proof by extrinsic evidence of a contrary intent." See also People *v.* Seaman, 5 Denio (N. Y.) 409.

So where a ballot was printed for Samuel *Tobey*, evidence is inadmissible that it was intended for Samuel *Tobey*. People *v.* McNeal, 63 Mich. 294. See also Anderson *v.* Winfree, — Ky. —, 4 S. W. Rep. 351.

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but if it is not ambiguous it can not be aided by extrinsic proof.[1]

§ 203. **Extrinsic Evidence to explain Ballot.**—The question of the admissibility of extrinsic evidence to explain imperfections, uncertainties and ambiguities in the ballot, is one upon which the authorities are not entirely in harmony, but it is believed that the weight of authority sustains the rule given by Judge COOLEY in his treatise on Constitutional Limitations.[2]

"We think evidence of such facts as may be called the circumstances surrounding the election,—such as who were the candidates brought forward by the nominating conventions; whether other persons of the same names resided in the district from which the officer was to be chosen, and, if so, whether they were eligible or had been named for the office; if a ballot was printed imperfectly, how it came to be so printed, and the like,—is admissible for the purpose of showing that an imperfect ballot was intended for a particular candidate, unless the name is so dif-

[1] See McKinnon v. People, 110 Ill. 305. Here votes cast for Joseph M. were counted for Henry M. on a showing that the tickets were so printed by mistake, and that voters supposed that Henry was named Joseph, there being no such candidate as Joseph M., and no such person in the election district.

In Kreitz v. Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349, it is said: "Manifestly it would not be competent to hear the voter say that he intended a ballot plainly for a particular name, for one having no such similarity of sound as that one might reasonably be intended for the other; and it is quite as obvious that it is competent to prove, by the elector, what he understood the names of the candidates to be and how he reads his ballot. If he has used the letters of a foreign language to express the name, it is competent to prove, by the voter, or by some one else versed in that language, what word or words they make. If the characters are so complex in their formation, or so imperfectly framed, or so obscurely impressed, as to make it difficult to read them, it is competent to prove, by any one understanding them, what they are. What is not admissible is to show that something was intended which is plainly contradictory of what was done—as for instance, that a ballot cast with the name of Jones for a particular office upon it was intended to be a vote for Smith for the same office. And so, upon like principle, where it is shown that there has been what appears to be an erasure of a name, it may be shown that it was not done by the voter, or that it was the result of an accident, and not of intention; but the fact of erasure being conceded to have been the deliberate act of the voter, it cannot be explained that by it he intended a different result from that which the law implies from it."

[2] 5th ed. p. 768.

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ferent that to thus apply it would be to contradict the ballot itself; or unless the ballot is so defective that it fails to show any intention whatever; in which cases it is not admissible.

And we also think that in any case to allow a voter to testify by way of explanation of a ballot otherwise fatally defective, that he voted the particular ballot, and intended it for a particular candidate, is exceedingly dangerous, invites corruption and fraud, and ought not to be suffered. Nothing is more easy than for reckless parties thus to testify to their intentions, without the possibility of their testimony being disproved if untrue; and if one falsely swears to having deposited a particular ballot, unless the party really depositing it sees fit to disclose his knowledge, the evidence must pass unchallenged; and the temptation to subornation of perjury, when public offices are at stake, and when it may be committed with impunity, is too great to allow such evidence to be sanctioned. While the law should seek to give effect to the intention of the voter, whenever it can be fairly ascertained, yet this intention must be that which is expressed in due form of law, not that which remains hidden in the elector's breast; and where the ballot, in connection with such facts surrounding the election as would be provable if it were a case of contract, does not enable the proper officers to apply it to one of the candidates, policy, coinciding in this particular with the general rule of law as applicable to other transactions, requires that the ballot shall not be counted for such candidate." [1]

[1] "When it is apparent," say the court by REED, J., in a recent Iowa case, "that the intent of the elector is imperfectly expressed by the ballot, as when the person intended to be voted for is not certainly identified by it, the true rule is, we think, to admit extrinsic evidence in aid of such imperfection. It often happens that the elector is ignorant or mistaken as to the Christian name of the person for whom he wishes to cast his ballot. In such cases the Christian name is either omitted entirely from the ballot, or wrongly written thereon. Now, if no evidence except the ballot could be resorted to in such cases in determining the intent of the election, it is manifest that the privilege of the elective franchise would be defeated by the rule. But the right to vote is one of the highest privileges of the citizen, and it ought not to be defeated by a technicality. Hence the courts have quite generally held that resort might be had in such cases to the circumstances surrounding the election, and the facts of a general public nature connected with it, and that these might be considered, in connection with the ballot, in determining what was the intention of the elector. The question is elaborately discussed in Attorney-Gene-

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7. *What constitutes an Election.*

§ 204. **Plurality of Votes sufficient for a Choice.**—In the absence of a constitutional or statutory provision expressly requiring more, a plurality of the votes lawfully cast is sufficient to elect.[1] In one or two States a majority of the votes is expressly required, but to require more than a plurality in the ordinary election where there are usually several candidates for every office would be to make the election in the majority of cases impossible.

Where several are to be chosen to the same office, the requisite number standing highest on the list will be elected.[2]

§ 205. **Not necessary that a Majority of Voters should vote** — And it is not necessary that a majority of the whole body of voters in the district should have participated in the election. Even though a minority only participate, yet, if the election be lawfully held, a plurality of the minority will elect.[3] Those of the voters who remain away from the polls are assumed to assent to the action of those who do attend, and those who do attend the election but fail to vote for any office are presumed to assent to the action of those who do vote.[4]

So where a question has been expressly referred to the decision of the "majority of the voters" of a county, a majority of the votes polled will determine it.[5]

ral *v.* Ely, 4 Wis. 438, and what we think is the true rule is there laid down." Wimmer *v.* Eaton, 72 Iowa, 374, 2 Am. St. Rep. 250. See also Phelps *v.* Goldthwaite, 16 Wis 146; People *v.* McNeal, 63 Mich. 294; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349.

[1] "He who receives the highest number of earnest valid ballots is the one chosen to the office," FOLGER, J., in People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508.

[2] Cooley's Const. Lim. 779.

[3] People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508; Augustin *v.* Eggleston, 12 La. Ann. 366; Gillespie *v.* Palmer, 20 Wis. 544; Oldknow *v.* Wainwright, 1 W. Bl. 229; Rex *v.* Foxcroft, 2 Burr. 1017.

[4] People *v.* Clute, 50 N. Y. 451; 10 Am. Rep. 508; Louisville &c. R. R. Co. *v.* County Court, 1 Sneed (Tenn.) 637, 62 Am. Dec. 421; County of Cass *v.* Johnston, 95 U. S. 360; Taylor *v.* Taylor, 10 Minn. 107; People *v.* Warfield, 20 Ill. 159; People *v.* Garner, 47 Ill. 246; People *v.* Wiant, 48 Ill. 263; State *v.* Swift, 69 Ind. 531.

[5] Louisville &c. R. R. Co. *v.* County Court, 1 Sneed. (Tenn.) 637, 62 Am. Dec. 424; Walker *v.* Oswald, — Md. —, 11 Atl Rep. 711; St Joseph Township *v.* Rogers, 16 Wall. (U. S.)

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So where a special question was to be submitted at a general election and was to be held approved if "two-thirds of the votes cast" were in favor of it, it was held that the approval required a number of votes equal to two-thirds of all the votes cast upon any one question, or for all of the candidates for any one office, voted for at that election.[1]

This, however, assumes that notice of the election, when required, has been duly given,[2] but if given, or if none was required, the fact that the majority of the electors paid no attention to the notice or failed to observe the law requiring the election to be held, will not defeat the choice of those who do participate.[3]

§ 206. **Effect of Ineligibility of Candidate receiving Majority of Votes.**—The question has been much discussed whether if the person receiving the highest number of votes were ineligible to the office, the person who receives the next highest number of votes, is, if eligible, to be deemed to be elected, or whether the election has failed and no one is chosen.

The English rule is, that if the ineligibility of the candidate receiving the highest number of votes was known to the voters, or if the fact were so notorious that they must be presumed to have known of it, the votes cast for him must be regarded as of no avail and are not to be counted, and hence the eligible candidate having the next highest number of votes must be deemed to be elected.[4]

But the English rule, though adopted in Indiana,[5] has had but

644; County of Cass *v.* Johnston, 95 U. S. 360; Everett *v.* Smith, 22 Minn. 53.

Contra, State *v.* Francis, 95 Mo. 44, 8 S. W. Rep. 1; State *v.* Sutterfield, 54 Mo. 392; State *v.* Brassfield, 67 Mo. 331; State *v.* Mayor, 73 Mo. 435.

See also Rigsbee *v.* Durham, 99 N. C. 341, 3 S. E. Rep. 749.

[1] State *v.* Anderson, — Neb. —, 42 N. W. Rep. 421.

[2] See State *v.* Good, 41 N. J. 296, where the people being in doubt as to whether a vacancy existed and only a very few voting, it was held that there was no election; and Secord *v.* Foutch, 44 Mich. 89, where no notice being given and only a few voting, it was held there was no election.

[3] People *v.* Hartwell, 12 Mich. 508, 86 Am. Dec. 70.

[4] Rex *v.* Hawkins, 10 East 211; Rex *v.* Parry, 14 East 549; Gosling *v.* Veley, 7 Q. B. 406; Rex *v.* Monday, 2 Cowp. 530; Rex *v.* Foxcroft, 2 Burr. 1017; Regina *v.* Coaks, 3 E. & B. 249; French *v.* Nolan, 20 Wk. Rep. 833, 2 Eng. Rep. (Moak) 711.

[5] Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49; Carson *v.* McPhet-

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little following elsewhere in the United States, and the doctrine here supported by an undoubted preponderance of authority is that though the candidate receiving the highest number of votes may, because of his ineligibility, fail of election, yet the votes cast for him are so far effectual as to prevent the election of other candidates, and there is no election at all.[1]

ridge, 15 Ind. 327; Price *v.* Baker, 41 Ind. 572, 13 Am. Rep. 346.

In the case last cited it is said by DOWNEY, J.:

"It is a principle of law well settled in this State, that where a majority of the ballots at an election are given to a candidate who is not eligible to the office, the ballots so cast are not to be counted for any purpose. They cannot be counted to elect the ineligible candidate or to defeat the election of an opposing candidate by showing that he did not receive a majority of the votes cast at such election. They are regarded as illegal, and as having no effect upon the election for any purpose. As a consequence, it follows that the candidate who is eligible, having the highest number of legal votes, though the number may be less than the number of votes cast for the ineligible candidate, and less than a majority of all the votes cast at such election, is entitled to the office. Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49.

But the rule is applicable to those cases only where different persons are candidates for the same office, and it has no application to cases where two or more persons are candidates at the same election for different offices. To apply the rule in such a case would be to put a party into office for whom, as a candidate for that office, none of the electors had voted."

[1] State *v.* Giles, 1 Chand. (Wis.) 112. 52 Am. Dec. 149; State *v.* Smith, 14 Wis. 497; State *v.* Tierney, 23 Wis. 430; Saunders *v.* Haynes, 13 Cal. 145; Fish *v.* Collens, 21 La. Ann. 289; State *v.* Gastinel, 20 La. Ann. 114; State *v.* Vail, 53 Mo. 97; State *v.* Boal, 46 Mo. 528; Sublett *v.* Bedwell, 47 Miss. 266, 12 Am. Rep. 338; State *v.* Swearingen, 12 Ga. 24; Commonwealth *v.* Cluley, 56 Penn. 270, 94 Am. Rep. 75; Opinion of Judges, 38 Me. 97; *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538. Barnum *v.* Gilpin, 27 Minn. 466, 38 Am Rep. 304; Crawford *v.* Dunbar, 52 Cal. 36; Dryden *v.* Swinburne, 20 W. Va. 89.

Even the death of the candidate receiving the highest vote, a few hours before the opening of the polls, does not elect the next highest candidate, although the voters and judges of election knew of the death. State *v.* Walsh, 7 Mo. App. 142.

In People *v.* Molitor, 23 Mich. 341, it appeared that the statute provides that "the persons having received the greatest number of votes given for any office, at such election, shall be deemed and declared duly elected." Said CAMPBELL, C. J.: "It does not, under any circumstances, allow a minority candidate to be deemed elected,—whether the person for whom the majority appear to have voted, can or cannot be installed. The majority here are alleged by the plea to have voted for some one whom they designated as 'L. C. Crawford.' Whether there is in fact a person of that name or not

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In a leading case in New York it was held that the knowledge, on the part of the voters, of the ineligibility of the leading candidate might be such as to indicate an intention on their part to throw away their votes,[1] but there must be actual knowledge

does not change the state of the canvass, nor make sixty-nine a larger number than seventy-two."

[1] People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508. In this case FOLGER, J., says: "There may be a disqualifying fact so patent or notorious, as that knowledge in the elector of the ineligibility may be presumed as matter of law. In modern times Lord DENMAN, C. J., thus puts a case: 'No one can doubt that if an elector would nominate and vote only for a woman to fill the office of mayor, or burgess in parliament, his vote would be thrown away; there the fact would be notorious, and every man would be presumed to know the law upon that fact.' Gosling *v.* Veley, 7 Ad. & Ell. N. R. 406, 439, 53 Eng. Com. Law 406. In the same case, the learned judge says that 'the result of the decisions appears to be this; where a majority of the electors vote for a disqualified person, in ignorance of the fact of disqualification, the election may be void or voidable, or, in the latter case, be capable of being made good, according to the nature of the disqualification. The objection may require ulterior proceedings to be taken before some competent tribunal, in order to be made available; or it may be such as to place the elected candidate on the same footing as if he never had existed, and the votes for him were a nullity.' And then, referring doubtless to the *viva voce* manner of voting in England, and to the manner of keeping of poll books there, and to the fact of the number of electors there being small, so that for whom each elector has voted is known, and he may be safely allowed to recall his vote for an ineligible person, and give it for another eligible, the learned Judge continues: 'But in no such case, are the electors who vote for him deprived of their vote if the fact becomes known, and is declared while the election is still incomplete. They may instantly proceed to another nomination and vote for another candidate. If it be disclosed afterward, the party elected may be ousted and the election declared void; but the candidate in the minority will not be deemed *ipso facto* elected. But where an elector, before voting, receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchises.' To which we add, that not only must the fact which disqualifies be known, but also the rule or enactment of law which makes the fact thus effectual.

In the multitude of cases in which the question has arisen, we think that up to this point there is no essential difference of result. All agree that there must be prior notice to or knowledge in the elector of fact and law to make his vote so ineffectual as that it is thrown away. But some say that if there be a public law, declaratory that the existence of a certain fact creates ineligibility in the candidate, the elector, having notice of that fact is conclusively presumed in law to have knowledge of the legal rule, and to be deemed to have voted in persistent disregard of it. Others

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both of the fact and the law. Says the court, per FOLGER, J., "the existence of the fact which disqualifies, and of the law

deny that the maxim '*Ignorantia juris excusat neminem*' even with the clause of it '*quod quisque scire tenetur*,' not often quoted, can be carried to that length, and insist that there does not apply to this question the rule that all citizens must be held to know the general laws of the land, and the special law affecting their own locality.

That maxim, in its proper application, goes to the length of denying to the offender against the criminal law a justification in his ignorance thereof; or to one liable for a breach of contract, or for civil tort, the excuse that he did not know of the rule which fixes his liability. It finds its proper application when it says to the elector, who, ignorant of the law which disqualifies, has voted for a candidate ineligible, your ignorance will not excuse you and save your vote; the law must stand, and your vote in conflict with it must be lost to you. But it does not have a proper application when it is carried further, and charges upon the elector such a presumption of knowledge of fact and of law as finds him full of the intent to vote in the face of knowledge, and to so persist, in casting his vote for one for whom he knows it cannot be counted, as to manifest a purpose to waste it. The maxim itself concedes that there may be a lack of actual knowledge of the law. For it is *ignorance* of it which shall not excuse. Then the knowledge of the law, to which each one is held, is a theoretical knowledge; and the doctrine urged upon us would carry a theoretical knowledge of the statute further than goes the statute itself. The statute but makes ineffectual to elect the votes given for one disqualified. The doctrine would make knowledge not actual, of that statute thus limited, waste the votes of the majority, and bring about the choice to office by the votes of a minority. We are not cited to nor do we find any decision to that extent of any court in this State. The industrious research of the learned counsel for the relator has found some from courts in sister States. Gulick *v.* New (14 Ind. 97, 77 Am. Dec. 49) is to that effect. Carson *v.* McPhetridge (15 Ind. 331), follows the last cited case. Hatcheson *v.* Tilden (4 Har. & McH. 279) was a case at *nisi prius*, and is to that effect. With respect for these authorities, we are obliged to say that they are not sustained by reasoning which draws with it our judgment. Commonwealth *v.* Read (2 Ashmead 261) is also cited. But that was a case of a board of twenty, assembling into a room to elect a county treasurer. On motion being made to elect *viva voce*, a protest was made that a law under which they were acting prescribed a vote by ballot. Thus *actual notice* of law and fact was brought directly to each elector before voting. Nineteen persisted in voting *viva voce*. These were held to be wasted votes. One voted by ballot, and his vote was held to prevail, and the person he voted for to be elected. Commonwealth *v.* Cluley (56 Penn. St. 270, 94 Am. Dec. 75) is also cited. But the language of the court there is: 'The votes cast at an election for a person who is disqualified from holding an office are not nullities. They cannot be rejected by the inspectors or thrown out of the count by the re-

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which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the

turn judges. The disqualified person is a person still, and every vote thrown for him is formal.' And that was the case of one who was ineligible by reason of having held the office of sheriff of a county, and became a candidate in the same county for the same office before the lapse of time prescribed by the constitution; a case in its facts quite like this in hand.

The relator also cites many instances of the action of legislative bodies and their committees. As to these, a respectable authority on these questions has remarked, 'that they cannot be said to afford any precise or useful principle.' (1 Peckwell 506): and learned counsel, arguing in support of the principle now claimed by the relator, has conceded that 'no fixed principle is established by the decision of committees.' (Galway Election Cases, 2 Moak Eng. Cases 714); and it may safely be said that they are not so conclusive and satisfactory as judicial determinations, as it is difficult to arrive at the exact principle upon which the votes of so many as constitute a legislative body are put. Besides that, they are not uniform, but quite diverse in their results, as appears from the citations of the counsel of the relator, and the instances noted in 56 Penn. St. *supra*.

We have consulted many of the authorities cited to us from the English books; and in them it will be found, we think, that where it was held that votes for an ineligible person would be treated as thrown away, it was not extended beyond cases in which there was actual notice of fact and law to the voters before their votes were cast. Gosling *v.* Veley, *supra;* Rex *v.* Hawkins, 10 East 211; Claridge *v.* Evelyn, 5 Barn. & Ald. 81; Douglass, 398 n. (22); Rex *v.* Parry, 14 East 549; Rex *v.* Bridge, 1 Maule & Selw. 76.

And there are American authorities which hold that if a majority of those voting by mistake of law or fact happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him in poll shall receive the office. Saunders *v.* Haynes, 13 Cal. 145; State *v.* Giles, 1 Chand. (Wis.) 112, 52 Am. Dec. 149; State *v.* Smith, 14 Wis. 497. And in Dillon on Mun. Corp. p. 176, § 135, it is stated that unless the votes for an ineligible person are expressly declared to be void, the effect of such person receiving a majority of the votes cast is, according to the weight of American authority, and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be had, and not to give the office to the qualified person having the next highest number of votes. And this view is sustained by a preponderance of the authorities cited by the author in the foot note, some of which are cited above.

And in the Queen *v.* Mayor, &c., 3 Law Rep. (Q. B.) 629 after holding that though the electors had actual notice of the fact which had been adjudged by the courts to disqualify, yet knowledge or notice in the elector of the adjudication could not be presumed. It is further said: 'It is not enough to show that the voter knew the fact only, but it is necessary to

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elector, as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a willfulness in acting, when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied."

8. *The Canvass and Returns.*

§ 207. **Canvassing the Vote.**—Upon the close of the election the inspectors of election are usually required to immediately make a public count or canvass of the votes cast. Where the election is a local one, the result of which is to be determined at a single precinct, they are also ordinarily required to make a public announcement of the result immediately upon the close of the canvass, and to give to the persons elected a certificate of that fact.

But where the election is a general one involving the choice, for example, of county, state and national officers, it is made the duty of the inspectors to certify or return in due form under their hands the total vote, at their respective precincts, for each of the offices to be filled and to file these certificates or returns with the proper officers for a general canvass to be had for the entire district, as for the county and state canvass.[1]

show sufficient to raise a reasonable inference that he knew that the fact amounted to a disqualification. It cannot be said in all cases that the mere knowledge of a fact, which in law disqualifies a candidate must be taken to be knowledge of all the accompanying circumstances.'"

[1] Supervising officers must be afforded a reasonable opportunity to perform their duties. United States v. Clark, 22 Fed. Rep. 387. Inspectors must perform their duties in person, and can not accept the statement of clerks or shield themselves by showing the errors of the clerks. Boland v. People, 25 Hun (N. Y.) 423. Where the law requires each ballot to be separately read and announced, it is improper to read them in parcels, and a recount will be had. O'Gorman v. Richter, 31 Minn. 25. Fact that others than judges participated in the count will not invalidate if count was correctly made. Roberts v. Calvert, 98 N. C. 580, 4 S. E. Rep. 127; nor will the fact that the mechanical act of reading the ballots was performed by the clerks. State v. Bernier, — Minn. —, 38 N. W. Rep. 368.

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§ 208. **Canvassers' Duties are ministerial merely.**—It is well settled that the duties of canvassing officers and boards are ministerial merely and not judicial. Their duty is to count the votes as cast, and they have no authority, unless expressly granted, to hear evidence or to pass upon or correct alleged errors, irregularities or frauds.[1]

§ 209. **Canvassing Boards bound by the Returns.**—And the canvassing boards are bound by the returns, when in due form, and cannot, unless expressly authorized by law, receive or regard anything outside of them, or reject them for other reasons than those appearing on their face.[2] Returns void upon their face may be rejected,[3] but if the returns be regular the duty of the canvassers "consists in a simple matter of arithmetic."[4]

And even matter appearing upon the face of the returns which is not, by law, required to be there, is *functus officio* and is to be disregarded.[5]

[1] People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69; People *v.* Cicott, 16 Mich. 321, 97 Am. Dec. 141; Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72; Dalton *v.* State, 43 Ohio St. 652, 1 West. Rep. 773: Opinion of Judges, 58 N. H. 621; State *v.* Steers, 44 Mo. 223: People *v.* Van Slyck, 4 Cow. (N. Y.) 297; *Ex parte* Heath, 3 Hill (N. Y.) 47; Dishon *v.* Smith, 10 Iowa, 212; State *v.* Cavers, 22 Iowa, 343; Attorney-General *v.* Barstow, 4 Wis. 749; State *v.* Rodman, 43 Mo. 256; State *v.* Harrison, 38 Mo. 540; Taylor *v.* Taylor, 10 Minn. 107; O'Ferrall *v.* Colby, 2 Minn. 180; Leigh. *v.* State, 69 Ala. 261; State *v.* Wilson, — Neb. —, 38 N. W. Rep. 31; Maxwell *v.* Tolly, 26 S. C. 77, 1 S. E. Rep. 160.

[2] *Ex parte* Heath, 3 Hill (N. Y.) 42; Morgan *v* Quackenbush, 22 Barb. (N. Y.) 72; People *v.* Cook, 14 Barb. 259, 8 N. Y. 67, 59 Am. Dec. 451; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325; People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769; People *v.* Jones, 19 Ind. 357; State *v.* Harrison, 38 Mo. 540; State *v.* Rodman, 43 Mo. 256; State *v.* Steers, 44 Mo. 223; Taylor *v.* Taylor, 10 Minn. 107; O'Ferrall *v.* Colby, 2 Minn. 180; Bacon *v.* York Co. 26 Me. 491; Opinion of Judges, 64 Me. 596; Peebles *v.* Commissioners, 83 N. C. 385; Clark *v.* County Examiners, 126 Mass. 282; State *v* Canvassers, 17 Fla. 29; Moore *v.* Kessler, 59 Ind. 152; State *v.* Hayne, 8 S. C. 367; Phelps *v.* Schroder, 26 Ohio St. 549; Hagge *v.* State, 19 Neb. 51; Opinion of Justices, 53 N. H. 640; State *v.* Cavers, 22 Iowa, 343; People *v.* Hilliard, 29 Ill 413; Brower *v.* O'Brien, 2 Ind. 423; State *v.* Hill, 20 Neb. 119; Lewis *v.* Commissioners, 16 Kans. 102, 22 Am. Rep. 275.

[3] State *v.* State Canvassers, 36 Wis. 498; Lawrence County *v.* Schmaulhausen, 123 Ill. 321, 14 N. E. Rep. 255.

[4] Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72.

[5] *Ex parte* Heath, 3 Hill (N. Y.) 212; Pennsylvania Dist. Election Case,

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So far has this doctrine been carried that it has been held that where the returns show votes distributed, for example to "William H. Smith," "W. H. Smith" and "W. Smith," the canvassing board cannot count them all for William H. Smith on the assumption that the voters intended to vote for him,[1] but the contrary has also been held,[2] and it would seem to be the true rule that the canvassers are at liberty to take notice of such facts of general notoriety as may aid them in arriving at the true intention, but matters requiring the aid of evidence *aliunde* must be reserved for the courts or other established tribunals.

§ 210. **Canvassers may be compelled to act by Mandamus.**— If the canvassers neglect or refuse, without sufficient reason, to meet and canvass the votes, they may be compelled to do so by mandamus,[3] and if they perform their duty in part only, or in any other illegal and unwarranted manner, they may be compelled to perform it in full or in a proper and legal manner.[4] And they cannot evade their duty by meeting and adjourning without action *sine die*, but may be compelled, notwithstanding such adjournment, to meet again and complete their duties.[5]

Bright Elec. Cases, 617; North Whitehall *v.* South Whitehall, 3 Serg. & R. (Penn.) 116.

[1] Opinion of Judges, 64 Me. 596; Opinion of Judges, 38 Me. 597; Clark *v.* County Examiners, 126 Mass. 282.

[2] People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242, per SELDEN, J.

[3] Attorney-General *v.* Board of Canvassers, 64 Mich. —, 31 N. W. Rep. 539, 7 West. Rep. 849; State *v.* Wilson, — Neb. —, 38 N. W. Rep. 31. Brown *v.* Rush County, — Kans. —, 17 Pac. Rep. 304; Territory *v.* Bernalillo County, — N. M. —, 16 Pac. Rep. 855; Clark *v.* McKenzie, 7 Bush (Ky.) 523; Burke *v.* Supervisors, 4 W. Va. 371; State *v.* County Judge, 7 Iowa, 186; Magee *v.* Supervisors, 10 Cal. 376; Kisler *v.* Cameron, 39 Ind. 488; Commonwealth *v.* Emminger, 74 Penn. St. 479; Alderson *v.* Commissioners, — W. Va. —, 8 S. E Rep. 274.

[4] State *v.* County Commissioners, 23 Kans. 264; State *v.* Hill, 10 Neb. 58; Lewis *v.* Commissioners, 16 Kans. 102, 22 Am. Rep. 275.

[5] "When they have figured up the returns exactly as handed over to them," says CAMPBELL, C. J., "they have completed their task and exhausted their powers. Until they have done so they have no right to dissolve their meeting. They can only get out of their office by completing its work. It would be worse than absurd to allow a board of canvassers to defeat the popular will and destroy an election by refusing or neglecting to do what the law requires them to do. They may bring themselves within the punishment of the law by such misconduct, but they cannot destroy the vote." Attorney-General *v.* Board of Canvassers, 64 Mich. —, 31 N. W. Rep. 539, 7 West. Rep. 849. To same effect, State *v.*

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But inasmuch as the issuing of a mandamus rests largely in the discretion of the court, it will not be awarded where it is apparent upon the face of the returns that the election was illegal,[1] or where it appears that there was no vacancy,[2] or that the returns were forged and illegal,[3] or where, for any reason, it would be unavailing.[4]

So, of course, the writ will not be granted before the time when it is the duty of the board to act,[5] or unless it is the clear duty of the officers complained of to make the canvass.[6]

§ 211. **Board can act but once.**—But having once met and fully completed their duty, their powers are exhausted and they cannot again meet and re-canvass the votes or reverse their prior decision and announce a different result.[7]

§ 212. **Canvassers' Findings not conclusive.**—The finding of the canvassers and the certificate of election issued by them, if any, are *prima facie* evidence of the result and of the title to the office of those declared elected, and this evidence is conclusive in all collateral inquiries.[8] But such finding or certificate is not conclusive, unless expressly made so by law, in a direct proceeding to try the title to the office. The fact of having a plurality of the votes lawfully cast is what confers the title to the office[9] and it is always open for the party receiving such plural-

Gibbs, 13 Fla. 55, 7 Am. Rep. 233; Hagerty *v.* Arnold, 13 Kans. 367; Lewis *v.* Commissioners, 16 Kans. 102, 22 Am. Rep. 274; *Contra*, Clark *v.* Buchanan, 2 Minn. 346; People *v.* Supervisors, 12 Barb. (N. Y.) 217; State *v.* Rodman, 43 Mo. 256.

[1] State *v.* Stevens, 23 Kans. 456, 33 Am. Rep. 175, where the returns to the board showed that there were 2,947 votes cast in a county which contained only 800 legal voters. State *v.* Whittemore, 11 Neb. 175.

[2] Peters *v.* Canvassers, 17 Kans. 365.

[3] State *v.* Kavanaugh, — Neb. —, 39 N. W. Rep. 431.

[4] High. Ex. Leg. Rem. § 14.

[5] State *v.* Carney, 3 Kans. 88. And the fact that they threaten not to perform their duty when the time arrives will not alter the rule.

[6] State *v.* Randall, 35 Ohio St. 64.

[7] Holden *v.* Village Council, — Minn. —, 34 N. W. Rep. 336; Hadley *v.* City of Albany, 33 N. Y. 603, 88 Am. Dec. 412; Keller *v.* Robertson, 27 Mich. 116; State *v.* Harrison, 38 Mo. 540; Swain *v.* McRae, 80 N. C. 111; Bowen *v.* Hixon, 45 Mo. 340; State *v.* Donewirth, 21 Ohio St. 216; Opinion of Judges, 117 Mass 599.

[8] Louisville R. R. Co. *v.* Davidson County, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; Prettyman *v.* Supervisors, 19 Ill. 406, 71 Am. Dec. 230; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

[9] People *v.* Kilduff, 15 Ill. 492, 60

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ity, unless otherwise expressly provided by law, to go behind the certificate or the returns and to establish this fact before the appropriate tribunal, although the canvassers may have decided otherwise.[1] This tribunal is usually the ordinary courts of law, but in some States special tribunals have been established for the purpose of deciding election contests.

9. *Contested Elections.*

§ 213. **The Right to contest.**—The duties of the canvassing officers being, as has been seen, generally merely of a ministerial nature, and their certificate of election being the *prima facie* evidence of election,[2] it is competent for a defeated candidate[3] who has not himself caused or contributed to the irregularities or frauds of which he complains,[4] or for the people,[5] or, in some instances, for any elector[6] to institute proceedings for the determination of the title to the office.

Where, however, the decision of the canvassing officers is expressly made the final one, no further remedy can, in general, be had.

§ 214. **The Tribunal.**—In several of the States, special tribunals have been created for the trial of election contests, but, where this is not the case, the ordinary courts of law are to be

Am. Dec. 769; State *v.* Draper, 50 Mo. 353.

[1] People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69; People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325; People *v.* Seaman, 5 Denio, (N. Y.) 409; Attorney-General *v.* Barstow, 4 Wis. 567; Attorney-General *v.* Ely, 4 Wis. 420; Dishon *v.* Smith, 10 Iowa, 212; State *v.* Fetter, 12 Wis. 566; State *v.* Avery, 14 Wis. 122; People *v.* Jones, 20 Cal. 50; Commonwealth *v.* Jones, 10 Bush. (Ky.) 725; Echols *v.* State, 56 Ala. 131; Reynolds *v.* State, 61 Ind. 392; Winter *v.* Thistlewood 101 Ill. 450; People *v.* Matteson, 17 Ill. 167; State *v.* Justices, 1 N. J. 244; Hill *v.* Hill, 4 McCord, S. C., 277; State *v.* Passaic, 25 N. J. 354; Newcum *v.* Kirtley, 13 B. Mon. (Ky.) 515.

[2] See *ante*, § 212.

[3] See Edwards *v.* Knight, 8 Ohio, 375. See also *post*, § 490.

[4] Louisville R. R. Co. *v.* Davidson Co. 1 Sneed (Tenn.) —, 62 Am. Dec. 424.

[5] See *post*, § 488.

[6] See Edwards *v.* Knight, 8 Ohio, 375. See also *post*, § 490.

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resorted to. Where such a special tribunal has been created, individuals desiring to institute proceedings must, where such appears to have been the intention, have recourse to that tribunal alone, and can not, in general, resort to the courts of law.[1]

Provisions in the charters of municipal corporations that the common council or other governing body shall be the judge of the qualification and election of its own members and of those of other officers of the corporation, do not ordinarily operate to oust the courts of law of their jurisdiction. In order to effect this result it must be expressly provided that no court shall take cognizance by *quo warranto*, or that the council shall have the *sole* or *final* power of decision.[2]

But a provision in the constitution of the State that each house of the legislature shall judge of the qualifications, election and return of its members, confers upon each house powers of a judicial nature in the exercise of which its decision is final and not subject to review by the courts.[3]

So a special remedy given to an elector to contest an election does not deprive the people of their remedy by *quo warranto* to inquire into the title to public offices. "The two remedies are distinct, the one belonging to the elector in his individual capac-

[1] State *v.* Marlow, 15 Ohio St. 114; State *v.* Taylor, 15 Ohio St. 137; Lord *v.* Every, 38 Mich. 405; Commonwealth *v.* Garrignes, 28 Penn. 9, 70 Am. Dec. 103; Commonwealth *v.* Henszey, 81½ Penn St. 101.

Equity will not interpose where a special statutory course is provided. Dickey *v.* Reed, 78 Ill. 261.

[2] State *v.* Kempf, 69 Wis. 470, 2 Am. St. Rep. 753.

Dillon's Munic. Corp. § 202, citing *In re* Heath, 4 Hill, (N. Y.) 42; State *v.* Fitzgerald, 44 Mo. 425; Commonwealth *v.* McCloskey, 2 Rawle (Pa.) 369; *In re* Strahl, 16 Iowa, 369; State *v.* Funck, 17 Iowa, 365; Kane *v.* People, 4 Neb. 509; Batman *v.* Megowan, 1 Metc. (Ky.) 533; Wammack *v.* Holloway, 2 Ala. 31; Hummer *v* Hummer, 3 G. Greene, (Iowa) 42; Macklot *v.* Davenport, 17 Iowa, 379; Gass *v.* State, 34 Ind. 425; Commonwealth *v.* Allen, 70 Penn. 465; Linegar *v.* Rittenhouse, 94 Ill. 208; Oregon *v.* McKinnon, 8 Oreg. 485. See also People *v.* Hall, 80 N. Y. 117; Kendall *v.* Camden, 47 N. J. 64, 54 Am. Rep. 117. But see People *v.* Metzker, 47 Cal. 524; People *v.* Mayor, 41 Mich. 2; Mayor *v.* Morgan, 7 Mart. (La.) 1, 18 Am. Dec. 232; Peabody *v.* School Committee, 115 Mass 383; Commonwealth *v.* Leech, 44 Penn. 332; Commonwealth *v.* Meeser, 44 Penn. 341; People *v.* Harshaw, 60 Mich. 200; Cooley *v.* Ashley, 43 Mich. 458; Alter *v.* Simpson, 46 Mich. 138; Doran *v.* DeLong, 48 Mich. 552.

[3] People *v.* Mahaney, 13 Mich. 481; State *v* Gilman, 20 Kans. 551, 27 Am. Rep. 189. But see State *v.* Francis, 26 Kans. 724.

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ity as a power granted, and the other to the people in the right of their sovereignty."[1]

The right and power to adjudicate upon the title to a public office, belong, it is held, to the courts as such, and cannot be conferred upon a single member of the court.[2]

§ 215. **The Procedure—Statutory Remedies.**—In many of the States, also, special forms of procedure for the contest of election cases have been provided. Where such is the case, the machinery so provided must, by individuals[3] and, usually, by the people,[4] be made use of in preference to the remedies awarded by the common law.

Where the statutory remedy is given to any particular person or class of persons, as to "any candidate or elector," proceedings instituted by an individual under the statute must show upon their face that the person so prosecuting is the person or one of the class of persons to whom the statutory remedy is given.[5]

§ 216. **Where no statutory Method, Quo Warranto is the Remedy.**—Where no special remedy is provided, the common law remedy by an information in the nature of a *quo warranto* must be resorted to.

As the nature and use of this writ will be made the subject of a special chapter no discussion of it will here be had.[6]

[1] People *v.* Holden, 28 Cal. 123. But see Commonwealth *v.* Garrignes, 28 Penn. St. 9, 70 Am. Dec. 103, where the state was held bound by a statute prescribing the mode of contesting elections.

[2] *In re* Cleveland, — N. J. — 17 Atl. Rep. 772.

[3] State *v.* Marlow, 15 Ohio St. 114; People *v.* Holden, 28 Cal. 123; Dickey *v.* Reed, 78 Ill. 261; Commonwealth *v.* Garrignes, 28 Penn. 9, 70 Am. Dec. 103; Commonwealth *v.* Baxter, 35 Penn. 263; Commonwealth *v.* Leech, 44 Penn. 332.

For various rulings upon such statutes see: Glidewell *v.* Martin, — Ark. —, 11 S. W. Rep. 882; Whitney *v.* Blackburn, — Oreg. —, 21 Pac. Rep. 874; Burke *v.* Perry, — Neb. —, 42 N. W. Rep. 401; Gumm *v.* Hubbard, — Mo. —, 11 S. W. Rep. 61; Vigil *v.* Pradt, — N. Mex. —, 20 Pac. Rep. 795; Hartman *v.* Young, — Oreg. —, 20 Pac Rep. 17.

[4] That such statutory methods are binding on the state as held in State *v.* Marlow, 15 Ohio St. 114; Commonwealth *v.* Garrignes, 28 Penn. 9, 70 Am. Dec. 103; Commonwealth *v.* Baxter, 35 Penn. 263; Commonwealth *v.* Leech, 44 Penn. 332.

But the contrary is held in People *v.* Holden, 28 Cal. 123.

The court will not interfere on *quo warranto* while a contest is going on under the statute. State *v.* Taylor, 15 Ohio St. 137.

[5] Edwards *v.* Knight, 8 Ohio, 375.

[6] See *post*, § 476, *et seq.*

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§ 217. **Mandamus not the Remedy.**—As has been seen,[1] mandamus will lie to compel the canvassers of the election to perform their duty, and it will also lie to compel them to issue the proper certificate to the person they declare elected.[2] And it is no objection to this use of the writ that the office is already filled by an incumbent *de facto*,[3] nor that the certificate has already been erroneously issued to another person,[4] unless proceedings are then pending to procure relief in some other manner,[5] or unless the writ would give no substantial relief, a resort to *quo warranto* being inevitable.[6]

But the writ will not lie to require the canvassers to find that any particular person is elected.

So it is well settled that mandamus will not lie to try the title to the office or to compel admission to it, or to obtain the possession of it or to oust an usurper from it. In all these cases the party must resort to his remedy by quo warranto.[7]

[1] See *ante*, § 210.

[2] State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233; *In re* Strong, 20 Pick. (Mass.) 484; People *v.* Rives, 27 Ill. 242; People *v.* Hilliard, 29 Ill. 419; Brower *v.* O'Brien, 2 Ind. 423; Kisler *v.* Cameron, 39 Ind. 488; State *v.* Circuit Judge, 9 Ala. 338; Ellis *v.* Commissioners, 2 Gray (Mass.) 370; Clark *v.* McKenzie, 7 Bush (Ky.) 523; Pacheco *v.* Beck, 52 Cal. 3.

[3] *In re* Strong, 20 Pick. (Mass.) 484.

[4] Ellis *v.* Commissioners, 2 Gray (Mass.) 370; Clark *v.* McKenzie, 7 Bush (Ky.) 523); State *v.* Lawrence, 3 Kans. 95; People *v.* Rives, 27 Ill. 242; People *v.* Hilliard, 29 Ill. 419.

[5] People *v.* Cover, 50 Ill. 100.

[6] Sherburne *v.* Horn, 45 Mich. 160.

[7] People *v.* New York, 3 Johns. Cas. (N. Y.) 79; St. Louis County Court *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355; State *v.* Rodman, 43 Mo. 256; State *v.* Dunn, Minor (Ala.) 46, 12 Am. Dec. 25; *Ex parte* Harris, 52 Ala. 87, 23 Am. Rep. 559; People *v.* Supervisors, 12 Barb. (N. Y.) 217; People *v.* Common Council, 18 Mich. 338; Underwood *v.* White, 27 Ark. 382; Commonwealth *v.* Commissioners, 6 Whart. (Penn.) 476; People *v.* Lane, 55 N. Y. 217; *In re* Gardner, 68 N. Y. 467; Denver *v.* Hobart, 10 Nev. 28; Meredith *v.* Supervisors, 50 Cal. 433; Duane *v.* McDonald, 41 Conn. 517; Harrison *v.* Simonds, 44 Conn. 318; Brown *v.* Turner, 70 N. C. 93; People *v.* Stevens, 5 Hill (N. Y.) 629; Wood *v.* Fitzgerald, 3 Oreg. 568; Bonner *v.* State, 7 Ga. 473; State *v.* Auditor, 36 Mo. 70; People *v.* Matteson, 17 Ill. 167; People *v.* Head, 25 Ill. 325; Hill *v.* Goodwin, 56 N. H. 441; Ellison *v.* Raleigh, 89 N. C. 125; King *v.* Mayor of Winchester, 7 A. & E. 81; Queen *v.* Derby, 7 A. & E. 135; King *v.* Oxford, 6 A. & E. 348; Frost *v.* Chester, 5 E. & B. 538; Queen *v.* Phippen, 7 A. & E. 966; McGee *v.* State, — Ind. —, 1 West. Rep. 467; French *v.* Cowan, 79 Me. 425, 10 Atl. Rep. 355.

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§ 218. **Same Subject—The Rule stated.**—Judge McCRARY in his treatise on Elections[1] deduces the following rules:—

1. If the officers of election refuse or fail to act, mandamus will lie to compel them to discharge their duties as required by statute; but in such cases the writ will not, as a general rule, command such officers to certify that any particular person has been elected.

2. If there are two or more persons claiming the office, the writ will never issue to require such officers to declare either one elected, but only to command them to execute the duties and exercise the functions conferred upon them by law.

3. If it clearly appears that a particular person has received the majority of the votes cast, and that no question is made upon this point, perhaps mandamus may issue to compel such officers to certify the election of that person by name, although this is substantially the same thing as to order them to certify the result according to law, and therefore the latter form will always be found to be the best.

§ 219. **Presumption of Regularity.**—The well settled presumptions of the regularity of official action and that things required to be done have been rightly done, apply here as in other cases. The presumption is, therefore, that the election has been properly conducted, and that the officers charged with the duty of ascertaining and declaring the result have discharged that duty faithfully.[2] Hence.—

§ 220. **Burden of Proof is upon Contestant.**—The burden of proving such irregularities or defects, as shall overturn the result as declared by the canvassers, rests upon him who alleges them.[3]

§ 221. **Presumption of Regularity may be overthrown.**—But the presumption above referred to, while conclusive in collateral inquiries, is not, as has been seen,[4] conclusive in direct proceedings to test the title, and the courts are at liberty to go behind the returns and ascertain the true result as indicated by the ballots of the electors.[5]

[1] 3d ed. § 388.
[2] McCrary on Elections § 424.
[3] McCrary on Elections § 424.
[4] See *ante* § 213.
[5] See Kreitz *v.* Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349.

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§ 222. **Distinction between defective Elections and defective Returns.**—An important distinction is to be observed between a void election and invalid returns. "To set aside the returns of an election," says Judge McCrary,[1] "is one thing; to set aside the election itself is another and very different thing. The return from a given precinct being set aside, the duty still remains to let the election stand, and to ascertain from other evidence the true state of the vote. The *return* is only to be set aside, as we have seen, when it is so tainted with fraud, or with the misconduct of the election officers, that the truth can not be deduced from it. The *election* is only to be set aside when it is impossible from *any evidence* within reach, to ascertain the true result, — when neither from the returns nor from other proof, nor from all together, can the truth be determined."

§ 223. **Irregularities not affecting Result may be ignored.**—As has been seen in an earlier section,[2] it is well settled that, where an election has been in fact had, and the great body of the electors have actually participated in it, irregularities not proceeding from a wrongful intent, in the manner of calling, holding or certifying the election, will, where they do not affect the result, be ignored. Hence.—

§ 224. **Contestant must show that Irregularities affected Result.**—Whoever contests the validity of an election upon the ground of irregularities in the manner of calling or conducting it, or of the reception of illegal or unauthorized votes, must be prepared to show that the irregularities were of such a nature,[3] or the illegal votes were of such a number,[4] as to materially affect or alter the result.

[1] McCrary on Elections § 483.

[2] See *ante* § 184.

[3] Piatt *v.* People, 29 Ill. 72; Bacon *v.* Malzacher, 102 Ill, 663; Dale *v.* Irwin, 78 Ill. 170; Barnes *v.* Supervisors, 51 Miss. 305; Trimmier *v.* Bomar, 20 S. C. 354; Coffey *v.* Edmonds, 58 Cal. 521; Campbell *v.* Braden, 31 Kans. 754; Whipley *v.* McKune, 12 Cal. 352; Taylor *v.* Taylor, 10 Minn. 107.

[4] "The rule prevails in every State," says Appleton, C. J. in Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325, "that an election is not to be set aside and declared void merely because certain illegal votes were received which do not change the result of the election. People *v.* Tuthill, 31 N. Y. 550; Judkins *v.* Hill, 50 N. H. 140; School District *v.* Gibbs, 2 Cush. (Mass.) 39. In *Ex parte* Murphy, 7 Cow. (N. Y.) 153, two ballots were put in the box on the names of two persons who were

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Courts incline rather to sustain than to overthrow an election, and will only declare it void where it is clearly illegal.[1] If the defect be such as can be corrected, the correction will be made.[2]

But irregularities in the conduct of the election, which materially affect or alter the result, and which are not capable of correction, will render the election void.[3]

§ 225. **Mandatory Provisions must be observed.**—So where the statute expressly requires an act to be done or makes its performance essential to the validity of the election, or declares that the election shall be void if it be not observed, the statute must be regarded as mandatory, and an omission to observe the statute will render the election void.[4] What statutes are so mandatory is a question to be determined largely from the consideration of each particular statute.

§ 226. **Effect of Intimidation or Violence—Must affect the Result.**—It is not infrequently attempted to impeach an election upon the ground that voters were intimidated or were prevented from voting by actual or threatened violence. Upon the question of the sufficiency of such acts to defeat the election, the rule given by Judge McCrary has been approved:—

"The violence and intimidation should be shown to have been sufficient either to change the result, or that by reason of it the

formerly voters, but who had died some weeks before the election. 'To warrant the setting aside the election,' the court observes, 'it must appear affirmatively that the successful ticket received a number of improper votes, which, if rejected, would have brought it down to a minority. The mere circumstance that improper votes were received will not vitiate an election.' The extra vote should never be rejected when it is possible to ascertain the fraudulent vote. Mann *v.* Cassidy, 1 Brewst. (Penn.) 32."

And to the same effect, see: Swepston *v.* Barton, 39 Ark. 549; Sprague *v.* Norway, 31 Cal. 173; Sudbury *v.* Stearns, 21 Pick. (Mass.) 148; Tarbox *v.* Sughrue, 36 Kans. 225, 12 Pac. Rep. 935.

[1] State *v.* Freeholders, 35 N. J. 269.

[2] Wheelock's Case, 82 Penn. 297.

[3] State *v.* Judge, 13 Ala. 805.

[4] Walker *v.* Sandford, 78 Ga. 165, 1 S.E. Rep. 424, where an unauthorized person held the election and it was held at a place different from the one fixed: Franklin *v.* Kaufman, 65 Ga. 260, where the statute required that a justice of the peace should preside but he was present only half of the day: Ledbetter *v.* Hall, 62 Mo. 422; West *v.* Ross, 53 Mo. 350, where ballots were rejected because they had not been numbered as the statute required.

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true result cannot be ascertained with certainty from the returns. To vacate an election on this ground, if the election were not in fact arrested, it must clearly appear that there was such a display of force as ought to have intimidated men of ordinary firmness." [1]

Where such violence and intimidation are shown, the election will be set aside, but where the election has actually been had and the mass of the electors have voted, it must be shown that the number of voters prevented from voting was sufficient to change the result or the election must stand.[2]

§ 227. **Impeaching the Returns.**—It is presumed that the officers of election have done their duty, and that the returns made by them are a full and fair statement of the true result, and this presumption is to be given effect until they are shown to be unreliable. And the returns will not be rejected until they have been shown to be so tainted with fraud, or so radically defective or incomplete that the truth can not be deduced from them. Where this is shown, however, the returns will be ignored.[3]

[1] McCrary on Elections § 515; State v. Calvert, 98 N. C. 580. Mere noise and confusion is not enough. *Id.*

[2] Tarbox v. Sughrue, 36 Kans. 225, 12 Pac. Rep. 935; State v. Mason, 14 La. Ann. 505; Augustin v. Eggleston, 12 La. Ann. 366.

[3] Howard v. Cooper, 1 Batr. 275; Blair v. Barrett, 1 Bart. 308; Knox v. Blair, 1 Bart. 521; Washburne v. Voorhees, 2 Bart. 54; Supervisors v. Davis, 63 Ill. 405.

"The returns," says ANDREWS, J. in People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312, "are made by public officers charged with the duty of receiving and canvassing the votes in their respective districts, and the presumption which always exists in favor of the due performance of official duty makes the return and the certificate of the city canvassers evidence of the facts contained in them. But they are *prima facie* evidence only. It had been held in a series of cases in this State, before the case of People v. Pease, 27 N. Y. 45 (84 Am. Dec. 242) that the returns of election officers were open to inquiry and correction to the extent of allowing proof of clerical mistakes and omissions by the inspectors, and that defective ballots, not allowed to the defeated candidate, were intended for him. But the doctrine of the case of People v. Pease was much more radical and comprehensive. Starting with the principle that the election, and not the return, is the foundation of the right to an elective office, it was held that it was competent, in an action to try the title, to go behind the ballot box and purge the return by proof that votes were received and counted which were cast by persons not qualified to vote. In that case no fraud or misconduct was imputed to the inspectors. The disputed votes had been received by them in good faith. The right of the persons offer-

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And upon the principle *Falsus in uno, falsus in omnibus*, it is held that when the returns are shown to be fraudulent and false in part they must be rejected altogether.[1]

Evidence, therefore, of the admission of illegal votes or the rejection of legal votes, or of fraud, errors or irregularities in the conduct of the election, or in canvassing the votes or making the returns, is properly admissible.

It is not necessary that actual fraud should have been practiced by the election officers in the returns. "They may be impeached for error, and whether the error is that of the inspectors, or arises from the interference or illegal conduct or acts of third persons, is immaterial. The integrity of the returning officers is not necessarily involved in the inquiry as to the truth of the return. They may have been deceived and innocently induced to make a certificate false in fact."[2]

Neither is it necessary, where the returns are fraudulent, to connect the candidate with the fraud, but they are to be rejected although he was innocent.[3]

§ 228. **Correcting the Returns.**—But not only may the returns be impeached upon proof of fraud or mistake, but they may also be corrected, where the means of correction are at hand, so as to conform to the actual state of the case. And they may be corrected by parol evidence as well as by written.[4]

§ 229. **The Ballots as Evidence.**—But it by no means fol-

ing them to vote was not challenged at the time, and the return accurately stated the result of the election as shown by the count of the ballots actually deposited, according to the forms of the law. The case is a strong illustration of the disposition of the courts in this State, in election cases, to look through the formal evidence of the right to the right itself, and to set aside the return of election officers when necessary to promote the ends of justice. Freedom of inquiry in investigating the title to office tends to secure fairness in the conduct of elections, faithfulness and integrity on the part of return officers, and it weakens the motive for fraud or violence by diminishing the chances that they may prove successful in effecting the objects for which they are usually employed."

[1] Russell *v.* State, 11 Kans. 308; State *v.* Commissioners, 35 Kans. 640.

[2] ANDREWS, J., in People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

[3] Blue *v.* Peter, 40 Kans. 701, 20 Pac. Rep. 442.

[4] People *v.* Vail, 20 Wend. (N. Y.) 12; Howard *v.* Shields, 16 Ohio St. 184; Powers *v.* Reed, 19 Ohio St. 189.

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lows that because the returns are of no value, the election must fail.

The returns being rejected, resort may then be had to the source from which the returns were made up,—the ballots themselves if they are still in existence, and have been preserved in the manner prescribed by law.[1] The right to the office comes, as has been seen, from the ballots [2] and not from the certificate or returns, and they are always the best evidence of the voters' action.[3]

But the right to have recourse to the ballots presupposes that they have been kept as required by law, that the guards thrown around them have been preserved and that they still exist in the same integrity as when cast. If they have not been so preserved and if opportunities for alteration, abstraction or corruption have occurred, it is obvious that their value as evidence must be very greatly impaired if not entirely destroyed.[4]

The provisions of the statute as to the exact *manner* in which

[1] People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312: People *v.* Livingston, 79 N. Y. 279; People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69; People *v.* Higgins, 3 Mich. 233; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; People *v.* Cook, 14 Barb. (N. Y.) 259, 8 N. Y. 67, 59 Am. Dec. 451; State *v.* Judge, 13 Ala. 805; State *v.* Clerk of Passaic, 25 N. J. 354; Attorney-General *v.* Ely, 4 Wis. 420; Hudson *v.* Solomon, 19 Kans. 177; Dorey *v.* Lynn, 31 Kans. 758; Kingery *v.* Berry, 94 Ill. 515; Coglan *v.* Beard, 65 Cal. 58; Newton *v.* Newell, 26 Minn. 529.

[2] State *v.* Draper, 50 Mo. 353.

[3] Hudson *v.* Solomon, 19 Kans. 177; People *v.* Livingston, 79 N. Y. 279; Wheat *v.* Ragsdale, 27 Ind. 191; People *v.* Holden, 28 Cal. 123; Searle *v.* Clark, 34 Kans. 49.

[4] In Hudson *v.* Solomon, 19 Kans. 177, BREWER, J. lays down the following rules:

"1. As between the ballots cast at an election and a canvass of these ballots by the election officers, the former are the primary, the controlling evidence.

2. In order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with."

"Before the ballots should be allowed in evidence to overturn the official count and return, it should appear *affirmatively* that they have been safely kept by the proper custodian of the law,—that they have not been exposed to the public, or handled by unauthorized persons, and that no opportunity has been given for tampering with them." McCrary on Elections, § 440.

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the ballots are to be kept, may be directory merely,[1] but the *result* is imperative, and before the ballots can be received in

[1] In passing upon the question in People *v.* Livingston, 79 N. Y. 279, it is said by Chief Judge CHURCH:

"Assuming the construction above indicated as to the sealing, the more important question remains whether, if it is proved satisfactorily that the boxes have been kept inviolate and undisturbed, the omission of the canvassers to seal up the boxes as contemplated, renders the ballots inadmissible as evidence.

The defendant strenuously insists that this omission is fatal to the admission of the ballots as evidence, and that considerations of public policy demand that this exceptional innovation upon the long established policy of the State in providing against such evidence by requiring the ballots to be destroyed should not be sustained unless the statute is strictly complied with.

There is plausibility and force in the argument, but after careful consideration of the subject and the authorities bearing upon it, I have arrived, with some hesitation, at a conclusion adverse to the defendant's views. It is to be observed that the terms of the statute do not make the admissibility of this evidence depend upon a compliance with the requirements of the act. The statute does not create this evidence, but impliedly recognizes it as evidence. It must be regarded as common law evidence. In *quo warranto* the returns and certificates are deemed only *prima facie* evidence, and the parties are permitted to go behind them and show what took place at the election, the number of votes cast and for whom. An election is for the purpose of ascertaining the will of the electors, and in controversies of this character that will may be shown by any available legal evidence. The ballots themselves are, of course, the highest and best evidence if they are actually preserved, but the liabilities of tampering and fraud doubtless induced the Legislature to require their destruction. But for the statute, there can be no doubt of their being common law evidence if they are identified. The preservation of the boxes inviolate being the ultimate object of the statute, if that is in fact accomplished the omission to observe all the formalities to secure that object is not fatal to the evidence. Such omission would weaken the force of the evidence and induce greater caution in regarding it, but would not necessarily destroy it. (People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451.)

We are without precedents in this State, but the tendency of the decisions in those States, where similar laws exist favor this view. In People *v.* Higgins (3 Mich. 233, 61 Am. Dec. 491), the aperture of one of the boxes was left unsealed, and the court held that the provision was directory merely. The case seems not to have been very fully considered. In People *v.* Cicott (16 Mich. 283, 306, 97 Am. Dec. 141), where there was imperfect sealing, the trial judge said there was not the same certainty of their correctness which the law would otherwise have presumed, but submitted it to the jury to determine whether they would rely upon the inspectors' returns or the recount of the ballots, and this was approved by the appellate court. (See also People *v.* Sackett, 14 Mich. 320; Pradat *v.* Ram-

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evidence to contradict the official returns, it must be made *affirmatively* to appear that they have in fact been kept inviolate.

sey, 47 Miss. 24; Hudson *v.* Solomon, 19 Kan. 177.)

Judge COOLEY, who, I infer from his opinion in People *v.* Sackett, (*supra*) regarded with disfavor the evidence of a recount of the ballots, without a substantial compliance with the statute, recognizes the rule above stated. He says: 'If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all; or, if received, that it should be left to the jury to determine upon all the circumstances of the case, whether they constitute more reliable evidence than the inspectors' certificate, which is usually prepared immediately on the close of the election, and upon an actual count of the ballots as then made by the officers whose duty it is to do so; (Cooley's Const. Lim. 625). This rule is quite as favorable to the admissibility of the ballots as can be justified, assuming that no defect or error appears in the returns, either upon their face or by evidence *aliunde*. * * *

The statute requires the ballot boxes to be preserved undisturbed and inviolate, and it is incumbent upon the party offering the evidence to show that they had been so kept; not beyond a mere possibility of interference, but that they were intact to the satisfaction of the jury. The burden was upon the relator to satisfy the jury that the boxes had remained inviolate. The returns are the primary evidence of the result of an election. They are made immediately upon canvassing the votes, and the votes are canvassed at the close of the polls in public, and presumably, in the presence of the friends of both parties. The result is at once publicly announced and duplicate returns are filed in different public offices. They may be impeached for fraud or mistake; but in attempting to remedy one evil we should be cautious not to open the door to another and far greater evil. After the election it is known just how many votes are required to change the result, the ballots themselves cannot be identified—they have no ear mark. Everything depends upon keeping the ballot boxes secure, and the difficulty of doing this for several months in the face of temptation and opportunity, requires that the utmost scrutiny and care should be exercised in receiving the evidence, especially as the election of every county and state officer may depend upon a recount of the ballots. * * * Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty. If the boxes have been rigorously preserved, the ballots are the best and highest evidence; but if not, they are not only the weakest, but the most dangerous evidence. The jury might not be satisfied with the proof of identity, and yet be unable to find from the evidence that actual tampering or fraud had been committed. The question upon whom the burden of proof rests is deemed

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"It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty." Unless this can be shown, the evidence to be derived from them can not overthrow the presumption of the regularity of official action which supports the returns.[1]

§ 230. **Poll-Books and Tally Sheets as Evidence.**—Where by law poll-books or tally sheets are required to be kept, showing who has voted and who was legally entitled to vote, resort may be had to these books or sheets when properly kept and identified,[2] to ascertain the number of votes cast and what persons have voted.[3]

§ 231. **Evidence of Election Officers.**—Where the ballots have not been kept as required by law,[4] or after proof of the loss of the tally sheets and poll-books,[5] the evidence of the election officers may be received to show what was the result of the election as counted and declared by them.

§ 232. **Evidence of the Voters.**—"It has always been held, and is not disputed," says Judge CAMPBELL, "that illegal votes do not avoid an election, unless it can be shown that their recep-

material, and an error in this respect has been held fatal (Lamb *v.* Camden and Amboy R. R. and T. Co. 46 N. Y. 271). The rule becomes more important in a case like this on account of the difficulty, if not impossibility, of ever proving actual fraud, and the grave consequences which may flow from the adoption of a contrary rule."

[1] People *v.* Livingston, 79 N. Y. 279; Hudson *v.* Solomon, 19 Kans. 177; Kingery *v.* Berry, 94 Ill. 515; Coglan *v.* Beard, 65 Cal. 58; Keeler *v.* Robertson, 27 Mich. 116; People *v.* Thacher, 55 N. Y. 524, 14 Am. Rep. 312; Powell *v.* Holman, 50 Ark. 85, 6 S. W. Rep. 505.

In State *v.* Kempf, 69 Wis. 470, 2 Am. St. Rep. 753, a demurrer to a *quo warranto* on the ground that there was no averment that the ballots had been preserved in the manner prescribed by law, was overruled, the court holding that the presumption of the due performance of official duty was sufficient without the averment.

[2] Where the poll lists have in fact been kept and are fully identified, it is immaterial that they were not kept in the precise manner pointed out by statute, and it is admissible to show that a person voted at the election, although it is not signed by the inspectors, has no heading denoting its character, and has never been filed in the proper office. People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

[3] People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; State *v.* Donnewirth, 21 Ohio St. 216.

[4] Stemper *v.* Higgins, 38 Minn. 222, 37 N. W. Rep. 95.

[5] Wheat *v.* Smith, 50 Ark. 266, 7 S. W. Rep. 161.

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tion affects the result. And where the illegality consists in the casting of votes by persons unqualified, unless it can be shown for whom they voted, it cannot be allowed to change the result."[1]

It becomes important, therefore, to determine by what means, if any, it can be shown how a voter, claimed to be an unlawful voter, has in fact voted.

§ 233. **Same Subject—Legal Voter not compelled to state how he voted.**—As has been seen, the idea of a secret ballot lies at the very foundation of our system of popular elections, and the courts are jealous in securing its protection.

It is, therefore, well settled that a legal voter will not be compelled to disclose for whom he voted.[2] And as the presumption is that one who votes does so legally rather than illegally, no mere doubt or uncertainty as to the legality of his vote will justify his being compelled to disclose it.[3]

And not only will the legal voter not be compelled to disclose for whom he voted, but, unless he has himself made the contents of his ballot public at the time of voting it, third persons will not be permitted to testify as to its purport.[4]

[1] People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

[2] People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Dixon *v.* Orr, 49 Ark. 238, 4 S. W. Rep. 774; Thompson *v.* Ewing, 1 Brewst. 66; *In re* McCullough, 12 Phila. 570; *In re* Locust Ward Election, 4 Penn. L. J. 341; State *v.* Hilmantel, 23 Wis. 309.

But see People *v.* Supervisors, 58 How. Pr. (N. Y.) 143, citing People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

[3] People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; *In re* Locust Ward Election, 4 Penn. L. J. 341; *In re* McCullough, 12 Phila. 570.

[4] In People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141. CAMPBELL, J., says "Our whole ballot system is based upon the idea that unless inviolable secrecy is preserved concerning every voter's action, there can be no safety against those personal or political influences which destroy individual freedom of choice.

It is altogether idle to expect that there can be any such protection where the voter is only allowed to withhold his own oath concerning the ticket he has voted, while any other prying meddler can be permitted in a court of justice to guess under oath at its contents. If the law could permit an inquiry at all, there is no reason whatever for preventing an inquiry from the voter himself, who alone can actually know how he voted, and who can suffer no more by being compelled to answer than by having the fact established otherwise. The reason why the ballot is made obligatory by our constitution is to secure to every one the

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This secrecy of the ballot is not alone protected against testimony by third persons as to its contents, but also from attempted disclosures based upon its color or external appearance.[1]

§ 234. **Same Subject—Voter may disclose voluntarily.**—But although the legal voter can not be compelled to disclose how he voted, he may, if he chooses, waive his privilege of secrecy, and voluntarily disclose the contents of his ballot.[2]

§ 235. **Same Subject—Illegal Voter may be compelled to disclose.**—The privilege of secrecy is, however, one belonging to the legal voter only. Where, therefore, it has been established by other evidence that a person has voted unlawfully, he may be compelled to disclose how he voted,[3] except where his answer might tend to criminate him.[4]

And where the unlawful voter refuses to disclose, or can not remember how he voted, or cannot be found, the fact may be proved by other evidence.[5]

§ 236. **Same Subject—Evidence of Voter's Statements as to his Disqualification or his Vote.**—Although there is some conflict in the authorities, the rule seems to be settled that the evidence of the statements of an alleged unlawful voter as to his disqualification, unless made so contemporaneously with the act of voting as to constitute part of the *res gestæ*,[6] is inadmissible

right of preventing any one else from knowing how he voted, and there is no propriety in any rule which renders such a safeguard valueless."

[1] CHRISTIANCY, J., in People *v.* Cicotte, 16 Mich. 283.

[2] Dixon *v.* Orr, 49 Ark. 238, 4 S.W. Rep. 774; Knoass's Case, 2 Pars. 553.

[3] State *v.* Hilmantel, 23 Wis. 422; Thompson *v.* Ewing, 1 Brewst. 67; CHRISTIANCY, J., in People *v.* Cicott, 16 Mich. 283.

[4] State *v.* Olin, 23 Wis. 309.

[5] People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242. "Where a voter refuses to disclose, or fails to remember, for whom he voted," says DAVIES, J., in this case, "I think it is competent to resort to circumstantial evidence to raise a presumption in regard to that fact. Such is the established rule in election cases before legislative committees, which assume to be governed by the legal rules of evidence: *Cushing's Law and Practice of Legislative Assemblies, Sec. 159, 210*; and within that rule it was proper, in connection with the other circumstances stated by the witness, to ask him for whom he intended to vote, not, however, on the ground that his intention, as an independent fact, could be material, but on the ground that it was a circumstance tending to raise a presumption for whom he did vote."

[6] Patton *v.* Coates, 41 Ark. 111;

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to establish the fact of such disqualification or how he voted. Such evidence is mere heresay.[1]

The contrary rule, however, prevails in New York[2] and Wisconsin.[3]

The reason given for holding such statements admissible is "that a person who has voted at an election is always considered as a party, when the result of the election is in controversy, and on that ground his declarations, voluntarily made, are admissible. It is considered to be a question between the voter and the party questioning his vote, and not merely between the party holding the office and him who claims it."[4]

§ 237. **Voter not voting, not permitted to state how he would have voted.**—A voter who did not vote, though legally entitled to do so, and although he did not vote because he was unlawfully prevented, can not afterwards be permitted to testify that he would have voted for a certain person, notwithstanding that the lawful votes so excluded would, if cast as intended, have changed the result.[5]

The election is to be decided by the number of legal votes actually cast, and not by ascertaining what might have been cast. The election may be held invalid because of the suppression of legal votes, but public policy forbids that, after it is known just how many votes are necessary to change the result, it should be permitted to change it upon the present statement of voters as to their past intentions.[6]

Where one, therefore, receives a majority of the legal votes cast, the opposing candidate cannot be declared elected upon evidence that legal voters, who would have voted for him, offered to vote, but were erroneously denied the right. A new election is the proper remedy in such a case.[7]

Beardstown *v.* Virginia, 81 Ill. 541; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349.

[1] Tarbox *v.* Sughrue, 36 Kans. 225, 12 Pac. Rep. 935; Gilleland *v.* Schuyler, 9 Kans. 582; People *v.* Commissioners, 7 Col. 190.

[2] People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

[3] State *v.* Olin, 23 Wis. 319.

[4] Dixon, C. J., in State *v.* Olin, 23 Wis. 319.

[5] Newcum *v.* Kirtley, 13 B. Mon. (Ky.) 515.

[6] Newcum *v.* Kirtley, 13 B. Mon. (Ky.) 515.

[7] Renner *v.* Bennett, 21 Ohio St. 431; Newcum *v.* Kirtley, 13 B. Mon. (Ky.) 515.

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§ 238. **When all Evidence fails Election must be set aside.**— When, however, notwithstanding a resort to all the legal means of proof, it is still impossible to ascertain, with reasonable certainty, what the true result of the election really is, the election must be set aside.[1]

[1] Russell *v.* State, 11 Kans. 308; State *v.* Commissioners, 35 Kans. 640.

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CHAPTER VI.

OF ACCEPTANCE OF OFFICE.

§ 239. In general.

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240. Citizen is under a social Obligation to accept Office.
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242. Duty imposed by Statute in some States.
243. Acceptance compelled by Mandamus.
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247. Acceptance necessary to full Possession of the Office.
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249. Seeking the Office or Consenting to be appointed or elected is not an Acceptance.
250. Qualification the best Evidence of Acceptance.
251. Effect of Failure to qualify.
252. Acceptance presumed from Exercise of Office.

§ 239. **In general.**—The individual having been, by the action of the appointing power or by the suffrages of the people, selected for the office, it becomes material to ascertain: (1) whether the individual so chosen owes to the power by which he was chosen any duty to accept the office, and if so, (2) what shall be deemed evidence of such acceptance.

I.

DUTY TO ACCEPT THE OFFICE.

§ 240. **Citizen is under social Obligation to accept Office.**—It is impossible that government shall be carried on, and the functions of civil society exercised, without the aid and intervention of public servants or officers, and every person, therefore, who enters into civil society and avails himself of the benefits and protection of the government, must owe to this society, or, in other words, to the public, at least a social duty to bear his

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share of the public burdens, by accepting and performing, under reasonable circumstances, the duties of those public offices to which he may be lawfully chosen.

§ 241. **Common Law also imposed the Obligation.**—And not only is this the social obligation, but so far as municipal offices are concerned, it was the obligation of the common law as well. "In England," says Mr. Justice BRADLEY, "a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear."[1]

§ 242. **Duty imposed by Statute in some States.**—This duty to accept and qualify for a municipal office, except where by law exempt, is also declared by statute in some of the States, and penalties or forfeitures are prescribed for a refusal or neglect to do so.

Under our political system, however, where offices are so eagerly sought for, there has seldom been occasion for the enforcement of such laws.[2]

§ 243. **Acceptance compelled by Mandamus.**—At the common law, a person elected or appointed to a municipal office, as for example, that of common councilman, was compelled by mandamus to qualify by taking the oath, and to enter upon and execute the duties of the office.[3]

§ 244. **Refusal to accept indictable at Common Law.**—And the refusal to accept a municipal office, as that of constable or overseer of the poor, rendered the delinquent liable, at common law, to an indictment.[4]

§ 245. **Not compelled to serve without Compensation.**—But in this country, it is said, though it cannot be universally true, that a person can not be compelled to serve the public without

[1] Edwards *v.* United States, 103 U. S. 471, 473; Rex *v.* Bower, 1 B. & C. 585; Rex *v.* Burder, 4 T. R. 778; Rex *v* Lone, 2 Strange, 920; Rex *v.* Jones, 2 Strange 1146.

[2] See Haywood *v.* Wheeler, 11 Johns. (N.Y.) 432; Winegar *v.* Roe, 1 Cow. (N.Y.) 258.

[3] Rex *v.* Bower, 1 Barn. & Cress. 585.

[4] Rex *v.* Burder, 4 T. R. 778; Rex *v.* Lone, 2 Strange, 920.

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compensation. Thus in a recent case in Illinois involving the constitutionality of an act creating a board of police commissioners, it was said by SCHOLFIELD, J., though *arguendo* merely, "No man can be compelled to give his time and labor, any more than his tangible property, to the public without compensation; and, since there is no mode by which policemen appointed by the commissioners can be compensated, it follows that no one, even after accepting their appointment can be compelled to perform any police duties."

And so, continues the same judge, "there can be no legal right in an individual to hold an office or trust, unless there is also a corresponding legal right in the public to compel performance of the duties with which the office or trust is charged. This would seem to be a legal truism and to need no demonstration."[1]

§ 246. **Not compelled to accept a second or a disqualifying Office.**—So it is said that a man cannot be compelled to accept a second office when he has previously been chosen to one which he still holds,[2] and that where he has been elected or chosen against his will or consent, he cannot be compelled to accept any office, at any rate, a disqualifying one—as a judicial office, the election to which renders him, during the term for which he was elected, ineligible to any office of trust or profit under the State, other than a judicial one.[3]

[1] Hinze *v.* People (1879), 92 Ill. 406.

[2] Hartford *v.* Bennett, 10 Ohio St. 441.

[3] Smith *v.* Moore (1883) 90 Ind. 294. ELLIOTT, J., in his opinion, says: "It can not be doubted that when it is said of one that he is elected to an office, it is ordinarily meant that he has been chosen or selected. It is never meant, I think it not too much to say, that he has been chosen and has also been inducted into office, or has qualfied by giving bond and taking an official oath. All will agree, I dare say, that as to the public, the candidate who has been legally chosen is elected when so declared by the proper authorities. As to the public then, the question is without difficulty, for the candidate declared chosen is elected.

A citizen, however, has individual rights, and it would result in injury and lead to injustice to declare that whenever he is chosen to the office of justice of the peace, or any other judicial office, he can seek no political preferment, even though he may have been chosen against his will. A construction of the constitution that would result in making a man a judicial officer against his will would put it in the power of those desiring to obstruct his way to other offices to

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§ 247. **Acceptance necessary to full Possession of the Office.**—But, regardless of the questions whether a man can be compelled to accept office, or can be punished for not accepting, it is clear that, though entitled to the office or charged with the duty of accepting it, the individual chosen can not be deemed to be either fully possessed of its rights and privileges or subject to the performance of its duties and obligations, until he has in fact, accepted it. Acceptance, therefore, is necessary to the full possession, enjoyment and responsibility of the office.[1]

§ 248. **When Acceptance may be given.**—The acceptance of an office and the agreement to accept are obviously different things. One is executory, the other executed. If the promise is made before the election or appointment, it is necessarily conditioned upon the contingency of his being elected or appointed. If made afterward, the promisor may not be able or may not be willing to fulfill his promise. The acceptance, therefore, must logically follow the election or appointment, and not precede it.[2]

disfranchise him, and this the constitution never intended should occur. We can not, therefore, I agree, hold that a man selected or chosen against his will or consent is, so far as concerns his own rights, elected within the meaning of the constitution, however it may be as to the public."

[1] Smith *v.* Moore, 90 Ind. 294, 306, 313.

[2] Smith *v.* Moore, 90 Ind. 294. But ELLIOTT, J., dissented, saying: "The majority of the court think that acceptance can only come after election and by qualification, and I, that it may come before as well as after, and that election and qualification are essentially distinct and different things. To my mind it is clear that consent or acceptance may be given as effectually before as after election; that an acceptance is acceptance whensoever made.

I cannot see that it is any more difficult to prove acceptance before an election than it is to prove it afterwards. In any event, it is a question of fact to be determined like all other questions of fact, upon evidence. If it leads to a *reductio ad absurdum* in the one case, to hold consent essential, it no less does so in the other. It seems to me that it is much more unreasonable to permit a man to cast aside an office which he has sought after he has secured the votes of the electors by his own efforts, than to hold that when he has done this he must abide the consequences of his own voluntary act. If men are not held to keep what they have sought and obtained, they are at unrestrained liberty to lightly toss about offices conferred upon them at their own solicitation."

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II.

WHAT CONSTITUTES AN ACCEPTANCE.

§ 249. **Seeking the Office or Consent to be appointed or elected is not an Acceptance.**—Pursuing the reasoning of the last section a step further, it is obvious that the mere seeking for the office or the consent to be voted for or appointed, though they may imply a promise to accept if elected or appointed, do not of themselves amount to an actual acceptance of the office.

A fortiori an election or appointment without one's knowledge or consent can not amount to an acceptance of the office.[1]

§ 250. **Qualification the best Evidence of Acceptance.**—But the best formal evidence of the acceptance is, undoubtedly, the

[1] In Smith *v.* Moore, 90 Ind. 294, the question arose whether one elected, with his consent, to a judicial office, but who does not accept the same, may, under the constitution of that State declaring that "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the State, other than a judicial office," be afterwards elected to an office, not judicial, the term of which will run during the judicial term to which he was elected. It was held that he could be.

ZOLLARS, J., writing for the court, said: "An office is not obtained or held by contract. *McCrary on Elections, 216, Pomeroy Const. Law*, § 547. It can not be said, with reason, that such consent to be voted for is, in any sense, an acceptance of the office. Until the consenting party is known to have received a majority vote, there is nothing for him to accept. If being voted for and receiving a majority of the votes is an election, in the sense in which the word 'elected' is used in this section of the constitution, it can make no difference whether such votes are cast with or without the knowledge and consent of the party voted for. To say that if the votes are cast with the knowledge and consent of the party voted for, he is thereby elected, and, if without such knowledge, he is not elected, is to depart from the literal signification of the word 'elected.' To adopt this view, it would become necessary to construe the word 'elected,' and make the constitution read: No person elected, with his knowledge and consent, to a judicial office, shall be eligible, &c. And further, it would impose upon the courts, in every case of contest like this, under this section, the unreasonable and difficult duty of deciding whether or not the party thus elected was voted for with his knowledge and consent."

ELLIOTT, J., dissented, holding that consenting to be voted for amounted to an acceptance. See extract from his opinion in note to preceding section.

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qualification of the officer elect, by taking the oath and giving the bond, if any, required by law.[1]

§ 251. **Effect of Failure to qualify.**—A failure or neglect to qualify at all would, *e converso*, be deemed evidence of a refusal of the office.[2] But a failure or neglect to qualify within the particular time prescribed, if afterwards supplied, would not ordinarily be deemed *ipso facto* a rejection of the office.[3] It would be different, however, if the qualification within a given time was expressly made a condition precedent.[4]

§ 252. **Acceptance presumed from Exercise of Office.**—And so if the officer were found to be in the actual occupation and exercise of the office, his acceptance of it would be presumed.[5]

[1] Smith *v.* Moore, 90 Ind. 294.

[2] Thompson *v.* Holt, 52 Ala. 491; Beebe *v.* Robinson, 52 Ala. 66.

[3] See City of Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; People *v.* Holley, 12 Wend. (N. Y.) 481; State *v.* Churchill, 41 Mo. 41; State *v.* County Court, 44 Mo. 230; Sprowl *v.* Lawrence, 33 Ala. 674; State *v.* Ely, 43 Ala. 568; State *v.* Colvig, 15 Oreg. 57; State *v.* Peck, 30 La. Ann. I. 280.

But see State *v.* Matheny, 7 Kans. 327 (Compare Carpenter *v.* Titus, 33 Kans. 7). See *post*, § 266.

[4] See Thompson *v.* Holt, 52 Ala. 491; Beebe *v.* Robinson, 52 Ala. 66. See *post*, § 265.

[5] Johnston *v.* Wilson, 2 N. H. 202, 9 Am. Dec. 5.

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CHAPTER VII.

OF QUALIFYING FOR THE OFFICE.

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311. Necessity of Approval.
312. Examination and Approval a public Duty.
313. Failure to approve or Defects in Approval do not release Sureties.
314. Whether Approval is a ministerial or judicial Act.

§ 253. **In general.**—The person elected or appointed to a public office is usually required by law, before entering upon the performance of his duties, to do some act by which he shall signify his acceptance of the office and his undertaking to execute the trust confided in him. This act is ordinarily termed *qualification.*

§ 254. **What constitutes Qualification.**—This act generally consists of the taking, and often of subscribing and filing, of an official oath, and, in many cases, of the giving of an official bond in such a penalty and with such sureties as the law prescribes.

Each of these acts requires consideration.

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I.

THE OATH OF OFFICE.

§ 255. **Oath not indispensable.**—But although the law usually requires the taking of an oath, it is not indispensable. It is, as has been said, but a mere incident to the office and constitutes no part of the office itself.[1]

§ 256. **What Oath to be taken.**—The form of oath to be taken by public officers is usually prescribed by the sovereign power, and it is often accompanied by a declaration that no other shall be exacted as a qualification for office.

Thus the constitution of the United States requires that, before entering upon the execution of his office, the President shall take the following oath or affirmation :—

"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect and defend the constitution of the United States."[2]

It further provides that—

"The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this constitution; but no religious test shall be required as a qualification to any office or public trust under the United States."[3]

So the constitutions of the several States usually provide, as in Michigan, that—

"Members of the legislature, and all officers, executive and judicial, except such officers as may by law be exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation :—'I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of this State, and that I will faithfully discharge the duties of the office of according to the best of my ability.' And no other oath,

[1] State v. Stanley, 66 N. C. 59, 8 Am. Rep. 448.

[2] Art. II, sec. 1, p. 8.

[3] Art. VI, p. 3.

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declaration or test shall be required as a qualification for any office or public trust." [1]

§ 257. **Exemption from taking Oath.**—Exemption from the constitutional provisions requiring an oath may be not only express, but may be gathered from the evident intention of the law makers. Thus it is said by SHELDON, J., "Where, by the law, there appears a manifestation of the intention of the legislature that an inferior officer should not be required to take an oath of office, there is, in our opinion, a sufficient exemption by law from taking the oath of office within the intent of the constitutional provision." [2]

§ 258. **Form prescribed must be substantially followed.**—Where the form of the oath to be administered to a public office is prescribed by law, that form should be substantially observed. Literal adherence to it is not required and a substantial compliance will suffice,[3] but anything less than this will not avail.[4]

This is particularly true where the form prescribed was intended to enforce the recognition and protection by the officer of important constitutional rights of individuals, as in proceedings under the right of eminent domain.

§ 259. **Requirement of Oath cannot vary Constitutional Rights.**—It is obviously beyond the power of the legislature in prescribing the oath to be administered to impose upon the officer tests or requirements greater than those which the constitution has declared shall be sufficient.

§ 260. **Nor disqualify for Act not a Crime when committed.**—Neither is it competent for the State, by its constitution, by the requirement of a given oath, to deprive one of his eligibility to office because of the previous commission of an act which was not punishable when committed.[5]

[1] Art. XVIII, sec. 1.

[2] School Directors *v.* People, 79 Ill. 511.

[3] Bassett *v.* Denn, 17 N. J. L. 432; Tide Water Canal Co. *v.* Archer, 9 G. & J. (Md.) 479; Hankins *v.* Calloway, 88 Ill. 155; State *v.* Trenton, 35 N. J. L. 485.

[4] *In re* Cambria Street, 75 Penn. 357; Bohlman *v.* Railway Co. 40 Wis. 157; Bowler *v.* Drain Commissioner, 47 Mich. 154; Chapman *v.* Clark, 49 Mich. 305.

[5] See the elaborate discussion of this question in Cummings *v.* Missouri, 4 Wall. (U. S.) 277.

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§ 261. **Oath need not be in Writing unless Law requires it.**—Unless the law expressly requires more, it is sufficient that the oath prescribed be taken; it need not also be in writing or be subscribed by the affiant.[1]

§ 262. **Effect of not taking Oath.**—Statutes requiring the taking of an oath, like those which require also the giving of a bond, usually require that it shall be done within a specified time. These statutes, however, as will be seen in a following section, are generally construed to be directory merely and not mandatory, and mere delay in taking the oath, if it be afterwards taken with the approval of the public authorities, while it may be ground for a forfeiture while the delay continues, does not amount *ipso facto* to a rejection of the office, and when the oath is so taken, the default is waived.[2]

Under some constitutional provisions, as those of Virginia, requiring the taking of the "anti-duelling" oath as a condition precedent, the failure to take the oath operates to vacate the office.[3]

The requirement that the oath shall be taken within a fixed period does not operate while a contest is pending to determine who is legally entitled to the office and hence required to take the oath prescribed by law.[4]

II.

OFFICIAL BONDS.

§ 263. **In general.**—Public officers to whom are entrusted the collection and custody of public money, and public ministerial officers whose actions may affect the rights and interests of individuals, are usually required to secure the faithful and proper discharge of their duties by giving bonds conditioned to that effect.

As a rule, political, judicial, military and naval officers are not required to give bonds.

[1] Davis *v.* Berger, 54 Mich. 653.
[2] See *post*, § 265, *ante*, § 251.
[3] Branham *v.* Long, 78 Va. 353; Johnson *v.* Mann, 77 Va. 265.
[4] People *v.* Potter, 63 Cal. 127; Pearson *v.* Wilson, 57 Miss. 648.

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§ 264. **Are required by Law.**—The giving of these bonds is generally required by the law creating the office, and the amount of the penalty, the conditions of the undertaking, and the number and qualification of the sureties are usually prescribed by the same authority.

1. *When to be Given.*

§ 265. **Statutes usually directory and not Mandatory.**—The statutes requiring a bond to be given ordinarily prescribe that it shall be given within a fixed time after the officer's election or appointment. These provisions as to time, however, though often couched in most explicit language, are usually construed to be directory only and not mandatory.[1]

§ 266. **Failure to give within Time prescribed does not work a Forfeiture.**—A failure to give the bond within the time prescribed does not, therefore, *ipso facto* work a forfeiture.[2] *A fortiori* is this so, where the failure was through no fault of the officer.[3]

Even though the statute expressly provide that upon a failure to give the bond within the time prescribed, the office shall be deemed vacant and may be filled by appointment, it is generally held that the default is a ground for forfeiture only and not a forfeiture *ipso facto*, and that if, notwithstanding his default, the State or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured,

[1] City of Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; People *v.* Holley, 12 Wend. (N. Y.) 481; State *v.* Churchill, 41 Mo. 41; State *v.* Porter, 7 Ind. 204; State *v.* Falconer, 44 Ala. 696; Sprowl *v.* Lawrence, 33 Ala 674; State *v.* Ely, 43 Ala. 568; State *v.* County Court, 44 Mo. 230.

[2] City of Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; People *v.* Holley, 12 Wend. (N. Y.) 481; State *v.* Churchill, 41 Mo. 41; State *v.* County Court, 44 Mo. 230; State *v.* Porter, 7 Ind. 204; State *v.* Falconer, 44 Ala. 696; Sprowl *v.* Lawrence, 33 Ala. 674; State *v.* Colvig, 15 Oreg. 57; State *v.* Peck, 30 La. Ann. I. 280; Kearney *v.* Andrews, 10 N. J. Eq. 70.

Contra, People *v.* Taylor, 57 Cal. 620; *In re* Attorney-General, 14 Fla. 277.

[3] Ross *v.* Williamson, 44 Ga. 501; State *v.* Hadley, 27 Ind. 496.

Where the giving of the bond is prevented by the unlawful acts of the officers appointed to receive it, the officer elect is relieved from the necessity of giving it. Culver *v.* Armstrong, — Mich. —, 43 N. W. Rep. 776.

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and it is converted into a title *de jure*, having relation back to the time of his election or appointment.[1]

Where, however, the giving of the bond within the time prescribed is expressly made a condition precedent to the right to the office, the rule would be different.[2]

The provisions of the law requiring the giving of a bond within a fixed period do not apply while a contest is pending to determine who is legally elected and hence required to give a bond.[3]

2. *Form of Bonds.*

§ 267. **Terms prescribed by Statute.**—The statutes requiring the giving of bonds usually prescribe, with more or less particularity, what shall be their terms and conditions. The object of this is not only to secure uniformity in the conditions, but more especially to provide that the public and those dealing with the officer shall receive all of the protection from the bond that it was the intention of the statute, exacting it, to secure.

§ 268. **Statutes are usually directory.**—And inasmuch as the substance is ordinarily more to be regarded than the form, it is quite generally held that, unless the statute expressly declares that a bond not executed in the form prescribed shall be void, the statute will be construed to be directory only and a substantial compliance with it will suffice.[4]

Immaterial variations or omissions, therefore, in the bond will not render it void but will be overlooked, while matters in excess of the requirements—redundancies—will be rejected as mere surplusage and the bond will be held valid as though they had not been inserted.[5]

[1] State *v.* Toomer, 7 Rich. (S.C.) L. 216; Sprowl *v.* Lawrence, 33 Ala. 674; City of Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; State *v.* Ring, 29 Minn. 78.

But *contra*, see State *v.* Matheny, 7 Kans. 327. (Compare Carpenter *v.* Titus, 33 Kans. 7.)

[2] See Thompson *v.* Holt, 52 Ala. 491; Beebe *v.* Robinson, 52 Ala. 66; People *v.* Taylor, 57 Cal. 620.

[3] People *v.* Potter, 63 Cal. 127; Pearson *v.* Wilson, 57 Miss. 848.

[4] Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680; Whitehurst *v.* Hickey, 3 Mart. (N. S.) La. 589, 15 Am. Dec. 167; Justices *v.* Wynn, Dud. (Ga.) 22; Boring *v.* Williams, 17 Ala. 510; People *v.* Slocum, 1 Idaho, 62; Quimby *v.* Adams, 11 Me. 332; Boykin *v.* State, 50 Miss. 375; Probate Court *v.* Strong, 27 Vt. 202; Place *v.* Taylor, 22 Ohio St. 317.

[5] Polk *v.* Plummer, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; McCaraher *v.* Commonwealth, 5 Watts.

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§ 269. **Informalities which do not invalidate—Instances.**—Thus that the bond is not taken by the proper persons or in the prescribed manner,[1] or that it was not approved,[2] or was not approved by the designated officer;[3] or that it was not signed or acknowledged in the presence of a particular officer,[4] or that it was given before the time specified,[5] or not until the time fixed had expired,[6] or was not stamped as required,[7] or that the officer who gave it had not been sworn,[8] is immaterial and the bond, if otherwise perfect, will be enforced.

So the fact that the penalty exceeds the amount required by law,[9] or that its recitals are more specific than the statute prescribes,[10] or that it does not recite the title of the officer,[11] or that it was not accompanied by his seal,[12] or that the names of the sureties were not inserted in the body of it,[13] or that it runs to "the People of the State" instead of "the State" as required,[14] or that it names the county as the obligee instead of the People of the State, as prescribed by law,[15] or *vice versa*,[16] or that the justification of the sureties is more comprehensive than required,[17] or that a mistake was made in the name of the obligee,[18] or that his official title was omitted,[19] or that the name

& S. (Penn.) 21, 39 Am. Dec. 106; Matthews *v.* Lee, 25 Miss. 417; State *v.* Rhoades, 6 Nev. 352; *In re* Read, 34 Ark. 239; Berrien County Treasurer *v.* Bunbury, 45 Mich. 79; United States *v.* Bradley, 10 Pet. (U. S.) 343.

[1] State *v.* McAlpin, 4 Ired. (N. C.) 140; State *v.* Perkins, 10 Ired. 333.

[2] People *v.* Edwards, 9 Cal. 286; McCracken *v.* Todd, 1 Kans. 148; Young *v.* State, 7 Gill. & J. (Md.) 253; Green *v.* Wardwell, 17 Ill. 278.

[3] People *v.* John, 22 Mich. 461.

[4] State *v.* Blair, 32 Ind. 313.

[5] Moore *v.* State, 9 Mo. 330.

[6] State *v.* Rhoades, 6 Nev. 352; State *v.* Cooper, 53 Miss. 615; Monteith *v.* Commonwealth, 15 Gratt. (Va.) 172.

[7] State *v.* Garton, 32 Ind. 1.

[8] Bonta *v.* Mercer County Court, 7 Bush (Ky.) 576; Board *v.* Judice, 39 La. Ann. 896, 2 S. Rep. 792.

[9] *In re* Read, 34 Ark. 239; Matthews *v.* Lee, 25 Miss. 417; State *v.* Rhoades, 6 Nev. 352; McCaraher *v.* Commonwealth, 5 Watts & Serg. (Penn.) 21, 39 Am. Dec. 106.

[10] Boring *v.* Williams, 17 Ala. 510.

[11] Wilson *v.* Cantrell, 19 Ala. 642.

[12] Supervisors *v.* Bird, 31 Cal. 66.

[13] Stewart *v.* Carter, 4 Neb. 564.

[14] Tevis *v.* Randall, 6 Cal. 632, 65 Am. Dec. 547; People *v.* Love, 19 Cal. 681.

[15] Bay County *v.* Brock, 44 Mich. 45; Faurote *v.* State, — Ind. —, 11 N. East. Rep. 472, followed in s. c. — Ind. —, 21 N. E. Rep. 663.

[16] State *v.* Horn, — Mo. —, 7 S. W. Rep. 116.

[17] Dorsey *v.* Smyth, 28 Cal. 21.

[18] Charles *v.* Haskins, 11 Iowa, 329, 77 Am. Dec. 148; Pursley *v.* Hayes, 22 Iowa, 11.

[19] Smith *v.* Wingate, 61 Tex. 54.

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of the township for which the officer elected is not given,[1] or that the penalty had not been fixed by the proper officer,[2] or that the bond has no witnesses,[3] or was not under seal,[4] or that the officer was ineligible,[5] or that one of the sureties did not reside in the proper locality,[6] will not invalidate.

§ 270. **Same Subject—Failure to approve or file.**—So the fact that the officers, charged with the duty of approving or filing the bond, have not performed it, will not defeat the validity of the bond or release the sureties upon it.[7]

§ 271. **When defective statutory Bond good as Common Law Obligation.**—And even though the bond be so defective that it can not operate as a bond under the statute, it is not necessarily wholly invalid. For where, in pursuance of the statute and because of it, an attempt is voluntarily made to execute such a bond as is required, and by virtue of the bond so executed the officer is inducted to the office, such bond, though so defective as to be invalid as a statutory bond, will, if not prohibited by statute or opposed to public policy, be held to be valid as a common law obligation and the principal and sureties will be bound by its terms.[8]

[1] State *v.* Kirby, 9 Mo. 295.

[2] State *v.* Lynch, 6 Blackf. (Ind.) 395.

[3] Pierce *v.* Richardson, 37 N. H. 306.

[4] Redwood County *v.* Tower, 28 Minn. 45; Board of Education *v.* Fonda, 77 N. Y. 350; United States *v.* Linn, 15 Pet. (U. S.) 290; United States *v* Hodson, 10 Wall. (U. S.) 395; Morse *v.* Hodsdon, 5 Mass. 318; Thomas *v.* White, 12 Mass. 369; Bank *v.* Smith, 5 Allen (Mass.) 415; Templeton *v.* Commonwealth — Penn. —, 8 Atl. Rep. 167.

[5] Board *v.* Judice, 39 La. 896, 2 S. Rep. 792.

[6] State *v.* Flinn, 77 Ala. 100.

[7] Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368; Whitehurst *v.* Hickey, 3 Martin, (N. S.) La. 589, 15 Am. Dec. 167; Jones *v.* State, 7 Mo. 81; 37 Am. Dec. 180; McCracken *v.* Todd, 1 Kans. 148; Young *v.* State, 7 Gill & J. (Md.) 253; Ashkum *v.* Lake, 12 Ill. App. 25; Boone Co. *v.* Jones, 54 Iowa, 699; Marshall *v.* Hamilton, 41 Miss. 229.

[8] Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680; Claasen *v.* Shaw, 5 Watts (Penn.) 468, 40 Am. Dec. 338; Goodrum *v.* Carroll, 2 Humph. (Tenn.) 490, 37 Am. Dec. 564; Barnes *v.* Brookman, 107 Ill. 317; Gradle *v.* Hoffman, 105 Ill. 147; Pritchett *v.* People, 6 Ill. 525; Fournier *v.* Faggott, 4 Ill. 347; Ballingall *v.* Carpenter, 5 Ill. 306; Todd *v.* Corvell, 14 Ill. 72; United States *v.* Mason, 2 Bond. (U. S. C. C.) 183; United States *v.* Tingey, 5 Pet. (U. S. 115; United States *v.* Linn, 15 Pet. (U. S.) 290; United States *v.* Rogers, 28 Fed. Rep. 607; McRea *v.* McWilliams, 58

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§ 272. **Voluntary Bond in Place of statutory Bond.**—And so where, by law, a bond of a certain nature is required, and the officer instead of giving such an one as the law prescribes, voluntarily gives another with terms and conditions different from those ordained by law, the bond so given will be held binding upon the principal and his sureties.[1]

§ 273. **Purely voluntary Bond not enforced.**—Where, however, there is no provision of law requiring the giving of any bond whatever, it is held that a bond voluntarily given is without consideration and cannot be enforced.[2]

§ 274. **Bond with excessive Condition extorted, void.**—So where the terms and conditions of the bond are prescribed by law, but the officer who takes the bond exacts from the officer giving it, as a condition precedent to his entering or remaining in office and receiving its emoluments, a bond with conditions in excess of those required by law, the bond so given will be deemed to be extorted and will not be enforced.[3]

§ 275. **Bond of de Facto Officer is valid.**—But a bond, otherwise valid, is not rendered void by the fact that the officer who gave it was not in all respects lawfully elected or inducted to the office. If he is an officer *de facto*, exercising the functions of the office, the bond given by him will be binding upon himself and his sureties.[4]

§ 276. **Bond of Deputy valid.**—Statutes which expressly authorize officers to appoint deputies, usually permit or require the taking of bonds from them, and prescribe their terms and

Tex. 328; People *v.* Shannon, 10 Ill. App. 355; Sheppard *v.* Collins, 12 Iowa 570; Garretson *v.* Reeder, 23 Iowa, 21.

[1] United States *v.* Tingey, 5 Pet. (U. S.) 115; United States *v.* Bradley, 10 Pet. (U. S.) 343; United States *v.* Linn, 15 Pet. (U. S.) 290; United States *v.* Hodson, 10 Wall. (U. S.) 395; Supervisors *v.* Coffenbury, 1 Mich. 354.

[2] State *v.* Heisey, 56 Iowa, 404; State *v.* Bartlett, 30 Miss. 624. But *contra*, see Commonwealth *v.* Wolbert, 6 Binn. (Penn.) 292, 6 Am. Dec. 452; Montville *v.* Haughton, 7 Conn. 543. See also note of Prof. Denslow, 1 Mich. An Ed. 355.

[3] United States *v.* Humason, 6 Sawyer, (U. S. C. C.) 199; United States *v.* Tingey, 5 Pet. (U. S.) 115.

[4] Jones *v.* Scanland, 6 Humph. (Tenn.) 195, 44 Am. Dec. 300; Williamson *v.* Woolf, 37 Ala. 298; People *v.* Slocum, 1 Idaho 62; Commonwealth *v.* Teal, 14 B. Monr. (Ky.) 29; Weston *v.* Sprague, 54 Vt. 395.

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conditions. Bonds taken under such statutes would be subject to the same considerations which apply to other official bonds.[1]

But even in the absence of such a statute, an officer, expressly or impliedly authorized to appoint a deputy, may take from such deputy a bond conditioned for the faithful discharge of his duty and for the indemnity of his principal, and such a bond, if not contrary to any statute or opposed to public policy, will be valid as a common law obligation.[2]

§ 277. **Effect of Blanks left unfilled.**—The leaving of a blank unfilled in a bond where the sense is not thereby left obscure or the meaning rendered imperfect will not invalidate the bond,[3] nor will the omission of words necessary to the meaning but readily supplied by the context.[4]

Thus the fact that the names of the principal[5] or the sureties[6] are omitted in the body of the bond, or that the name of the township in and for which he was elected is left blank,[7] will not impair the validity of the bond.

But where the name of the obligee is entirely omitted, and is not fixed by law, the bond is void;[8] and so where the principal, in the joint bond of himself and his sureties, omits to sign the bond.[9]

3. *Liability of Sureties.*

a. Bonds executed in Blank.

§ 278. **When Surety bound by Filling of Blanks.**—The question frequently arises as to the liability of sureties who have signed in blank a bond and delivered it to the officer for completion upon the understanding that it shall be filled by him

[1] Gradle *v.* Hoffman, 105 Ill. 147; Hubert *v.* Mendheim, 64 Cal. 213.

[2] Mott *v.* Robbins, 1 Hill (N. Y.) 21, 37 Am. Dec. 286; Lucas *v.* Shepherd, 16 Ind. 368.

[3] Knisely *v.* Shenberger, 7 Watts. 2 (Penn.) 103; Partridge *v.* Jones, 38 Ohio St. 375.

[4] DeSota County *v.* Dickson, 34 Miss. 150.

[5] Walbridge *v.* Spalding, 1 Doug. (Mich.) 451; Moore *v.* McKinley, 60 Iowa, 367; Rader *v.* Davis, 5 Lea (Tenn.) 536.

[6] Stewart *v.* Carter, 4 Neb. 564; Partridge *v.* Jones, 38 Ohio St. 375.

[7] State *v.* Kirby, 9 Mo. 295.

[8] Phelps *v.* Call, 7 Ired. (N. C.) L. 262, Am. Dec. 327.

[9] People *v.* Hartley, 21 Cal. 585, 82 Am. Dec. 758.

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with a penalty of a certain amount or with specified conditions, and the bond is afterwards filled out by him with a greater penalty or more onerous conditions.

Where such a bond bears upon its face evidence that it has been completed in violation of such a stipulation, or where there is sufficient upon its face to put a reasonably prudent man upon an inquiry by which the facts could have been ascertained, or where the fact of the misapplication of the bond is known to the person who seeks to avail himself of its security, he certainly could not enforce it against the sureties.[1]

But where the bond as actually executed by the principal is fair upon its face, and a person, having a right to rely upon it, has relied upon it in good faith as a perfect bond according to its apparent purport, and has had no notice or knowledge of the breach of the conditions, the surety can not, by the weight of authority and reason, defeat an action by such a person upon the ground that a greater penalty than that authorized was inserted or that it contains more burdensome conditions than those agreed upon.[2]

This rule does not conflict with the more modern rule which permits authority to fill blanks in sealed instruments to be conferred by other than an authority under seal.[3]

[1] Dair *v.* United States, 16 Wall. (U. S.) 1; People *v.* Bostwick, 43 Barb. (N. Y.) 9, 32 N. Y. 445.

[2] White *v.* Duggan, 140 Mass. 18, 54 Am. Rep. 437. "We are aware," said HOLMES, J. "that there are several cases more or less opposed to our conclusion. People *v.* Bostwick, 32 N. Y. 445; Ohio *v.* Boring, 15 Ohio, 507; United States *v.* Nelson, 2 Brock, (U. S. C. C.) 64; Preston *v.* Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153, and cases cited. But we think that the prevailing tendency both in this State and elsewhere has been in the direction we have taken. Thomas *v.* Bleakie, 136 Mass. 568; Butler *v.* United States, 21 Wall. (U. S.) 272; Dair *v.* United States, 16 Wall. (U. S.) 1; South Berwick *v.* Huntress, 53 Me. 89, 87 Am. Dec. 535, State *v.* Pepper, 31 Ind. 76; Millett *v.* Parker, 2 Metc. (Ky.) 608."

To like effect see Bartlett *v.* Board of Education, 59 Ill. 364; City of Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; McCormick *v.* Bay City, 23 Mich. 457.

[3] See Mechem on Agency § 94 and notes.

Upon the older rule requiring authority by sealed instrument, see Williams *v.* Crutcher, 5 How. (Miss.) 71, 35 Am. Dec. 422; Davenport *v.* Sleight, 2 Dev. & Bat. (N. C.) L. 381, 31 Am. Dec. 420; Burns *v.* Lynde, 6 Allen, (Mass.) 305; Preston *v.* Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153; Wunderlin *v.* Cadogan, 50 Cal. 613; Adamson *v.* Hartman, 40 Ark. 58; Upton *v.* Archer, 41 Cal. 85, 10 Am. Rep. 266; Hibblewhite *v.* McMorine,

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b. Conditional Delivery of Bond.

§ 279. **When Surety bound by Delivery contrary to Condition.**—Analogous to the question considered in the preceding section is that of the liability of sureties who have signed a bond upon the condition that the principal shall, before its delivery, procure it to be signed by other sureties also, or that the ownership of more property shall be sworn to, or that any other lawful act or thing shall be done, and the bond has been delivered in violation of the condition.

Here, as in the former case, if the person seeking to enforce the bond knew, or had, either from the face of the bond or from any other source, notice sufficient to have put him, as a reasonably prudent man, upon an inquiry which would have disclosed the facts, he can not enforce it against the sureties in violation of the condition.[1]

But where the bond as delivered is perfect on its face, and appears to have been duly executed by the several obligors and was delivered and used by the principal without disclosing any stipulation, reservation or condition, and third persons, having a

6 M. & W. 200; People *v.* Organ, 27 Ill. 27, 79 Am. Dec. 391; Gilbert *v.* Anthony, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439.

Upon the more modern rule, permitting such authority to be conferred in the same manner as in case of unsealed instruments. See State *v.* Young, 23 Minn. 551; Drury *v.* Foster, 2 Wall. (U. S.) 24; South Berwick *v.* Huntress, 53 Me. 89, 87 Am. Dec. 535; Wiley *v.* Moor, 17 Serg. & R. (Penn.) 438, 17 Am. Dec. 696; Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec, 317; Wooley *v.* Constant, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246. *Ex parte* Decker, 6 Cow. (N. Y.) 60. *Ex parte* Kerwin, 8 Cow; (N. Y.) 118; Humphreys *v.* Guillow, 13 N. H. 335, 38 Am. Dec. 499.

Upon the question of *estoppel* see Swartz *v.* Ballou, 47 Iowa, 188, 29 Am. Rep. 470; Phelps *v.* Sullivan, 140 Mass. 36, 54 Am. Rep. 442; Field *v.* Stagg, 52 Mo. 534, 14 Am. Rep. 435; Van Etta *v.* Evenson, 28 Wis. 33, 9 Am. Rep. 485.

[1] Ward *v.* Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749; Pepper *v.* State, 22 Ind 399, 85 Am. Dec. 430; Pawling *v.* United States, 4 Cranch (U. S.) 219; Fletcher *v.* Austin, 11 Vt. 448, 34 Am. Dec. 698; Duncan *v.* United States, 7 Pet. (U. S.) 435.

And in Ward *v.* Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749, it was held that where a bond is drawn with the names of the principal and four sureties, and is signed by but three of them, two of whom sign it upon condition that the fourth shall sign it also, but the third signer makes no such condition, it is not only void as to the two who sign conditionally, but as to the third surety also.

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right to rely upon the bond, have in good faith relied thereon to their prejudice without any knowledge or notice of the condition, stipulation or reservation, they may hold the sureties liable.[1]

The fact that the bond was delivered to a third person and was by him delivered in violation of the condition will not release the sureties.[2]

Where the bond shows by its recitals or by the insertion of the names, as sureties, of more persons than actually sign it, it has been held that this, except where the bond is actually delivered to the obligee by the complaining surety himself,[3] is sufficient evidence to apprise one who would rely upon it that it must have been intended to be signed by other sureties as well.[4]

[1] Taylor County *v.* King, 73 Iowa 153, 5 Am. St. Rep. 666; Carroll County *v.* Ruggles, 69 Iowa 275, 58 Am. Rep. 223; City of Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; Nash *v.* Fugate, 24 Gratt. (Va.) 202, 18 Am. Rep. 640, s. c. 32 Gratt. 595, 34 Am. Rep. 780; State *v.* Potter, 63 Mo. 212, 21 Am. Rep. 440; Trustees of Schools *v.* Sheik, 119 Ill. 579, 59 Am. Rep. 830; Mathis *v.* Morgan, 72 Ga. 517, 53 Am. Rep. 847; Dair *v.* United States, 16 Wall. (U. S.) 1; Brown *v.* Probate Judge, 42 Mich. 501; McCormick *v.* Bay City, 23 Mich. 457; State *v.* Peck, 53 Me. 284; State *v.* Pepper, 31 Ind. 76; Millett *v.* Parker, 2 Metc. (Ky.) 608; Webb *v.* Baird, 27 Ind. 368, 89 Am. Dec. 507; Emmons *v.* Carpenter, 55 Ind. 330; Allen *v.* Marney, 65 Ind. 401, 32 Am. Rep. 73; Smith *v.* Peoria County, 59 Ill. 414; Cutler *v.* Roberts, 7 Neb. 4, 29 Am. Rep. 371; Deardorff *v.* Foresman, 24 Ind. 481; Spitler *v.* James, 32 Ind. 202, 2 Am. Rep. 334; Wild Cat Branch *v.* Ball, 45 Ind. 213; Hunt *v.* State, 53 Ind. 321; Hall *v.* Parker, 37 Mich. 590, 26 Am. Rep. 540; Lyttle *v.* Cozad, 21 W. Va. 183; Mowbray *v.* State, 88 Ind. 324; Rhode *v.* McLean, 101 Ill. 467; Hessell *v.* Johnson, 63 Mich. 623.

Contra, Guild *v.* Thomas, 54 Ala. 414, 25 Am. Rep. 703, followed in Smith *v.* Kirkland, 81 Ala. 345, 1 S. Rep. 276.

[2] Taylor County *v.* King, 73 Iowa 153, 5 Am. St. Rep. 666.

[3] Where the complaining surety had himself delivered the bond, as a perfect and completed instrument, without giving any notice that he expected the other surety to sign, he was held liable. State *v.* Lewis, 73 N. C. 138, 21 Am. Rep. 461. See also Harris *v.* Harris, 23 Gratt. (Va.) 778.

[4] Ward *v.* Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749; Wendlinger *v.* Smith, 75 Va. 317; Markham M. & M. Co. *v.* Kimmell, 87 Ind. 572; Pepper *v.* State, 22 Ind. 399, 85 Am. Dec. 430; Fletcher *v.* Austin, 11 Vt. 448, 34 Am. Dec. 698; Pawling *v.* United States, 4 Cranch (U. S.) 219; Allen *v.* Marney, 65 Ind. 401, 32 Am. Rep. 73.

The mere fact that the obligation clause of the bond in the printed form was filled out so as to read "*sureties*," but no names being filled in as sureties, when the complaining surety signed it, and that the probate judge

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So if a bond, which upon its face purports to be the bond of the principal and his sureties, is not signed by the principal, it is held in some States not to be binding upon the sureties,[1] at least unless it appears that they agreed to be bound without him;[2] but in other States such a bond is held binding upon the sureties where there is no notice or knowledge at the time of delivery that they were not to be liable unless the principal also signed.[3]

§ 280. **Same Subject—Forgery of other Surety's Signature.**—The fact that the signature of another surety was forged is held to constitute no defence to a surety who signed the bond supposing the signature to be genuine.[4]

who accepted the bond wrote in the name of the surety who signed the bond, and changed the word "sureties" to "surety," is not sufficient to disclose that the surety signed only on condition that others should sign also. Brown *v.* Probate Judge, 42 Mich. 501, relying on McCormick *v.* Bay City, 23 Mich. 457.

But where a surety signed bond, and entrusted it to the principal on condition that it should also be signed by another whose name appeared in the body of the bond as co-surety, and the principal did not procure the additional signature, but erased that name and delivered the bond, it was held that the surety was not bound. The fact that the additional name had been placed in the bond and had been erased was enough, as the court held, to put a prudent man upon his guard. Allen *v.* Marney, 65 Ind. 398, 32 Am. Rep. 73.

See also Inhabitants of Readfield *v.* Shaver, 50 Me. 36, 79 Am. Dec. 592.

[1] Bean *v.* Parker, 17 Mass. 603; Russell *v.* Annabel, 109 Mass. 72, 12 Am. Rep. 665; Wood *v.* Washburn, 2 Pick. (Mass.) 24; Ferry *v.* Burchard, 21 Conn. 602; Bunn *v.* Jetmore, 70 Mo. 228, 35 Am. Rep. 425

See also Mayo *v.* Renfroe, 66 Ga. 408.

[2] Johnston *v.* Kimball, 39 Mich. 187, 33 Am. Rep. 372; Hall *v.* Parker, 39 Mich. 287.

[3] Trustees of Schools *v.* Sheik, 119 Ill. 579, 59 Am. Rep. 830; citing State *v.* Bowman, 10 Ohio 445; Loew *v.* Stocker, 68 Penn. St. 226; Herrick *v.* Johnson, 11 Metc. 34; Keyser *v.* Keen, 17 Penn. St. 330; Haskins *v.* Lombard, 16 Me. 142; Grim *v.* School Directors, 51 Penn. St. 219; Williams *v.* Marshall, 42 Barb. 524; Miller *v.* Ferris, 10 Up. Can. 423.

[4] Stern *v.* People, 102 Ill. 540, where the court held that Seely *v.* People, 27 Ill. 173, 81 Am. Dec. 224, is overruled by Stoner *v.* Millikin, 85 Ill. 218, and that People *v.* Organ, 27 Ill. 27, 79 Am. Dec. 391, in so far as it makes a distinction between commercial and other paper is overruled by City of Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; State *v.* Baker, 64 Mo. 167, 27 Am. Rep. 214; Mathis *v.* Morgan, 72 Ga. 517, 53 Am. Rep. 847; Helms *v.* Wayne Agr. Co. 73 Ind. 325, 38 Am. Rep. 147; Linn County *v.* Farris, 52 Mo. 75, 14 Am. Rep. 389, seems to be overruled.

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Thus in a recent case it was held that where a surety on a bond given to the State as security for a bank depositary signs it before another surety, whose name precedes his in the body of the bond, but is forged thereto in the signature, and where the name of the same person, as well as that of another whose name appears before that of the complaining surety in the body of the bond, appears as being signed to an affidavit that they were worth a certain sum, but in fact their names were forged to it; and where the complaining surety intrusts the bond to the president of the bank as an escrow, not to be delivered to the State until these sureties execute it, but the president does deliver it to the governor who is the obligee, the complaining surety is liable thereon.[1]

§ 281. **Same Subject—Erasure of Name of one Surety.**—But where a bond, signed by a number of sureties, had been confided to the principal for delivery, and he before delivery, erased the name of one of the sureties without the consent of the others, and then delivered the bond, it was held that not only were those sureties released who had signed after the one whose name was erased, but those who had signed it before were released also.[2]

c. Liability of Sureties for Defaults of Principal.

§ 282. **Surety's Liability is strictissimi Juris.**—The contract of sureties upon an official bond is subject only to the strictest interpretation. They undertake, in the language of Judge COOLEY, "for nothing which is not within the letter of their contract. The obligation is *strictissimi juris;* and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent."[3]

[1] Mathis *v.* Morgan, 72 Ga. 517, 53 Am. Rep. 847.

[2] State *v.* Craig, 58 Iowa 238, citing "as tending to support" the ruling: Smith *v.* United States, 2 Wall. (U. S.) 219; McCramer *v.* Thompson, 21 Iowa 244; Dickerman *v.* Miner, 43 Iowa 508.

[3] Detroit Savings Bank *v.* Zeigler, 49 Mich. 157, 43 Am. Rep. 456, citing Paw Paw *v.* Eggleston, 25 Mich. 36, 40; Detroit *v.* Leadbeater, 29 Mich. 24; Johnston *v.* Kimball, 39 Mich. 187, 33 Am. Rep. 372; Bullock *v.* Taylor, 39 Mich. 137, 33 Am. Rep. 356; United States *v.* Boyd, 15 Pet (U. S.) 187; State *v.* Cutting, 2 Ohio St. 1; McCluskey *v.* Cromwell, 11 N. Y.

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§ 283. **Extends to official Acts only.**—So the liability of the sureties is to be limited to the *official acts* of the principal only,[1] and is by no means an undertaking against every act that he may chance to commit. As is said in a leading case, "The sureties do not bind themselves to protect the public against every act of their principal, nor do they become his sureties to keep the peace."[2] So it is said "It is an official act, a failure to perform an official duty or performing it in an improper manner, which comes within the scope of the surety's undertaking."[3] And again, "For acts not within the line of official duty and authority, not under color of office, (the officer) may incur personal not official responsibility; and in that personal responsibility, the sureties on his official bond are not involved."[4]

§ 284. **Same Subject—Distinction between Acts done Colore Officii and Virtute Officii.**—Acts done by virtue and authority of the office—*virtute officii*,—are clearly to be regarded as official acts, and render the sureties responsible; but acts done merely under color of the office,—*colore officii*,—do not stand upon so clear a ground. The distinction between the two has been stated thus: "Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do

593; Urmston *v.* State, 73 Ind. 175.

Their liability will not be extended by construction or doubtful interpretation. Taylor *v.* Parker, 43 Wis. 78. "Liability of sureties is not to be extended by construction, but is to be limited to the terms of the obligation, considered according to their true intent and meaning." State *v.* Conover, 4 Dutch (N. J.) 224, 78 Am. Dec. 54.

See also to like effect Clark *v.* Lamb, 76 Ala. 406; Heidenheimer *v.* Brent. 59 Tex. 533.

[1] State *v.* Conover, 4 Dutch. (N. J.) 224, 78 Am. Dec. 54; Gerber *v.* Ackley, 37 Wis. 43, 19 Am. Rep. 751; State *v.* Davis, 88 Mo. 585; Clark *v.* Lamb, 76 Ala. 406; Heidenheimer *v.* Brent, 59 Tex. 533; People *v.* Lucas, 93 N. Y. 585.

[2] State *v.* Conover, 4 Dutch. (N. J.) 224, 78 Am. Dec. 54.

[3] COLE, J. in Gerber *v.* Ackley, 37 Wis. 43, 19 Am. Rep. 751.

[4] McKee *v.* Griffin, 66 Ala. 211; Coleman *v.* Ormond, 60 Ala. 328; Brewer *v.* King, 63 Ala. 511; Morrow *v.* Wood, 56 Ala. 1; Kelly *v.* Moore, 51 Ala. 364; Moore *v.* Madison Co. 38 Ala. 670; McElhaney *v.* Gilleland, 30 Ala. 183.

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them."[1] For acts of the latter kind, it is held in many States that the sureties are not responsible.[2]

This question has been most frequently raised, and is well illustrated, in cases in which it has been sought to hold liable the sureties of a sheriff, marshal, constable or other executive officer who has seized, upon process against one person, the goods or other property of another, or who has levied upon property which was exempt from such seizure.

Upon the one hand it is said that the officer acts officially, and hence binds his sureties, only when acting in pursuance and by virtue of his writ, and as his writ justifies only the seizure of the property of the defendant therein named, not exempt from execution, his seizure of the goods of a stranger, or his seizure of exempt property is a purely voluntary and unauthorized trespass which neither his writ nor his official character can justify, and which imposes upon the officer merely personal and not official responsibility.[3]

On the other hand it is said that the undertaking of the sureties is that their principal will well and faithfully execute the duties of his office, and that he can not be deemed to have done so when he seizes the property of a stranger or levies upon property exempt from execution. There is, therefore, such a breach of the condition of the bond as renders the sureties liable.[4]

[1] People *v.* Schuyler, 4 N. Y. 187; Gerber *v.* Ackley, 37 Wis. 43, 19 Am. Rep. 751.

[2] See cases cited in following note.

[3] State *v.* Conover, 4 Dutch. (N. J.) 224, 78 Am. Dec. 54; State *v.* Long, 8 Ired. (N. C.) 415; State *v.* Brown, 11 Ired. 141; Gerber *v.* Ackley, 32 Wis. 233, 37 Wis. 43, 19 Am. Rep. 751; Governor *v.* Hancock, 2 Ala. 728; McElhaney *v.* Gilleland, 30 Ala. 183; Brown *v.* Mosely, 11 Smedes & M. (Miss.) 354; Jenkins *v.* Lemonds, 29 Ind. 294; Carey *v.* State, 34 Ind. 105

[4] Carmack *v.* Commonwealth, 5 Binn. (Penn.) 184; Brunott *v.* McKee, 6 Watts & S. (Penn.) 513; Archer *v.* Noble, 3 Greenl. (Me.) 418; Harris *v.* Hanson, 2 Fairf. (Me.) 241; Greenfield *v.* Wilson, 13 Gray, (Mass.) 384; Tracy *v.* Goodwin, 5 Allen (Mass.) 409; State *v.* Jennings, 4 Ohio St. 418; Sangster *v.* Commonwealth, 17 Gratt. (Va.) 124; Commonwealth *v.* Stockton, 5 T. B. Mon. (Ky.) 192; Jewell *v.* Mills, 3 Bush (Ky.) 62; State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563; State *v.* Fitzpatrick, 64 Mo. 185; Charles *v.* Haskins, 11 Iowa 329, 77 Am. Dec. 148; Turner *v.* Killian, 12 Neb. 580; Holliman *v.* Carroll, 27 Tex. 23, 84 Am. Dec. 606; Van Pelt *v.* Littler, 14 Cal. 194; United States *v.* Hine, 3 McAr. (D. C.) 27; Lammon *v.* Feusier, 111 U. S. 17.

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The non-liability of the sureties in such cases is maintained in New Jersey,[1] North Carolina,[2] Texas,[3] and Wisconsin,[4] and perhaps in Alabama,[5] Indiana[6] and Mississippi.[7]

But the rule of liability is not only supported by the soundest reasons of policy, but is maintained by the great preponderance of authority, being adopted in California,[8] Iowa,[9] Illinois,[10] Kentucky,[11] Maine,[12] Massachusetts,[13] Michigan,[14] Missouri,[15] Nebraska,[16] New York,[17] Ohio,[18] Pennsylvania,[19] Texas,[20] Virginia,[21] Washington,[22] the District of Columbia,[23] and the Supreme Court of the United States.[24]

§ 285. **Same Subject—Sureties for one Office not liable for Defaults in another.**—Sureties who have undertaken to become responsible for the defaults of their principal in respect to a particular office are not liable for the defaults of the same principal in his character as the incumbent of another and independent

[1] State *v.* Conover, 4 Dutch. (N. J.) 224. 78 Am. Dec. 54.

[2] State *v.* Long, 8 Ired. (N. C.) 415; State *v.* Brown, 11 Ired. 141.

[3] Heidenheimer *v.* Brent, 59 Tex. 533.

[4] Gerber *v.* Ackley, 32 Wis. 233; Gerber *v.* Ackley, 37 Wis. 43, 19 Am. Rep. 751.

[5] See Governor *v.* Hancock, 2 Ala. 728; McElhaney *v.* Gilleland, 30 Ala. 183; McKee *v.* Griffin, 66 Ala. 211.

[6] See Jenkins *v.* Lemonds, 29 Ind. 294; Carey *v.* State, 34 Ind. 105.

[7] See Brown *v.* Mosley, 11 Smedes & M. (Miss.) 354.

[8] Van Pelt *v.* Littler, 14 Cal. 194.

[9] Charles *v.* Haskins, 11 Iowa 329, 77 Am. Dec. 148.

[10] Horan *v.* People, 10 Ill. App. 21.

[11] Commonwealth *v.* Stockton, 5 T. B. Mon. (Ky.) 192; Jewell *v.* Mills, 3 Bush (Ky.) 62.

[12] Archer *v.* Noble, 8 Greenl. (Me.) 418; Harris *v.* Hanson, 2 Fairf. (Me.) 241.

[13] Turner *v.* Sisson, 137 Mass. 191; Greenfield *v.* Wilson, 13 Gray (Mass.) 384; Tracy *v.* Goodwin, 5 Allen (Mass.) 409.

[14] People *v.* Mersereau, — Mich. —, 42 N. W. Rep. 153.

[15] State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563.

[16] Turner *v.* Killian, 12 Neb. 580; Noble *v.* Himeo, 12 Neb. 193.

[17] People *v.* Schuyler, 4 N. Y. 173; Mayor *v.* Sibberns, 3 Abb. App. 266; Cumming *v.* Brown, 43 N. Y. 514. See People *v.* Lucas, 93 N. Y. 585, distinguishing People *v.* Schuyler.

[18] State *v.* Jennings, 4 Ohio St. 418. See also Hubbard *v.* Elden, 43 Ohio St. 380.

[19] Carmack *v.* Commonwealth, 5 Binn. (Penn.) 184; Brunott *v.* McKee, 6 Watts & Serg. (Penn.) 513.

[20] Holliman *v.* Carroll, 27 Tex. 23, 84 Am. Dec. 606, but see Heidenheimer *v.* Brent, 59 Tex. 533.

[21] Sangster *v.* Commonwealth, 17 Gratt. (Va.) 124.

[22] Mace *v.* Gaddis, — Wash. —, 13 Pac. Rep. 545.

[23] United States *v.* Hine, 3 McAr. (D. C.) 27.

[24] Lammon *v.* Feusier, 111 U. S. 17.

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office,[1] unless the duties of the second office were by law then made a part of the regular duties of the first,[2] or unless the duties of the second office were such as the officer, as incumbent of the first office, might naturally and legally be called upon to perform.[3]

Thus the sureties of a clerk of court are not responsible for the defaults of the same person while acting as a receiver,[4] nor of a register in chancery while officiating as probate judge,[5] nor of a sheriff while acting as trustee.[6]

But if the duties of the second office are, *ex officio*, part of the duties of the first,[7] or if the law requires the incumbent of the first to perform the duties of the second,[8] the sureties on the bond for the first office, will, unless such a liability is expressly excluded, be liable for defaults in the performance of the second.

§ 286. **Sureties bound for Default occurring during Term only.**—Sureties upon the bond of an officer elected or appointed for a fixed or ascertained term, are, unless they have expressly assumed a greater responsibility, bound only for such defaults as may occur during the term for which they became sureties.[9]

This is clearly so where the bond itself specifies the period. If the bond is silent as to the length of the term, the statute fixing the length is to be regarded and read as a part of the contract.[10]

[1] State *v.* Odom, 86 N. C. 432; Syme *v.* Bunting, 91 N. C. 48; Kerr *v.* Brandon, 84 N. C. 128; Wilmington *v.* Nutt, 80 N. C. 265; State *v.* Davis, 88 Mo. 585; Waters *v.* Carroll, 9 Yerg. (Tenn.) 102; Williams *v.* Bowman, 3 Head. (Tenn.) 681; State *v.* Blakemore, 7 Heisk. (Tenn.) 638; Hammer *v.* Kaufman, 39 Ill. 87.

[2] Satterfield *v.* People, 104 Ill. 448; Van Valkenbergh *v.* Paterson, 47 N. J. L. 146.

[3] Hubbard *v.* Elden, 43 Ohio St. 380.

[4] State *v.* Odom, 86 N. C. 432; Syme *v.* Bunting, 91 N. C. 48.

[5] McKee *v.* Griffin, 66 Ala. 211.

[6] State *v.* Davis, 88 Mo. 585.

[7] Van Valkenbergh *v.* Patterson, 47 N. J. L. 146.

[8] Satterfield *v.* People, 104 Ill. 448.

[9] People *v.* Toomey, 122 Ill. 308, 13 N. East Rep. 521; Rogers *v.* State, 99 Ind. 218; Yost *v.* State 80 Ind. 350; Ohning *v.* Evansville, 66 Ind. 59; Stern *v.* People, 96 Ill. 475; Potter *v.* Board of Trustees, 11 Ill. App. 280; Van Sickel *v.* Buffalo County, 13 Neb. 103, 42 Am. Rep. 753; Inhabitants *v.* Stanley, 47 Me. 515, 74 Am. Dec. 501; Inhabitants *v.* Randall, 105 Mass. 295, 7 Am. Rep. 519; Mahaska County *v.* Ingalls, 16 Iowa 81; Bessinger *v.* Dickerson, 20 Iowa 260; Lowry *v.* State, 64 Ind. 421; State *v.* Hauser, 63 Ind. 155; Farrar *v.* United States, 5 Pet. (U. S.) 373; United States *v.* Boyd, 15 Pet. 187; United States *v.* Linn, 1 How. (U. S.) 104; Myers *v.* United States, 1 McLean 492.

[10] People *v.* Toomey, 122 Ill. 308, 13 N. E. Rep. 521.

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The sureties, therefore, can be held responsible neither for those defaults of the officer which occurred before they became sureties,[1] nor for those happening after the term for which they agreed to be bound has expired,[2]

Where the office is, by the law or usage by which it is created, an annual one, the bond covers only the official acts of the year for which it was given.[3]

And even though the statute, fixing the term, declares that the officer shall hold for a given term, and until his successor is elected, the sureties, if liable at all after the expiration of that term, can be held liable for such defaults only as occur within a reasonable time after the expiration of the term within which such successor might have been chosen although he may not, in fact, have been chosen.[4]

But the fact that the bond contains the clause which, in terms, extends the liability until another is chosen, does not, like the statutory clause of the same import, extend the legal liability beyond the expiration of the year.[5]

The condition for the appointment of "another" officer is satisfied by the re-appointment of the same officer, and the sure-

[1] State *v.* Alsup, 91 Mo. 172, 4 S. W. Rep. 31; Webster County *v.* Hutchinson, 60 Iowa 721; State *v.* Orr, 12 Lea (Tenn.) 735.

[2] State *v.* Powell, 40 La. Ann. 241, 4 South. Rep. 447; Mayor *v.* Crowell, 40 N. J. L. 207, 29 Am. Rep. 234; Mayor *v.* Horn, 2 Harr. (Del.) 190; Commissioners *v.* Greenwood, 1 Desaus. Eq 450; Chelmsford *v.* Demarest, 7 Gray (Mass.) 1; Leadley *v.* Evans, 2 Bing. 32; Liverpool Co. *v.* Harpley, 6 East 507; Peppin *v.* Cooper, 2 B. & Ald. 431; Bigelow *v.* Bridge, 8 Mass. 275; People *v.* Toomey, 25 Ill. App. 46; Lauderdale *v.* Alford, 65 Miss. 63.

[3] Norridgewock *v.* Hale, 80 Me. 362, 14 Atl. Rep. 943; Arlington *v.* Merricks, 2 Saund. 411; Bigelow *v.* Bridge, 8 Mass. 275.

[4] County of Scott *v.* Ring, 29 Minn. 398; Mayor of Rahway *v.* Crowell, 11 Vroom (N. J.) 207, 29 Am. Rep. 224; Mutual Loan Assn. *v.* Price, 16 Fla. 204, 26 Am. Rep. 703; State Treasurer *v.* Mann, 34 Vt. 371, 80 Am. Dec. 688; Wapello County *v.* Bigham, 10 Iowa 39, 74 Am. Dec. 370; Welch *v.* Seymour, 28 Conn. 387; Mayor of Wilmington *v.* Horn, 2 Harr. (Del.) 190; Dover *v.* Twombley, 42 N. H. 59; Bigelow *v.* Bridge, 8 Mass. 275; Chelmsford County *v.* Demarest, 7 Gray (Mass.) 1.

Contra, see BERRY, J., in County of Scott *v.* Ring, 29 Minn. 398; Dumphy *v.* Whipple, 25 Mich. 10.

[5] Norridgewock *v.* Hale, 80 Me. 362, 14 Atl. Rep. 943; Amherst Bank *v.* Root, 2 Metc. (Mass.) 542; Chelmsford Co. *v.* Demarest, 7 Gray (Mass.) 4; Dover *v.* Twombley, 42 N. H. 50.

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ties upon his bond for the first term are not bound after his re-appointment.[1]

§ 287. **Same Subject—Sureties for second Term.**—In accordance with the principles laid down in the foregoing section, it is held that sureties, upon the bond of an officer continued in office for a second or other successive term, are not liable for defaults which occurred during a preceding term, or for moneys which should have been in his hands at the beginning of his second term but which he had appropriated to his own use during his first term,[2] unless, of course, they were also his sureties for that term; and it is always open for them to show that the default complained of did, in fact, occur during a previous term for which they were not sureties.[3] In such a case the sureties for the previous term are alone liable.[4]

In the absence, however, of any showing as to the time when the default actually occurred, it will be presumed that it took place during the last term, and the sureties for that term will be liable.[5] The burden of overcoming this presumption is upon the sureties.[6]

Where the officer has used moneys coming into his hands offic-

[1] Citizens' Loan Association *v.* Nugent, 11 Vroom. (N. J.) 215, 29 Am. Rep. 230.

[2] Rogers *v.* State, 99 Ind. 218; Stern *v.* People, 96 Ill. 475; County of Scott *v.* King, 29 Minn. 398; Yoakley *v.* King, 10 Lea. (Tenn.) 67; Pape *v.* People, 19 Ill. App. 24; Potter *v.* Trustees, 11 Ill. App. 280; Webster County *v.* Hutchinson, 60 Iowa, 721; State *v.* Orr, 12 Lea. (Tenn.) 725; Pine County *v.* Willard, 39 Minn. 125, 39 N. W. Rep. 71; Crawn *v.* Commonwealth, 84 Va. 282, 4 S. E. Rep. 721; State *v.* Churchill, 48 Ark. 426, 3 S. W. Rep. 352; State *v.* Alsup, 91 Mo. 172, 4 S. W. Rep 31; Heppe *v.* Johnson, 73 Cal. 265, 14 Pac. Rep. 833; State *v.* Finn, 23 Mo. App. 290; Detroit *v.* Weber, 29 Mich. 24; Paw Paw *v.* Eggleston, 25 Mich. 36; Vivian *v.* Otis, 24 Wis. 518, 1 Am. Rep. 199; Inhabitants *v.* Randall, 105 Mass. 295, 7 Am. Rep. 519; Bissell *v.* Saxton, 66 N. Y. 55, s. c. 77 N. Y. 191; Thompson *v.* McGregor, 81 N. Y. 592; Coons *v.* People, 76 Ill. 383.

[3] Webster County *v.* Hutchinson, 60 Iowa, 721; Pine County *v.* Willard, 39 Minn. 125, 39 N. W. Rep. 71; Stern *v.* People, 96 Ill. 475.

[4] Coons *v.* People, 76 Ill. 383.

[5] Heppe *v.* Johnson, 39 Cal. 265, 14 Pac. Rep. 833; Pape *v.* People, 19 Ill. App. 24; Pine County *v.* Willard, 39 Minn. 125, 39 N. W. Rep. 71; Kelley *v.* State, 25 Ohio St. 567.

But see Trustees *v.* Smith, 88 Ill. 181.

[6] Pine County *v.* Willard, 39 Minn. 125, 39 N. W. Rep. 71; Kelly *v.* State, 25 Ohio St. 567; Bruce *v.* United States, 17 How. (U. S.) 437; Hetten *v.* Lane, 43 Tex. 279.

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ially during the second or other subsequent term, to make good a default committed by him in the first or other prior term, the sureties upon his bond for the second or other subsequent term will be liable,[1] and the fact that the public officers, charged with the duty, failed to require the officer to account at the close of the prior term,[2] or extended the time for such accounting,[3] or that, with knowledge of his default, they accepted the bond for the subsequent term,[4] will not relieve the sureties for the subsequent term.

But while the sureties for a subsequent term are not liable for defaults or misappropriations occurring before their term, they are of course liable for all official defaults occurring during the term, and they are thus liable for any defalcation in the amount of funds in the hands of their principal at the commencement of their term and carried forward from the prior term.[5]

§ 288. **Same Subject—How when Time of Default can not be ascertained.**—Where, however, it cannot be ascertained in which of several successive terms the deficiency arose, equity, it is said, will apportion it ratably upon all of the several bonds.[6]

§ 289. **Same Subject—How far Officer's Accounts conclusive upon Sureties.**—It therefore becomes material to inquire how far the sureties upon an official bond are bound by the accounts, statements and reports of the officer as to the amount in his hands during the term.

It is held in a number of cases that such accounts, statements and reports are not only conclusive upon the officer, but upon

[1] Pine County *v.* Willard, 39 Minn. 129, 39 N. W. Rep. 71; Crawn *v.* Commonwealth, 84 Va. 282, 4 S. E. Rep. 721; Gwynne *v.* Burnell, 7 Clark. & F. 572; Inhabitants *v.* Bell, 9 Metc. (Mass.) 499; Cook *v.* State, 13 Ind. 154; Rogers *v.* State, 99 Ind. 218.

[2] Crawn *v.* Commonwealth, 84 Va. 282, 4 S. E. Rep. 721; Paw Paw *v.* Eggleston, 25 Mich. 36.

[3] Crawn *v.* Commonwealth, 84 Va. 282, 4 S. E. Rep. 721.

[4] Pine County *v.* Willard, 39 Minn. 125, 39 N. W. Rep. 71; Crawn *v.* Commonwealth, 84 Va. 282, 4 S. E. Rep. 721.

[5] Board of Education *v.* Fonda, 77 N. Y. 350; United States *v.* Boyd, 15 Peters, (U. S.) 187.

Contra, Sidner *v.* Alexander, 31 Ohio St. 378.

See cases cited in following sections.

[6] State *v.* Churchill, 48 Ark. 426; Phipsburg *v.* Dickinson, 78 Me. 457.

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his sureties as well, and that they are estopped to assert or show that he had not in his hands the amount reported by him.[1]

But other cases hold, and it is believed with better reason, that while such accounts, statements and reports may be *prima facie* evidence of the officer's liability, they are not conclusive upon his sureties, and that the latter may show, if it be the fact, that he had not actually in his hands the amount he reported to be held by him.[2] They may thus show that defalcations apparently taking place within their term actually occurred during a prior term.

§ 290. **Same Subject—How far Judgment against Principal is conclusive upon Sureties.**—Much uncertainty exists also as to how far the sureties upon an official bond are concluded by a judgment against their principal for a breach of the duty secured by the bond.

Where the action is brought upon the bond itself against the

[1] Baker *v.* Preston, 1 Gilm. (Va.) 235; (criticised in later cases, Munford *v.* Overseers, 2 Rand. 313; Jacobs *v.* Hill, 2 Leigh 393; Craddock *v.* Turner, 6 Leigh 116; Crawford *v.* Turk, 24 Gratt. 176); State *v.* Grammer, 29 Ind. 530; (overruled Lowry *v.* State, 64 Ind. 421) Morley *v.* Metamora, 78 Ill. 394, 20 Am. Rep. 266; Boone County *v.* Jones, 54 Iowa, 699, 37 Am. Rep. 229; City of Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; McCabe *v.* Raney, 32 Ind. 309; Pinkstaff *v.* People, 59 Ill. 148; Roper *v.* Lodge, 91 Ill. 518, 33 Am. Rep. 60; Territory *v.* Cook, — Ariz. —, 17 Pac. Rep. 10.

[2] Bissell *v.* Saxton, 66 N. Y. 55; Van Zickel *v.* Buffalo County, 13 Neb. 103, 42 Am. Rep. 753; State *v.* Rhoades, 6 Nev. 352; State *v.* Newton, 33 Ark. 276; United States *v.* Boyd, 5 How. (U. S.) 29; United States *v.* Eckford, 1 How. (U. S.) 250; Nolley *v.* Callaway, 11 Mo. 447; State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204; Hatch *v.* Attleborough, 97 Mass. 533; Inhabitants *v.* Randall, 105 Mass. 295, 7 Am. Rep. 519; Vivian *v.* Otis, 24 Wis. 518, 1 Am. Rep. 199; State *v.* Fullenwider, 4 Ired. (N. C.) 364; Broad *v.* Paris, 66 Tex. 119; Mann *v.* Yazoo, 31 Miss. 574; Supervisors *v.* Bristol, 99 N. Y. 316; Lowry *v.* State, 64 Ind. 421; Ohning *v.* Evansville, 66 Ind. 59; State *v.* Haynes, 79 Ind. 294; Heagy *v.* State, 85 Ind. 260; Lipscomb *v.* Postell, 38 Miss. 477, 77 Am. Dec. 651; Governor *v.* Suton, 4 Dev. & B. (N. C.) 484.

While books and entries made by a county treasurer, or his agent, are *prima facie* evidence against him and his sureties, yet entries made by the agent after the termination of his agency by the death of the treasurer, are not binding on him or his sureties, and are not admissible in evidence against them. Coleman *v.* Pike County, 83 Ala. 326, 3 Am. St. Rep. 746.

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principal and his sureties jointly, they are, of course, bound by the judgment.

But it is where a judgment has first been obtained in an action against the principal alone, and this judgment is afterwards offered, in an action against the sureties upon the bond, as evidence of the fact and extent of their liability, that the question arises.

A distinction is made between cases where the sureties undertake generally that their principal shall faithfully perform the duties of a certain office, and those cases where the undertaking is that the principal shall do a specific act, as to pay a judgment if recovered, or to account before some court or tribunal as in the case of executors, administrators, guardians, receivers and the like. In these latter cases, it is usually held that the judgment recovered,[1] or the order, judgment or decree fixing the amount to be accounted for, is conclusive upon the sureties.[2]

[1] Thus in Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647, the court, per BALDWIN, J. say: There can be no doubt that where a surety undertakes for the principal that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, that the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such cases stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact. Train *v.* Gold, 5 Pick. (Mass.) 380; Lincoln *v.* Blanchard, 17 Vt. 464. See also Riddle *v.* Baker, 13 Cal. 295. It is upon this ground that the liability of bail is fixed absolutely by the judgment against the principal. But this rule rests upon the terms of the contract."

[2] In the case of administrators, sureties are bound, in the absence of fraud, by decree against principal. Storall *v.* Banks, 10 Wall. (U. S.) 583; State *v.* Holt, 27 Mo. 340, 72 Am. Dec. 273; Heard *v.* Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; Ralston *v.* Wood, 15 Ill. 159, 58 Am. Dec. 604; Garber *v.* Commonwealth, 7 Penn. St. 265; Salyer *v.* State, 5 Port. (Ind.) 203; Hobbs *v.* Middleton, 1 J. J. Marsh. (Ky.) 179; Irwin *v.* Backus, 25 Cal. 223.

But see Armistead *v.* Harramond, 4 Hawks (N. C.) 341; Iglehart *v.* State, 2 Gill & J. (Md.) 235; Seat *v.* Cannon, 1 Humph. (Tenn.) 471; Ordinary *v.* Wallace, 1 Rich. (S. C.) 507.

In the case of receivers, see Ball *v.* Chancellor, 47 N. J. L. 125. "Nor does it make any difference," says the court in this case, "whether the duty of the principal to make such accounting be expressly stipulated for in the instrument composing the suretyship, or such obligation is merely to be necessarily inferred from the nature of the business in question."

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In the former cases, however, the authorities range from the one extreme that the judgment is not admissible at all against the sureties,[1] or at least if they were not notified of the suit and given an opportunity to defend,[2] to the other extreme that such judgment is conclusive of the fact and amount of the sureties' liability.[3]

But the true rule seems to be that laid down, in an early case in Massachusetts, by Chief Justice SHAW, that "When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for the failure of the performance of such duty, if not conclusive, is *prima facie* evidence, in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is *prima facie* evidence, to stand until impeached or controlled, in whole or in part, by countervailing proofs."[4]

In North Carolina, the judgment is, by statute, made presumptive only.[5]

[1] Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647, citing McKellar *v.* Bowell, 4 Hawks (N. C.) 34; Munford *v.* Overseers, 2 Rand. (Va.) 313; Beal *v.* Beck, 3 Har & M. (Md.) 242.

[2] Douglass *v.* Howland, 24 Wend. (N. Y.) 35; Jackson *v.* Griswold, 4 Hill (N. Y.) 522; Slee *v.* Bloom, 20 Johns. (N. Y.) 669, 10 Am. Dec. 273; Carmichael *v.* Governor, 3 How. (Miss.) 236; Carmack *v.* Commonwealth, 5 Binn. (Penn.) 184.

[3] Fay *v.* Ames, 44 Barb. (N. Y.) 327; Masser *v.* Strickland, 17 Serg & R. (Penn. 354, 17 Am. Dec. 668; Eagles *v.* Kern, 5 Whart. (Penn.) 144; Evans *v.* Commonwealth, 8 Watts. (Penn.) 399; Musselman *v.* Commonwealth, 7 Penn St. 240; McMicken *v.* Commonwealth, 58 Penn. St. 221; Giltinan *v.* Strong, 64 Penn. St. 242; Commonwealth *v.* Smith, 4 Phila. 51; Dane *v.* Gilmore, 51 Me. 544; Tracy *v.* Goodwin, 5 Allen, (Mass.) 409.

[4] City of Lowell *v.* Parker, 10 Metc. (Mass.) 309, 315, 43 Am. Dec. 436. To same effect, Stephens *v.* Shafer, 48 Wis. 54, 33 Am. Rep. 793; Graves *v.* Buckley, 25 Kans. 249, 37 Am. Rep. 249; Fay *v.* Edmiston, 25 Kans. 439, 37 Am. Rep. 252, n.; Charles *v.* Haskins, 14 Iowa 471, 83 Am. Dec. 378; Crawford *v.* Word, 7 Ga. 445; Taylor *v.* Johnson, 17 Ga, 521; Mullen *v.* Scott, 9 La. Ann. 173; Treasurer *v.* Temples, 2 Bail. (S. C.) 362; Atkins *v.* Baily, 9 Yerg. (Tenn.) 111; People *v.* Mersereau, — Mich. —, 43 N. W. Rep. 153.

As to the Ohio rule, see State *v.* Colerick, 3 Ohio 487; State *v.* Jennings, 14 Ohio St. 73.

Subsequently to City of Lowell *v.* Parker, *supra*, the judgment was held to be conclusive evidence in Massachusetts: Tracy *v.* Goodwin, 5 Allen 409.

[5] State *v.* Smith, 95 N. C. 396;

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§ 291. **Same Subject — Appropriation of Payments.**—The sureties for each term being thus liable for those defaults or defalcations only which occur during the term for which they became security, it is evidently just and equitable that the sureties for any term should have any moneys properly received on account of that term applied to the reduction of their liability.[1]

Thus where a collecting officer, who is in default for a prior term, properly pays over in a subsequent term, according to his bond, money received during that term, the government officers cannot, even with the consent of the collector, apply the money so received upon the defalcation of the previous term, and by thus creating an apparent deficit at the end of the subsequent term, hold the sureties for that term liable for it.[2]

So where a county treasurer, having served two successive terms, was a defaulter at the end of each, and afterwards made payments upon the aggregate without any designation as to their application by anyone, the money so paid being derived from two sources: 1. From loans and investments of the money for which he was in default, and 2. From sources having no connection with the office, it was held, in a suit upon the first bond, that payments from funds of the first class should be appropriated to the defalcations of the respective terms from the moneys of which the loans and investments were made, in proportion to the amounts appropriated from each. As to the moneys of the second class, however, the court held that, inasmuch as the sureties upon each bond were equally solvent, the application should be made to the debt of the first term, as the older debt, in accord-

Moore *v.* Alexander, — N. C. —, 1 S. E. Rep. 526.

[1] United States *v.* Irving, 1 How. (U. S.) 250; Rogers *v.* State, 99 Ind. 218; Pine County *v.* Willard, 39 Minn. 125, 39 N.W. Rep. 71; State *v.* Alsup, 91 Mo. 172, 4 S. W. Rep. 31; State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204.

[2] United States *v.* Irving, 1 How. (U. S.) 250. And to the same effect, see United States *v.* January, 7 Cranch (U. S.) 572; Jones *v.* United States, 7 How. (U. S.) 688; Pickering *v.* Day, 3 Houst. (Del.) 474, 95 Am. Dec. 291; Boring *v.* Williams, 17 Ala 525; Porter *v.* Stanley, 47 Me. 518; Myers *v.* United States, 1 McLean, 495; Postmaster-General *v.* Norvell, Gilpin 106; State *v.* Middleton, 57 Tex. 185.

But in Postmaster-General *v.* Furber, 4 Mason 333, and United States *v.* Wardwell, 5 Mason 82, J. STORY questions the effect of the decision in United States *v.* January, 7 Cranch 572, *supra*, and to the case in 5 Mason appends a long note in explanation of his views.

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ance with the rule laid down in an earlier case,[1] that "When a person owes upon several distinct accounts, he has a right to direct his payments to be applied to either, as he chooses; but if he pays generally, then the creditor may apply as he elects; and if neither makes a specific application, then the court will usually make the application, first to the most precarious security, or to the oldest debt."[2]

§ 292. **Same Subject.—The contrary View.**—But, on the other hand, it has been said in a Missouri case:[3] "Although the law, when it falls to its lot to appropriate payments, will not suffer the revenue received under one term to be applied to the satisfaction of a defalcation incurred under another term, when there is a different set of securities for each term, yet if the officer himself will make the misappropriation, and the money is received in good faith by the party to whom the officer is indebted, such misappropriation cannot be avoided, and it will be binding on the sureties for the term during which it was collected." And "if the officer does not make the application of payment, the creditor may. If it is shown that the creditor has made application of the payment in good faith towards the extinguishment of the prior indebtedness, the sureties on the last bond will be bound by such application. It is only when the law makes the application of the payments that the second set of sureties is entitled to the sums that may be shown to have been received under their bond."[4]

In another case it is said that, in cases of successive bonds with different sureties, the creditor, *if he be informed of the source from which the money came*, cannot apply it upon a prior debt, even with the consent or by the direction of the principal debtor.[5]

[1] King *v.* Andrews, 30 Ind. 429.

[2] Rogers *v.* State, 99 Ind. 218. See also Frost *v.* Mixsell, 38 N. J. Eq. 586, 602.

[3] State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204, by Scott, J.

[4] Citing Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 403.

[5] Chapman *v.* Commonwealth, 25 Gratt. (Va.) 721, 751. In this case the court approve the rule laid down by Judge Story in Postmaster-General *v.* Furber (1827), 4 Mason 333, and United States *v.* Wardwell (1828), 5 Mason 82, and lay down the following rules:

"A payment by a debtor who owes several debts to a creditor, is to be applied to one or the other of the debts: First, as the debtor may direct at or

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But the weight of authority seems to sustain the rule, laid down at the beginning of the section, that the general principles governing the application of payments between private individuals does not apply between collecting officers and their sureties on the one hand and the accounting officers of the government on the other, and that neither the collector himself nor the accounting officers can so apply the funds as to affect the right of the successive sets of sureties to have the funds received on account of any year or term applied to that year or term.[1]

Where the officer serves for two successive terms, it is held

before the time of making such payment; and such direction may be given expressly or by implication. Secondly, if the debtor give no such direction, then the creditor may make the application, according to his pleasure; and he may make it, either at the time of such payment or afterwards, before the commencement of any controversy on the subject; though after he has once made the application, he can not change it to another without the consent of all other persons concerned. Such application by a creditor may also be made either expressly or by implication. If he enter the debts and credits in a general account, as they occur, this will be considered, in the absence of any evidence to the contrary, as a general application of the credits to the debits in the order of time in which the latter occur, thus paying first the antecedent debts. Thirdly, if neither the debtor nor the creditor make the application, then the law will make it, according to the circumstances of each particular case; and if there be no other controlling circumstance, the application will be made according to the order of time, paying first the oldest debt. But if the debts be due by a collector or other receiver of money under bonds with different sets of sureties, then the law will so apply the payments, if possible, as that the money collected under one bond shall be applied to the relief of the sureties in that bond respectively. And the creditor in such a case, if he be informed as to the source from which the money with which a payment may have been made was derived can not apply it otherwise, even with the consent or by the direction of the principal debtor."

Chapman *v.* Commonwealth is approved in Crawn *v.* Commonwealth, 84 Va. 282, 4 S. E. Rep. 721.

See also United States *v.* Nicholl, 12 Wheat. (U. S.) 505; Boody *v.* United States, 1 Woodb. & M. 150; Inhabitants *v.* Shaver, 50 Me. 39, 79 Am. Dec. 592.

In Frost *v.* Mixsell, 38 N. J. Eq. 586, 601, REED, J. says: "Had the officer, at the time of payment, made an application of this sum to any particular one of his successive official years, such application, in the absence of any design to defraud sureties of which the county officials were cognizant, would be recognized, and the rights of the sets of sureties would be fixed by the act of the debtor. State *v.* Sooy, 10 Vroom 539."

[1] See cases cited in note 2, page 187.

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that no presumption arises as a matter of law, that all payments made by him into the treasury during the second term, are made out of moneys collected from the revenues of that year, and in extinguishment of his liabilities as collector incurred during that year. If such payments are made after he is properly chargeable with money for the second term, it may be presumed that they were made on account of the indebtedness of that term, but it may be shown to be otherwise.[1]

§ 293. **When official Bonds are cumulative.**—Where an officer holding for a term embracing more than one year is required to file a new bond annually, the several bonds so filed during the same term are considered as cumulative and the sureties upon them will be held liable *pro rata*.[2]

Where, however, the officer is to be re-elected annually, the general rule, already considered, will apply that the sureties for each year are liable for the defaults of that year only.[3]

§ 294. **When special Bond supersedes general.**—Where an officer charged with the performance of general duties in respect of which he gives a general bond, is also required to perform duties of a special kind and to give a special bond for their performance, the special bond is usually held to supersede the general bond as to the special duties, and the sureties upon the general bond will not be held liable for defaults covered by the special bond.[4]

§ 295. **Liability of Sureties for Funds illegally received.**—An officer who has received money for and on account of his principal can not, in general, when called upon to pay it over,

[1] State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204; St. Joseph *v.* Merlatt, 26 Mo. 233, 72 Am. Dec. 207; Draffen *v.* Boonville, 8 Mo. 395; Pine County *v.* Willard, 39 Minn. 125, 39 N. W. Rep. 71.

[2] Moore *v.* Boudinot, 64 N. C. 190; Poole *v.* Cox, 9 Ired. (N. C.) 69, 49 Am. Dec. 410; Jones *v.* Hays, 3 Ired. Eq. 502, 44 Am. Dec. 78.

[3] State *v.* Davis, 7 Ired. (N. C.) 198.

[4] Sureties upon the general bond of a county treasurer are not liable for his defaults in respect to school moneys for which he has given a special bond. State *v.* Young, 23 Minn. 551; County *v.* Tower, 28 Minn. 45; State *v.* Starnes, 5 Lea (Tenn.) 545; State *v.* Mayes, 54 Miss. 417; State *v.* Felton, 59 Miss. 402, distinguishing State *v.* Matthews, 57 Miss. 1; State *v.* Harney, 57 Miss. 863. See also Milwaukee Supervisors *v.* Pabst, 70 Wis. 352.

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defend upon the ground that it was money which his principal had no right to obtain, procure or receive.[1]

And it is held that his sureties are equally estopped.[2] Thus it is held that the sureties on the official bond of a county treasurer are liable for a balance found to be due from him, on a settlement of his account by the auditors, although he was charged therein with scrip issued, during his term, in violation of law, but which he had received, deposited and paid out as money.[3] And so where the public officers have exceeded their legal powers in borrowing money, but the money raised by them has been received by the treasurer, his sureties are liable for his default in keeping and disbursing it.[4]

A fortiori are the sureties liable for money lawfully paid and actually received by the officer in his official capacity, though it was raised in excess of the public need.[5]

So the sureties are liable for moneys actually received by the officer from his predecessor, though there may have been some irregularity in the manner in which they were deposited with the predecessor.[6]

§ 296. **Securities estopped to deny official Character of Principal.**—Sureties who have undertaken to answer for the faithful performance by their principal of the duties of a designated office and whose undertaking has been accepted, are estopped, when called upon to respond for him, to object that he was not eligible[7] or was not duly chosen[8] to the office which he has assumed to execute.

[1] See Mechem on Agency, § 526.

Placer County *v.* Astin, 8 Cal. 303; Clark *v.* Moody, 17 Mass. 145: Hammond *v.* Christie, 5 Robt. (N. Y.) 160; Galbraith *v.* Gaines, 10 Lea (Tenn.) 568.

[2] Franklin *v.* Hammond, 45 Penn. St. 507; Wylie *v.* Gallagher, 46 Penn. St. 205; Boehmer *v.* Schuylkill County, 46 Penn. St. 452.

[3] Wylie *v.* Gallagher, 46 Penn. St. 205.

[4] Boehmer *v.* Schuylkill County, 46 Penn. St. 452. But a contrary conclusion was reached in Frost *v.* Mixsell, 38 N. J. Eq. 586, where it was held that where county officers illegally borrowed money for county purposes by giving notes, and this was received by the collector along with the legal funds of the county, his sureties are not liable for a failure to disburse the borrowed money, but are liable for the failure to pay over the legally received funds.

[5] Sutherland *v.* Carr, 85 N. Y. 105.

[6] Heppe *v.* Johnson, 73 Cal. 265.

[7] Anderson *v.* Johett, 14 La. Ann. 614.

[8] People *v.* Huson, — Cal. —, 20 Pac. Rep. 369: Byrne *v.* State, 50 Miss. 638; Taylor *v.* State, 51 Miss. 79.

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§ 297. **Liability of Sureties for Loss of Funds.**—The liability of the principal, and consequently of his sureties, for a loss of the public funds by the principal without intentional wrong upon his part, is a question of great interest and importance, but one upon which the authorities are in conflict.

The undertaking of the principal, and of his sureties for him, that he will faithfully perform the duties of his office includes, either expressly or impliedly, that he will duly pay over the public funds which come into his hands. The question therefore arises, what loss of the public funds can excuse him and his sureties from this undertaking.

And as obviously no loss can excuse them which is based upon the officer's own negligence or default, the question becomes narrowed to this: What loss occurring without his negligence or default will excuse them?

In respect of this question, four theories, at least, have prevailed. Thus—

§ 298. **Same Subject—One View.**—1. One view is based upon the strict language of the bond. The officer having bound himself and his sureties, without reservation or qualification, by the express terms of his bond that he will duly deliver and pay over the public funds which come into his hands, this obligation "can only be met or discharged by making such delivery or payment,"[1] and that having bound himself by his solemn agreement to do this act, he must be "held liable for its non-performance though it is rendered impossible by events over which he had no control." If the parties had desired exemption in a given contingency, it should have been "so nominated in the bond."[2]

[1] State *v.* Moore, 74 Mo. 413, 41 Am. Rep. 322, citing State *v.* Powell, 67 Mo. 935, 29 Am. Rep. 512; United States *v.* Prescott, 3 How. (U. S.) 578; United States *v.* Morgan, 11 How. (U. S.) 154; United States *v.* Dashiel, 4 Wall. (U. S.) 182; United States *v.* Keehler, 9 Wall. (U. S.) 83; Boyden *v.* United States, 13 Wall. (U. S.) 17.

[2] Union Township *v.* Smith, 39 Iowa 9, 18 Am. Rep. 39, citing Bacon *v.* Cobb, 45 Ill. 47; School Trustees *v.* Bennett, 3 Dutch. (N. J.) 513; Tompkins *v.* Dudley, 25 N. Y. 272, 82 Am. Dec. 349; Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Adams *v.* Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; School District *v.* Dauchy, 25 Conn. 530, 68 Am. Dec. 371; Brumby *v.* Smith, 3 Ala. 123; Reid *v.* Edwards, 7 Port. (Ala.) 508, 31 Am. Dec. 720; Davis *v.* Smith, 4 Greenl. (Me.) 337; Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Stone *v.* Dennis, 3 Port. (Ala.)

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§ 299. **Same Subject—A second View.**—2. A second view, somewhat analogous to the last, is based upon the requirements of the public policy. "Public policy," says McLean, J., "requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense. And it is believed the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of Congress.

As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."[1]

§ 300. **Same Subject—A third View.**—3. A third view is based upon the assumption that, by force of the statutes governing the subject, the officer becomes, in effect, the debtor of the public. His liability, therefore, becomes absolute, and, like other debtors, he is not relieved from liability because he is so unfortunate as to lose, though by unavoidable accident, the money

231; Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 417; Fowler *v.* Bott, 6 Mass. 63; District Township *v.* Morton, 37 Iowa, 550 and distinguishing Ross *v.* Hatch, 5 Iowa 149.

[1] United States *v.* Prescott, 3 How. (U. S.) 578. This view is adopted in Commissioners *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462. The court also approves the view first above referred to, and cites Commonwealth *v.* Comly; 3 Penn, St. 372; Muzzy *v.* Shattuck, 1 Den. (N. Y.) 233; United States *v.* Dashiel, 4 Wall. (U. S) 185; United States *v.* Morgan, 11 How. (U. S.) 153; United States *v.* Thomas, 15 Wall. (U. S.) 338; State *v.* Harper, 6 Ohio St. 607, 67 Am. Dec. 363.

This view is also adopted in a recent case, elaborately considered, in Nevada. State *v.* Nevin, 19 Nev. 162, 3 Am. St. Rep. 873.

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with which he expected to make payment. In legal effect, he is not a mere bailee, but he loses his own money, and can not, therefore, call upon the public to bear the loss.[1]

These views all lead obviously to the enforcement of an exceedingly strict liability.

§ 301. **Same Subject—A fourth View.**—4. But another view less stringent, and in the opinion of the writer, more consonant with reason and justice, has also met with favor, although the cases which maintain it are few.

By this view the officer is regarded as standing in the position of a bailee for hire,[2] and "bound, *virtute officii*, to exercise good

[1] In Perley *v.* Muskegon County, 32 Mich. 132, 20 Am. Rep. 637, it is said: "In regard to county funds, the treasurers are responsible as debtors, and in the case of vacancy the moneys belonging to the treasury are not to be taken possession of specifically, but are to be delivered over on oath by the previous officer if alive, and in case of his death, by his personal representatives. C. L. 1871, § 518. There is no principle which would allow private persons to meddle with county records or county funds in county possession. It can only be on the theory that the treasurer is a debtor, at all events, for the money received by him, and that the title vests in him personally, that his representatives can have anything to do with the funds. *Accordingly his liability is absolute, and not affected by unavoidable loss or accident;* which, in case of bailments, could not fail to release him, without injustice."

See also Colerain *v.* Bell, 9 Metc. (Mass.) 499; Hancock *v.* Hazzard, 12 Cush. (Mass.) 112; Muzzy *v.* Shattuck, 1 Denio (N. Y.) 233; Looney *v.* Hughes, 26 N. Y. 514.

In a late Texas case it is said: "It is too well settled to require discussion that an officer who is a custodian of public money does not occupy the relation of a mere bailee for hire, who is responsible only for such care of the money as a prudent man would take of his own. He is bound to account for and pay over the public money, less his commissions, or his sureties must pay it for him. This has been expressly decided in our own State, and also in frequent decisions of the Supreme Court of the United States. Boggs *v.* State, 46 Tex. 10; Boyden *v.* United States, 13 Wall. (U. S.) 17; United States *v.* Prescott, 3 Howard (U. S.) 578; United States *v.* Morgan, 11 Howard (U. S.) 154; United States *v.* Dashiel, 4 Wallace (U. S.) 182." WILLIE, C. J., in Wilson *v.* Wichita County, 67 Tex. 647. See also Allen *v.* State, 6 Blackf. (Ind.) 252; Morbeck *v.* State, 28 Ind. 86; Halbert *v.* State, 22 Ind. 125; Rock *v.* Stinger, 36 Ind. 346; Steinback *v.* State, 38 Ind. 483; Board of Justices *v.* Fennimore, Coxe (N. J.) 242; Hayes *v.* Grier, 4 Binn. (Penn.) 80.

[2] Cumberland *v.* Pennell, 69 Me. 357, 31 Am. Rep. 284; York County *v.* Watson, 15 S. C. 1, 45 Am. Rep. 674; United States *v.* Thomas, 15 Wall. (U. S.) 344.

In United States *v.* Thomas, 15 Wall. (U. S.) 344, BRADLEY, J., says:

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faith and reasonable skill and diligence in the discharge of his trust, or, in other words, to bring to its discharge that prudence,

"The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desirable, it must be prescribed by statute or exacted by express stipulation. The ordinary rule will be found illustrated by a number of analogous cases. It is laid down by Justice STORY that officers of courts having the custody of property of suitors are bailees, and liable only for the exercise of good faith and reasonable diligence, and not responsible for loss occurring without their fault or negligence. Story on Bailments, § 620. Trustees are only bound to exercise the same care and solicitude with regard to the trust property which they would exercise with regard to their own. Equity will not exact more of them. Story on Bailments, § 620. Lewin on Trusts, 332, 3d ed. They are not liable for a loss of theft without their fault. *Id.* But this exemption ceases when they mix the trust money with their own, whereby it loses its identity, and they become mere debtors. *Ib.* and 2 Story's Eq. Jur. § 1270, and see §§ 1268, 1269; also, 2 Spence's Eq. Jur., 917, 933, 937; Wren *v.* Kirton, 11 Vesey 381; Utica Ins. Co. *v.* Lynch, 11 Paige (N. Y.) 520. Receivers, appointed by the court, though held to a stricter accountability than trustees, on account of their compensation, are nevertheless not liable for a loss without their fault; and they are entitled to manage the property and transact the business in their hands in the usual and accustomed way. Knight *v.* Ld. Plymouth, 3 Atkyns 480; Rowth *v.* Howell, 3 Vesey 566; Lewin on Trusts, 332 3d. ed; Edwards on Receivers, 573 599; White *v.* Baugh, 3 Cl. & Fin. 44. A marshal appointed by a court of admiralty to take care of a ship and cargo is responsible only for a prudent and honest execution of his commission. The Rendsberg, 6 Robinson 142, 'Every man,' says Sir William Scott, 'who undertakes a commission incurs all the responsibility that belongs to a prudent and honest execution of that commission. Then the question comes, What is a prudent and honest execution of that commission? The fair performance of the duties that belong to it * * * He must provide a competent number of persons to guard the property; having so done he has discharged his responsibility, unless he can be affected with fraud, or negligence amounting in legal understanding to fraud.' 6 Robinson 154; see also Burke *v.* Trevitt, 1 Mason 96, 100. A postmaster is bound to exercise due diligence, and nothing more in the care of matter deposited in the postoffice. He is not liable for a loss happening without his fault or negligence. * * * In certain cases, it is true, a more stringent accountability is exacted, as in the case of a sheriff, in reference to prisoners

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caution and attention which careful men usually exercise in the management of their own affairs," but "not responsible for any loss occurring without any fault on his part."

held by him in custody, where the law puts the whole power of the county at his disposal, and makes him liable for an escape in all cases, *except* where it is caused by an act of God or the public enemy; 33 Hen. VI., p. 1; Brooke's Abridgement, tit. Dette, 22; Dalton's Sheriff, 485; Watson on Sheriffs, 140. The exception which thus qualifies the severest exaction of official responsibility known at the common law is worthy of particular notice. * * *

The basis of the common-law rule is founded on the doctrine of bailment. A public officer having property in his custody in his official capacity is a bailee; and the rules which grow out of that relation are held to govern the case. But the legislature can undoubtedly, at its pleasure, change the common-law rule of responsibility. And with regard to the public moneys, as they often accumulate in large sums in the hands of collectors, receivers and depositaries, and as they are susceptible of being embezzled and privately used without detection, and are often difficult of identification, legislation is frequently adopted for the purpose of holding such officers to a very strict accountability. And in some cases they are spoken of as though they were absolute debtors for, and not simply custodians of the money in their hands. In New York, in the case of Muzzy *v.* Shattuck, 1 Denio 233, the court, after a careful examination of the statutory provisions respecting the duties and liabilities of a town collector, came to the conclusion (contrary to its previous decision in the Supervisors *v.* Dorr, 25 Wend. 440), that he was liable as a *debtor*, and not merely as a *bailee*, for the moneys collected by him, and consequently that he could not excuse himself, in an action on his bond, by showing that, without his fault, the money had been stolen from his office.

When, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property, received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility. The mere prescription of duties has nothing to do with the question as to what shall constitute the rule of responsibility in the discharge of those duties, or a legal excuse for the non-performance of them, or a discharge from their obligation. The common law, which is common reason, prescribes that, and statutes, in subordination to their terms, are to be construed agreeably to the rules of the common law. * * *

No ordinary excuse can be allowed for the non production of the money committed to their hands. Still they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the public money except as directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official

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The statute may, of course, impose, or the officer may himself assume, a more onerous responsibility, but in the contemplation of this theory, a greater liability does not result from the simple undertaking to faithfully discharge the duties of the office.[1]

§ 302. **Same Subject—Illustrations of the stricter Rules.**—In pursuance of the stricter views above referred to, it has been held that where the official bond of the treasurer of a school district was conditioned for the fulfillment of his duties "to the best of his ability and according to law," it was no defense to an action against the officer and his sureties upon the bond, that the moneys received by him had been actually consumed by fire, without want of care and diligence on his part;[2] that a county treasurer is liable, upon his bond, for the loss of public funds deposited by him in a bank and lost through its failure, though the bank was reputed solvent, and such deposit was necessary for the safety of the funds,[3] or although he was guilty of no negligence in failing to ascertain its financial condition,[4] or although he deposited the funds in that bank with the consent of the

bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same."

[1] Cumberland *v.* Pennell, 69 Me. 357, 31 Am. Rep. 284; citing Mechanics Bank *v.* Hallowell, 52 Me. 545; Potter *v.* Titcomb, 7 Me. 302.

In United States *v.* Thomas, 15 Wall. (U. S.) 337, SWAYNE, MILLER and STRONG, J. J. dissented. Mr. Justice MILLER, referring to the previous cases of United States *v.* Prescott, 3 How. 578; United States *v.* Morgan, 11 How. 154; United States *v.* Dashiel, 4 Wall. 182, and United States *v.* Keehler, 9 Wall. 83, said: "When the case of United States *v.* Dashiel came before the court, I was not satisfied with the doctrine of the former cases. I do not believe now that on sound principle the bond should be construed to extend the obligation of the depositary beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver if no bond had been given, the object of taking the bond, being to obtain sureties for the performance of that obligation.

Nor do I believe that, prior to these decisions, there was any principle of public policy, recognized by the courts or imposed by the law, which made a depositary of the public money liable for it when it had been lost or destroyed without any fault of negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safekeeping."

[2] Union Township *v.* Smith, 39 Iowa 9, 18 Am. Rep. 39.

[3] State *v.* Moore, 74 Mo. 413, 41 Am. Rep. 322.

[4] State *v.* Powell, 67 Mo. 395, 29 Am. Rep. 512.

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county commissioners,[1] or although the county provided no safe place for making such deposit.[2] *A fortiori* is this so where he deposited the funds in his own name.[3]

So a county treasurer and his sureties have been held liable upon his bond for trust moneys stolen from the safe provided by the county, without any want of care on his part,[4] and for public funds forcibly stolen from him without any fault or negligence on his part.[5]

§ 303. **Same Subject—Illustrations of the more liberal Rules.** —But, on the other hand, in accordance with the more liberal rule regarding custodians of public moneys as bailees for hire, and charged with reasonable skill and diligence in the discharge of his trust, but not liable as an absolute insurer of the safety of the funds, it has been held that a county treasurer and his sureties are not liable, upon a bond conditioned that he "shall well and faithfully attend to the duties of said office and perform all things required by said office to be performed," for a loss of public moneys of which the officer was violently robbed without his fault;[6] nor for a loss of public funds caused by the subsequent failure of a bank in which he had deposited them, the bank being then in good standing.[7]

So in the United States Supreme Court, a collector of public money and his sureties, who had given a bond to keep it safely and pay it over when required, were held to be excused from its obligations where it appeared that the money had been forcibly seized by the rebel authorities against the will and without the fault or negligence of the officer.[8]

d. Release of Sureties.

§ 304. **Sureties released by material Alteration of Contract.** —"It is unquestionably true," says Bouldin, J., in a recent case,

[1] Wilson *v.* Wichita County, 67 Tex. 647.

[2] Lowry *v.* Polk County, 51 Iowa, 50, 33 Am. Rep. 113.

[3] Ward *v.* School District, 10 Neb. 293, 35 Am. Rep. 477.

[4] Commissioners *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462.

[5] State *v.* Nevin, 19 Nev. 162, 3 Am. St. Rep. 873.

[6] Cumberland *v.* Pennell, 69 Me. 357, 31 Am. Rep. 284.

[7] York County *v.* Watson, 15 S. Car. 1, 40 Am. Rep. 675.

[8] United States *v.* Thomas, 15 Wall. (U. S.) 337. See full extract from opinion in this case in the note to the preceding section.

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"that a surety can only be held bound by his contract as he made it, and that he will be discharged if, by any binding agreement for indulgence to his principal or otherwise, his contract is materially altered or varied by the creditor without his consent. And it is also true that this principle applies alike to sureties in official bonds and private obligations. The contract of the surety cannot be so varied or extended in either case without his consent."[1] And, as a general rule, this principle is well settled.[2]

Sureties, therefore, will be released if after the execution of the bond, but before its delivery, a material alteration is made therein without their consent.[3] This has been held to be true even though the alteration was made by their principal, to whom they had confided the bond for delivery.[4]

So if, after the delivery, material alterations are made in the bond by any of the parties thereto but without the consent of the sureties, the latter will be discharged.[5] Unauthorized alterations by a stranger, however, without the privity of the obligor or obligee will not avoid the bond.[6]

Immaterial alterations, which do not change the nature or effect of the instrument or prejudice the rights or interests of the obligors, will not discharge the sureties.[7]

§ 305. **By what Law their Contract interpreted.**—The contract entered into by the sureties is ordinarily to be construed by reference to that law, and that only, which was in effect at the

[1] Commonwealth *v.* Holmes, 25 Gratt. (Va.) 771.

[2] Smith *v.* United States, 2 Wall. (U. S.) 219, where Mr. Justice CLIFFORD says that the "substance of the rule is, that any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he subscribed, will discharge the surety, upon the principle of the maxim *non haec in foedera veni.*" Bonar *v.* McDonald, 3 H. L. Cas. 226; Boston Hat Manufactory *v.* Messinger, 2 Pick. (Mass.) 223; Miller *v.* Stewart, 9 Wheat. 680; Mayhew *v.* Boyd, 5 Md. 102, 59 Am. Dec. 101; Gardiner *v.* Harback, 21 Ill. 129; Darwin *v.* Rippey, 63 N. C. 318.

[3] See cases cited in note 2, *supra.*

[4] State *v.* Craig, 58 Iowa, 238.

[5] See cases cited in note 2, *supra.*

[6] United States *v.* Spalding, 2 Mason (U. S. C. C.) 478, per STORY, J.; Waugh *v.* Bussell, 5 Taunt. 707; Mattison *v.* Atkinson, 3 T. R. 153 note c; Henfree *v.* Bromley, 6 East 309; United States *v.* Cutts, 1 Gall. (U. S. C. C.) 69; Perrott *v.* Perrott, 14 East. 423.

[7] Crawford *v.* Dexter, 5 Sawy. (U. S. C. C.) 201.

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time their contract was made and which they then had in contemplation.[1]

It is, indeed, possible for the sureties, by language clearly showing such an intention, to place their undertaking under the effect of future laws, but where this has not been done their rights, liabilities and duties cannot be materially altered to their detriment by future legislation.[2] Some illustrations of this rule will be found in the following section.

§ 306. **Same Subject—Effect of increasing Duties or changing the Character of Office.**—As a rule, the sureties upon an official bond can be held liable for the faithful performance of those duties only which adhered or were germane to the office at the time their undertaking was entered into, and not for other and different duties added to the office after the execution of the bond.

[1] Commonwealth *v.* Holmes, 25 Gratt. (Va.) 771.

[2] Thus in United States *v.* Powell, 14 Wall. (U. S.) 493, 504, Mr. Justice CLIFFORD says, "It must be admitted that any substantial addition by law to the duties of the obligor of a bond, after the execution of the instrument, materially enlarging his liabilities, will not impose any additional responsibility upon his sureties unless the words of the bond, by a fair and reasonable construction, bring such subsequently imposed duties within its provisions." citing Farr *v.* Hollis, 9 B. & C. 332.

[3] City of Lafayette *v.* James, 92 Ind. 240, 47 Am. Rep. 140; People *v.* Pennock, 60 N. Y. 421; Manufacturers' Nat. Bank *v.* Dickerson, 41 N. J. L. 448, 32 Am. Rep. 237; White Sew. Machine Co. *v.* Mullins, 41 Mich. 339; Mumford *v.* Memphis &c. R R. Co. 2 Lea (Tenn.) 393, 31 Am. Rep. 616.

Thus where a city superintendent of waterworks gave a bond for the proper discharge of his duties and the payment of moneys coming to his hands, at a time when there was no law or ordinance specifying his duties or requiring any bond, but at the same session that the bond was approved an ordinance was passed defining his duties, one of which was to collect water rents, it was held that his sureties were not liable for his default in paying over such rents collected by him. City of Lafayette *v.* James, 92 Ind. 240, 47 Am. Rep. 140.

Where sureties undertook for the faithful performance of duty by their principal as "assistant clerk" in a bank, and, without the knowledge of his sureties, he was promoted through intermediate positions to that of bookkeeper, in which capacity he defaulted, his sureties were held not liable. Manufacturers' Nat. Bank *v.* Dickerson, 41 N. J. L. 448, 32 Am. Rep. 237.

In this case, WOODHULL, J. said:

"That a surety is not to be held beyond the precise terms of his contract is declared by KENT, J. in Ludlow *v.* Simond, 2 Cai. Cas. 1, to be a well settled rule, both at law and in equity, and to be founded on the

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Where the bond is given to secure the faithful execution of a given office and, after the execution of the bond, the whole

most cogent and salutary principles of public policy and justice, s. c. Am. Dec. 291; McMicken *v.* Webb. 6 How. 292; Bowmaker *v.* Moore, 7 Price, 223; Smith *v.* United States, 2 Wall. 219; McCluskey *v.* Cromwell, 11 N. Y. 593.

Resulting from the principles just stated is the familiar rule that the surety is discharged if, without his consent, the principal parties make a new agreement inconsistent with the terms of the original agreement, or in the mode of performing them, Theobold on Principal and Surety, 119 (1 Law Lib. Vol. LXX.); Whitcher *v.* Hall, 5 B. & C. 269; Pitman on Principal and Surety, 166 (Law Lib. Vol. XL.)

From the same principles results also another rule, still more closely applicable to the case before us, namely, that when there is a bond of suretyship given for an officer, and by the act of the obligee the office is materially changed, so as to effect the risk of the surety, the bond, as to him, is avoided.

In Pybus *v.* Gibb, 6 E. & B. 902 (88 Eng. Com. L. 88) a bond was executed by G. and two sureties, conditioned for indemnifying the high bailiff of a county court against liabilities for the misconduct in the office of G. who was appointed by the high bailiff to act under him as bailiff of said court. At the time the bond was executed the jurisdiction of the county court was regulated by statute 9 and 10 Vict. After the execution of the bond the jurisdiction of that court was extended and increased by several statutes. It was held that the statutes had so materially altered the nature of the office of bailiff that the sureties were no longer liable to indemnify the high bailiff, even though the misconduct of G. was in respect of a matter within the jurisdiction conferred by the statute first named, and as to which the duty of the bailiff was not altered by the latter acts.

CAMPBELL, C. J., who delivered one of the opinions in that case, says: 'It may be considered settled law that where there is a bond of suretyship for an officer, and by the act of the parties, or by act of parliament, the nature of the office is so changed that the duties are materially altered, so as to effect the peril of the sureties, the bond is avoided. * * * The question is whether the nature and functions of the office or employment are changed; for if they are, it is not the same office within the meaning of the bond.'

COLERIDGE, J. in the same case, says: 'The rights and liabilities of sureties has often been considered in England and many points are well established. One is, that when the nature of the employment of the principal is so altered by the act either of his employer or the legislature that the risk of his surety is materially altered, the surety has a right to say, 'I did not bargain for this risk; I am discharged."

WIGHTMAN, J., says, in the same case: "It may be taken as a principle of law that a bond by a surety, conditioned for the due performance by his principal of the duties of an office, is rendered null if the office or its duties are so altered as in any degree to increase or vary the risk of the surety, to his possible disadvantage." See also Oswald *v.* Mayor of Berwick, 5 H. L. Cas. 856, 26 Eng. L. & Eq. 85.

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nature of the office is changed, the bond ceases to be obligatory, because the office is no longer the same within the meaning of the bond.[1]

But the fact that duties were imposed upon the officer, different in their nature from those which he was required to perform at the time the bond was executed, does not render it void as an undertaking for the faithful performance of those which he first assumed. It will still remain a binding obligation for what it was originally given to secure.[2]

So the fact that the duties were imposed after the passage of the statute requiring the bond but before the execution of the bond in controversy will not relieve the sureties.[3]

But the language of the bond may well be such as reasonably to embrace duties, of a character corresponding with those required at the date of the bond, even though they were imposed by subsequent enactments.

Thus in Ohio it is held that where the bond is conditioned for the faithful performance of the duties "according to law," it embraces whatever duties are required of the officer during the term covered by the bond whether the statute requiring them was passed before or after the execution of the bond.[4] And similar rulings have been made in other courts.[5]

Sureties of a sheriff are not bound for his default in the performance of duties as a tax collector, imposed upon him by a law passed after the execution of the bond. White *v.* East Saginaw, 43 Mich. 567.

[1] Gaussen *v.* United States, 97 U. S. 584.

[2] Gaussen *v.* United States, 97 U. S. 584; United States *v.* Kirkpatrick, 9 Wheat. (U. S.) 720; Commonwealth *v.* Holmes, 25 Gratt. (Va.) 771.

[3] Marquette County *v.* Ward, 50 Mich. 174.

[4] Dawson *v.* State, 38 Ohio St. 1. In this case the sureties on the bond of a county treasurer were held liable where between the date of the bond and the commencement of the term the county treasurer was by law made *ex officio*, city treasurer, in which capacity the default arose. The court said that the power of the legislature to modify the duties of the officer during his term cannot be doubted, and the exercise of that power must have been within the contemplation of the parties at the time the bond was executed. The case of King *v.* Nichols, 16 Ohio St. 80, was cited and approved.

[5] Mayor *v.* Kelly, 98 N. Y. 467; Board *v.* Quick, 99 N. Y. 138. In United States *v.* Powell, 14 Wall. (U. S.) 493, 501, CLIFFORD, J. says:

"By the recital of the bond it appears that the principal therein named intended, on and after that date, to be engaged in the business of distillers within the fifth collection district of

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§ 307. **Not released by Extension of Time for accounting.**—Laws creating a public office and requiring a bond for its faith-

the state, and the condition of the bond is that they shall, *in all respects*, faithfully comply with *all* the provisions of law in relation to the duties and business of distillers, and that they shall pay all penalties incurred or fines imposed on them for a violation of any of the said provisions. Stronger language to signify an intention to stipulate that the principals in the bond should comply with duties subsequently imposed by law in relation to the business of a distiller could not well be employed, as the language of the bond is that they shall faithfully comply with all the provisions of law in relation to the duties and business of distillers, knowing as all the obligors did that Congress might at any time enact new provisions imposing new duties or vary those already imposed. Bartlette *v.* Governor, 2 Bibb. 586; Minor *v.* Mechanics' Bank, 1 Peters, 73. Both parties, it must be assumed, knew that changes might be made in that behalf at any time, and the defendants must have understood that it never could have been intended that a new bond should be required with every modification made in relation to the duties and business in which the principals in the bond were about to engage. Where a person was elected sheriff and executed a bond to the county conditioned that he would well and faithfully in all things discharge the duties of the office during his continuance in the same, by virtue of his said election, the Supreme Court of Ohio held that the language of the bond was broad enough, not only to embrace any duty imposed at the date of the bond, but any also that might be imposed upon the offices by law during the term for which the bond was given.

King *et al. v.* Nichols *et al.*, 16 Ohio State 82; United States *v.* Bradley, 10 Peters, 343; Cameron *v.* Campbell, 3 Hawks. 285. Bonds in such cases, as well as in cases like the one before the court, are required to secure the faithful discharge of the duties ordinarily imposed upon the principal obligor, without reference to the time when the law was passed imposing the duty, and where, as in this case, the language of the bond is sufficiently comprehensive to embrace duties subsequently imposed, of a character corresponding with those required at the date of the bond, the construction which gives a prospective as well as retrospective operation to the condition of the bond may well be adopted as both reasonable and just to all concerned. White *v.* Fox, 22 Maine, 341; United States *v.* Hodson, 10 Wallace, 406; United States *v.* Tingey, 5 Peters, 127.

Exceptional cases may doubtless arise, as where the condition of the bond is, in terms, or by a fair and reasonable construction, limited to existing duties, or where the appointment is a temporary one, to expire at the end of the next session of the Senate. Different rules are applied in the case of a temporary appointment, as the commission is for a different tenure, and unless there is something in the act under which the first commission issued showing that it contemplated a permanent and continuing responsibility under laws subsequently passed, the rule is that the liability of sureties must be strictly confined to the duties created by the acts passed antecedent to the date of

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ful execution usually provide that the incumbent shall be called upon by designated officials at stated times to account for the moneys received by him by virtue of his office. These laws, however, which require such accounting, though they may have entered into the contemplation of the sureties at the time they signed the bond, are generally held to constitute no part of the *contract* of the surety and the latter is, therefore, not released because the time fixed for such accounting is subsequently altered or extended by law.[1]

"Forming no part of that contract," it is said in one case,[2] "it follows as a necessary consequence, that like any other act of a like nature, the provision may be extended, altered or repealed at the will of the legislature and without the assent of the surety, looking alone to the public interest. And we think, as a general rule, that what in such a case will advance the public good, will at the same time protect the interest of the surety. Indeed the indulgence granted to the officer by the extension of time in this case, is not a contract, but is an ordinary act of legislation for the public good, with no consideration for the extension moving from the officer, and is repealable at the will of the general assembly."

§ 308. **Sureties not released by Laches of Government**

the bond. United States *v.* Kirkpatrick, 9 Wheaton, 730."

But in White *v.* East Saginaw, 43 Mich. 567. GRAVES, J. says that "the law will not intend that duties not yet existing and not germane to the office were within the contemplation of the sureties, or within the proper scope of their undertaking. Gaussen *v.* United States, 97 U. S. 584; Converse *v.* United States, 21 How. (U. S.) 463; Commonwealth *v.* Holmes, 25 Gratt. (Va.) 771. And it must be observed further that in proceeding to ascertain whether the new duties were or were not adventitious, they cannot be considered otherwise as against the sureties unless their affinity to the office is plain and obvious. This rule is one of manifest justice. St. Louis *v.* Sickles, 52 Mo. 122; Mayor *v.* Crowell, 11 Vroom (N. J.) 207, 29 Am. Rep. 224; Citizens Loan Association *v.* Nugent, 11 Vroom 215, 29 Am. Rep. 230; Amherst Bank *v.* Root, 2 Metc. 536; Kitson *v.* Julian, 4 El. & Bl. 854, 30 Eng. L. & Eq. 326."

[1] Commonwealth *v.* Holmes, 25 Gratt. (Va.) 771; Smith *v.* Commonwealth, 25 Gratt. (Va.) 780; Crawn *v.* Commonwealth, 84 Va. 282, 4 S. E. Rep. 721; State *v.* Carleton, 1 Gill. (Md.) 249.

Contra, Davis *v.* People, 1 Gilm. (Ill.) 409; People *v.* McHatton, 2 Gilm. (Ill.) 639.

[2] Commonwealth *v.* Holmes, 25 Gratt. (Va.) 771.

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Agents.—*A fortiori* are the sureties not released by the mere delay, negligence or laches of the government officials in calling the sureties' principal to account, or in pursuing the remedy upon the bond. "The general principle," says Judge STORY, "is that laches is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents: and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities. * * * It is said that the laws require that settlements should be made at short and stated periods; and that the sureties have a right to look to this as their security. But these provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its own officers. *They are merely directory to such officers, and constitute no part of the contract with the surety.* The surety may place confidence in the agents of the government, and rely on their fidelity in office; but he has of this the same means of judgment as the government itself and the latter does not undertake to guarantee such fidelity."[1]

The fact that the delay is great or the laches gross will not alter the rule.[2]

[1] United States *v.* Kirkpatrick, 9 Wheat. (U. S.) 720. To the same effect are United States *v.* Vanzandt, 11 Wheat. 184; United States *v.* Nicholl, 12 Wheat. 509; United States *v.* Boyd, 15 Peters (U. S.) 187; Commonwealth *v.* Holmes, 25 Gratt. (Va.) 771; Smith *v.* Commonwealth, 25 Gratt. (Va.) 780; Crawn *v.* Commonwealth, 84 Va. 282, 4 S. E. Rep. 721; Dox *v.* United States, 1 Peters (U. S.) 318.

People *v.* Jansen, 7 Johns. (N. Y.) 332, 5 Am. Dec. 275, to the contrary is denied by STORY, J., in United States *v.* Kirkpatrick, 9 Wheat. (U. S.) 720, and has been practically overruled in New York; Looney *v.* Hughes, 26 N. Y 514; McKecknie *v.* Ward, 58 N. Y. 541, 17 Am. Rep. 281, where FOLGER, J., says it has not been followed in New York, citing People *v.* Berner, 13 Johns. 383; People *v.* Foot, 19 Johns. 58; People *v.* Russell, 4 Wend. 570; Looney *v.* Hughes, 26 N. Y. 514; and Jones *v.* United States, 18 Wall. (U. S.) 662.

See also Freaner *v.* Yingling, 37 Md. 491; Pittsburgh, &c., R. R. Co. *v.* Shaeffer, 59 Penn. St. 350.

[2] Thus in Dox *v.* Postmaster-General, 1 Pet. (U. S.) 218; MARSHALL, C. J., speaking of United States *v.* Kirkpatrick, 9 Wheat. 720, and

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§ 309. **Sureties not discharged by Concealment of previous Default.**—It is held, in a recent case, that the fact that the government agents knew, at the time they took the bond of an officer with sureties, that he had been a defaulter in a previous term, and that they did not disclose this fact to the sureties, was not a fraud upon the sureties and did not operate to release them from their bond. The government agents, the court held, were under no obligation to voluntarily warn the sureties, nor to protect them from their principal's possible dishonesty in the future by declining to accept their tendered suretyship. If the bond was sufficient, it was the duty of the government agents to accept it.[1]

The same question has also arisen in the case of private agents, and while the prevailing rule seems to be that the creditor is under no obligation to give a voluntary warning,[2] there are numerous and well considered cases which impose it.[3]

United States *v.* Vanzandt, 11 Wheat. 184, says: "These two cases seem to fix the principle that the laches of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond, from the obligation it creates, as firmly as the decisions of this court can fix it."

[1] Pine County *v.* Willard, 19 Minn. 125, 39 N.W. Rep. 71. No cases are cited by the court.

[2] Roper *v.* Sangamon Lodge, 91 Ill. 518, 33 Am. Rep. 60. In this case it was held that the sureties upon the bond of the treasurer of a secret society, conditioned for the faithful application of the trust moneys, cannot escape liability for a misappropriation by the fact the treasurer has misappropriated funds in the preceding year to the knowledge of the officers and members of the society, but not of the sureties, and had been re-elected without any notice of the defalcation to the sureties.

In Home Insurance Co. *v.* Halway, 55 Iowa 571, 39 Am. Rep. 179, the court approve Roper *v.* Sangamon Lodge, *supra*, and held that the creditor is under no obligation to volunteer information of a previous default, citing also, Ham *v.* Greve, 34 Ind. 18; Atlantic, &c. Telegraph Co. *v.* Barnes, 64 N. Y. 385, 21 Am. Rep. 621; Cawley *v.* People, 95 Ill. 249; Remington Sewing Machine Co. *v.* Kezertee, 49 Wis. 409; Atlas Bank *v.* Brownell, 9 R. I. 168, 11 Am. Rep. 231.

Magee *v.* Manhattan L. Ins. Co. 93 U. S. 93, is an interesting case upon this subject, and in line with the cases above cited.

[3] Thus, in Dinsmore *v.* Tidball, 34 Ohio St. 411, it is said: "Admitting that a principal, in accepting a guaranty for the faithful and honest conduct of his agent, is not bound under all circumstances to communicate to the guarantor every fact within his knowledge, which increases the risk, yet we think there can be no doubt, either upon principle or authority, that when an agent has acted dishonestly in his employment, the principal, with a knowledge of the fact,

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At all events, however, active misrepresentation, fraud or concealment as to the previous default, would, in either case, undoubtedly operate to release the sureties.[1]

§ 310. **Same Subject—Duty of notifying Sureties of subsequent Defaults.**—Analogous to that of the preceding section is the question of the duty of the government agents to notify sureties of defaults by their principal occurring during the term for which they have become bound.

This question has not frequently arisen in regard to public officers, but in the case of private agents it has been often raised, and, though the decisions are far from uniform, the decided tendency is toward the rule stated in Massachusetts[2] that "the creditor owes no duty of active diligence to take care of the interest of the surety. It is the business of the surety to see that his principal performs the duty which he has guaranteed,

cannot except a guaranty for his future honesty from one who is ignorant of the agent's dishonesty, and to whom the agent is held out by the principal as a person worthy of confidence. The failure to communicate such knowledge under such circumstances would be a fraud upon the guarantor."

The same ruling has been made in Sooy ads. State, 39 N. J. L. 135; Franklin Bank *v.* Cooper, 36 Me. 179, Smith *v.* Bank of Scotland, 1 Dow 272; Railton *v.* Mathews, 10 Cl. & F. 934. See also Phillips *v.* Foxall, L. R. 7 Q. B. 666, 3 Eng. Rep. 259; Sanderson *v.* Aston, L. R. 8 Ex. 73, 4 Eng. Rep. 452.

[1] Graves *v.* Lebanon Nat. Bank, 10 Bush (Ky.) 23, 19 Am. Rep. 50. In this case defendants became sureties on the official bond of a bank cashier, being induced to do so by a statement published by the directors, according to law, whereby the affairs of the bank appeared to be well managed. The cashier of the bank was a defaulter when the statement was published, of which fact the directors, by the use of slight care, might have learned. In an action on the bond for subsequent embezzlements, it was held that the sureties were not liable; they had a right to believe that, before publishing the statements, the directors had used reasonable diligence in ascertaining the condition of the bank, and, being misled by this statement, were not bound. See also Franklin Bank *v.* Cooper, 36 Me. 179.

[2] Watertown F. Ins. Co. *v.* Simmons, 131 Mass. 85, 41 Am. Rep. 196. In this case an insurance agent had given a bond with sureties for the faithful performance of his duties according to the company's by-laws. A by-law required monthly accounting and paying over. He accounted regularly, but one month neglected to pay over the whole balance due, and after that his indebtedness increased, without notification to the sureties, until it exceeded the penal sum, but it was held that the sureties were not discharged.

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and not that of the creditor.[1] The surety is bound to inquire for himself; and cannot complain that the creditor does not notify him of the state of the accounts between him and his agent, for whom the surety is liable. *Mere inaction of the creditor will not discharge the surety unless it amounts to fraud or concealment.*"[2]

The English rule, however, is otherwise. Thus it is said in a leading case:[3] "We think that in a case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service." And this case has, with some variations, been followed by several of the American courts.[4]

[1] The court cite Wright *v.* Simpson, 6 Ves. 714; Adams Bank *v.* Anthony, 18 Pick. (Mass.) 238; Taft *v.* Gifford, 13 Metc. (Mass.) 187; Tapley *v.* Martin, 116 Mass. 275, and refuse to follow Sanderson *v.* Aston, L. R. 8 Ex. 73, 4 Eng. Rep. 452.

[2] In Atlantic, &c., Telegraph Co. *v.* Barnes, 64 N. Y. 385, 21 Am. Rep. 621, it was held that the sureties upon a bond given by an employee to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming to his hands, are not discharged from a subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employee.

To the same effect is McKechnie *v.* Ward, 58 N. Y. 541, 17 Am. Rep. 281. In Atlas Bank *v.* Brownell, 9 R. I. 168, 11 Am. Rep. 231, it held that it is no defence to the sureties upon the bond of bank cashier that the directors have been negligent in examining his accounts. To avoid the bond on the ground of fraud on the bank or its directors, there must be a fraudulent concealment of some thing material for the surety to know.

[3] Phillips *v.* Foxall, L. R. 7 Q. B 666, 3 Eng. Rep. 259. This case was followed in Sanderson *v.* Aston, L. R. 8 Ex. 73, 4 Eng. Rep. 452; see also Burgess *v.* Eve, L. R. 13 Eq. Cas. 450, 2 Eng. Rep. 379.

[4] In Charlotte, &c., R. R. Co. *v.* Gow, 59 Ga. 685, 27 Am. Rep. 403, it is held that the agent of a corporation being under bond to account and pay over daily, cannot be trusted with more moneys at his sureties' risk after *dishonesty* of the agent is discovered by the corporation. But he may be so

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It is obvious, however, that the application of this rule to the case of public officers must frequently be embarrassing if not impossible, inasmuch as that which "is a most material ingredient in the consideration of the question,"—"the right of the master at once to discharge the servant on discovering his dishonesty, and so place himself in *statu quo*," must in many cases be either wanting altogether, or be capable of exercise only by judicial procedure.

4. *Approval of Bonds.*

§ 311. **Necessity of Approval.**—The statutes requiring bonds to be given usually require that, before they are accepted, they shall be examined and approved by some representative of the government. The purpose of this examination is, obviously, that there shall be some means by which the public may be assured that the bond tendered is sufficient in form and amount and is so executed as to effectuate the objects contemplated in its requirement.

§ 312. **Examination and Approval a public Duty.**—It is also evident that the duty imposed upon the officer charged with the responsibility of examining and approving or rejecting the bond is one owing to the public, and not to the principal or his sureties.

This being so, the officer is under no obligation to look after the interests of the sureties upon the bond or to protect them from loss, and is not liable to them for a loss which they may sustain by reason of his violation of his duty[1] And this rule is not altered by the fact that he is alleged to have violated his duty "wilfully" or "maliciously" or "to oppress" the plaintiff.[2]

§ 313. **Failure to approve, or Defects in Approval do not release Sureties.**—Approval being thus for the protection of the

trusted so long as the circumstances fairly interpreted point, not to moral turptitude, but to a want of diligence or punctuality rather than to a want of integrity.

The court call "special attention" to Pittsburgh, &c., Ry. Co. *v.* Shaefter, 59 Penn. St. 350; Atlas Bank *v.* Brownell, 9 R. I. 168, 11 Am. Rep. 231; McKeeknie *v.* Ward, 58 N. Y. 541, 17 Am. Rep. 281; Phillips *v.* Foxall, L. R. 7 Q. B. 666, 3 Eng. Rep 259, and Sanderson *v.* Aston, L. R. 8 Ex. 73, 4 Eng. Rep. 452.

[1] Held *v.* Bagwell, 58 Iowa 139; Cooley on Torts 379.

[2] Held *v.* Bagwell, 58 Iowa 139.

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public only, it is well settled that where, by virtue of the bond, the officer has been inducted to the office, his sureties can not escape liability for his defaults because the bond was not approved by the proper officer[1] or was not approved at all.[2]

§ 314. **Whether Approval is a ministerial or judicial Act.**— Whether the approval of the bond of a public officer is to be regarded as a judicial or as a ministerial act is a question upon which the authorities are in conflict.

Upon the one hand it is held that, even where the duty is imposed upon judicial officers, the act is essentially a ministerial one; while on the other hand it is said that the act requires the exercise of judgment and discretion and is judicial in its nature. In cases of the first class, it follows that the performance of the duty may be enforced by mandamus,[3] but where the latter view prevails, mandamus will not lie.[4]

In Michigan[5] it is said that the duty is a *quasi* judicial one, and that it is this, at least, seems to be the better view.

[1] People *v.* Johr, 22 Mich. 461.

[2] People *v.* Edwards, 9 Cal. 286; McCracken *v.* Todd, 1 Kans. 148; Young *v.* State, 7 Gill & J. (Md.) 253; People *v.* Wardwell, 17 Ill. 278.

[3] State *v.* County Court, 41 Mo. 221, and 545; State *v.* County Court, 44 Mo. 230; Beck *v.* Jackson, 43 Mo. 117; Oliver *v.* Martin, 36 Ark. 134.

[4] *Ex parte* Harris, 52 Ala. 87, 23 Am. Rep. 559, overruling *Ex parte* Candee, 48 Ala. 386; State *v.* Ely, 43 Ala. 568; *Ex parte* Thompson 53 Ala. 98; Swan *v.* Gray, 44 Miss. 393.

[5] Bay County *v.* Brock, 44 Mich. 45.

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CHAPTER VIII.

OF OFFICERS DE FACTO.

§ 315. Purpose of Chapter.
316. Officer *de Jure* defined.
317. Officer *de Facto* defined.
318. Same Subject—Chief Justice Butler's Definition.
319. Same Subject—Color of Right Necessary.
320. Same Subject—Illustrations.
321. Usurper and Intruder defined.
322. Officer *de Facto* and Officer *de Jure* can not both hold at same time.
323. Two Officers *de Facto* cannot hold at same Time.
324. Cannot be Officer *de Facto* where there is no Office.
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327. But Officer may be *de Facto* though chosen under unconstitutional Statute.
328. Acts of Officer *de Facto* valid as to Public.
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331. Officer *de Facto* cannot recover Compensation.
§ 332. But if Payment is made to Officer *de Facto*, Officer *De Jure* cannot recover it from Government.
333. *De Jure* Officer may recover Salary paid *de Facto* Officer.
334. *De Jure* Officer cannot recover on Bond of *de Facto* Officer.
335. Public cannot recover Salary voluntarily paid to Officer *de Facto*.
336. Officer *de Facto* liable for Malfeasance.
337. May be punished for Embezzlement.
338. Must respond for his Negligence.
339. May be required to act by Mandamus.
340. But incurs no Liability by ceasing to act.
341. Is liable upon his Bond.
342. When he sues or defends in his own Right must show valid Title.
343. His Title cannot be tried collaterally.
344. *Quo Warranto* is the Remedy.
345. Injunction will not lie to prevent his acting.
346. Mandamus will not lie to install Officer *de Jure*.

§ 315. **Purpose of Chapter.**—It having been seen in the preceding chapters who may be chosen to public office and how that choice is to be expressed, it now remains to consider the rights, duties and liabilities of one who assumes to act as a public officer, but whose right to the office can not be traced by all of the

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steps which the law has prescribed to be taken. Such an officer, to distinguish him from one whose legal title is clear—the office *de jure*, and from one who has no color of right at all—the mere intruder or usurper, is frequently spoken of as an officer *de facto*.

§ 316. **Officer de Jure defined.**—To recall somewhat definitions already given, an officer *de jure* may be defined as one who has the lawful right to the office in all respects, but who has either been ousted from it, or who has never actually taken possession of it.[1] When the officer *de jure* is also the officer *de facto*, the lawful title and possession are united.[2]

§ 317. **Officer de Facto defined.**—Some doubt has existed in earlier times as to the measure of the requisites which should entitle one to be adjudged an officer *de facto*. Thus in some early English cases it is said that in order to constitute one an officer *de facto* it is necessary that his claim to the office should be supported by some form or color of an election,[3] and these cases have received some following in the United States.[4]

But in a later English case,[5] Lord Ellenborough defined an officer *de facto* to be "one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law;" and this definition has, in substance, been adopted by the majority of the cases, and the necessity for a color of election has not been affirmed, so far as the rights of third persons are concerned.[6]

[1] Hamlin *v.* Kassafer, 15 Oreg. 456, 3 Am. St. Rep. 176; Plymouth *v.* Painter, 17 Conn. 585. But in State *v.* Staton, 73 N. C. 546, 21 Am. Rep. 479, an officer *de jure* is said to be one who is regularly and lawfully elected or appointed, and inducted into office and exercises the duties as his right.

[2] Hamlin *v.* Kassafer, 15 Oreg. 456, 3 Am. St. Rep. 176.

[3] King *v.* Lisle, 2 Strange 1090, s. c. Andrews 163. But see the elaborate comments on this case by BUTLER, C. J., in State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

[4] People *v.* Collins, 7 Johns. (N. Y.) 549; McInstry *v.* Tanner, 9 Johns. 135; Cocke *v.* Halsey, 16 Pet. (U. S.) 71; Douglass *v.* Wickwire, 19 Conn. 492; McCall *v.* Mfg. Co. 6 Conn. 428; Fitchburg Railroad *v.* Grand Junction Railroad, 1 Allen (Mass.) 552; Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; Carleton *v.* People, 10 Mich. 250.

[5] King *v.* Bedford Level, 6 East 356. See also Parker *v.* Kett, 12 Mod. 467.

[6] See Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335; State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409;

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It will be evident that the question will assume different aspects according to the position from which it arises.

Thus if the title of the assumed officer be directly assailed by the State, in a proper proceeding, it will be necessary for him to show himself something more than an officer in fact. So in a direct proceeding brought by the assumed officer himself to secure rights which belong only to an officer *de jure*, it may be necessary for him to show himself to be such.

But when the question of the protection of the rights of third persons is involved different considerations must apply. "Third persons," it is said, "from the nature of the case, can not always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called into question."[1]

§ 318. **Same Subject—Chief Justice Butler's Definition.**—In this view, perhaps the most comprehensive definition is that given by BUTLER, C. J., in a leading case in Connecticut.[2] "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calcu-

Brown *v.* Lunt, 37 Me. 423; Cary *v.* State, 76 Ala. 78, 58 Am. Rep. 440 n.

[1] DEVENS, J., in Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335, citing Brown *v.* Lunt, 37 Me. 423; State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

[2] State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409. See also Hamlin *v.* Kassafer, 15 Oreg. 456, 3 Am. St. 176; Creighton *v.* Commonwealth, 83 Ky. 142, 4 Am. St. Rep. 143; Mallet *v.* Mining Co. 1 Nev. 188, 90 Am. Dec. 484; Fowler *v.* Bebee, 9 Mass. 231, 6 Am. Dec. 62; Burke *v.* Elliott, 4 Ired. (N. C.) L. 355, 42 Am. Dec. 142; People *v.* Staton, 73 N. C. 546, 21 Am. Rep. 479; Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374; Wilcox *v.* Smith, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; Hildreth *v.* McIntire, 1 J. J. MARSH. (Ky.) 206, 19 Am. Dec. 61.

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lated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

Second, under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent requirement or condition, as to take an oath, give a bond or the like.

Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public.

Fourth, under color of an election, or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

§ 319. **Same Subject—Color of Right necessary.**—But although the officer *de facto* may not be required to be in by color of election or appointment, yet he must, to distinguish him from a mere intruder or usurper, be in by some color of right. And, in harmony with the rule last quoted, it has been said "that the color of right which constitutes one an officer *de facto* may consist in an election or appointment, or in holding over after the expiration of one's term, or acquiescence by the public in the acts of such officer for such a length of time as to raise the presumption of colorable right by election or appointment." [1]

The rule extends to officers of all grades, executive, ministerial or judicial, and to inferior as well as superior officers.[2]

It will be obvious, under this rule, that one who at first was but a mere usurper may by acquiescence become an officer *de facto*.

§ 320. **Same Subject—Illustrations.**—Illustrations of this rule are numerous, but enough will be given to show its application. Thus a person exercising the functions of a valid public office by

[1] LORD, C.J., in Hamlin *v.* Kassafer, 15 Oregon, 456, 3 Am. St. Rep. 76.

[2] Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374; Milward *v.* Thatcher, 2 T. R. 81; People *v.* White, 24 Wend. 527; State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

One cannot be a *de facto* officer when he is constantly in hiding, has no place of business, and can only be communicated with by means of his friends in secret. Williams *v.* Clayton, — Utah —, 21 Pac. Rep. 398.

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color of right and with the acquiescence of the public will be deemed to be an officer *de facto* and his acts will protect third persons even though he was elected under an unconstitutional statute;[1] or was not eligible to the office;[2] or though the office to which he was chosen was unlawfully vacated;[3] or the election was held without the proper notice;[4] or though he was appointed when he should have been elected;[5] or though he has legally forfeited his office by the acceptance of an incompatible one,[6] or by removing from the county,[7] or though he has not given the prescribed bond,[8] or only a defective one;[9] or though the bond was not duly filed;[10] or though he has held over after the expiration of his term.[11]

§ 321. **Usurper or Intruder defined.**—Contra-distinguished from the officer *de facto*, is the mere usurper or intruder who is one who has intruded upon the office and assumes to exercise its functions without either the lawful title or the color of right to it.[12] His acts, therefore, are entirely void.[13] He may, however, as is stated in the last section, grow into an officer *de facto*, if his assumption of the office is acquiesced in.[14]

[1] State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409; Cole *v.* Black River Falls, 57 Wis. 110, Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89.

[2] Farrier *v.* State, — N. J. L. — 7 Atl. Rep. 881; Darrow *v.* People, 8 Colo. 417; Lockhart *v.* City of Troy, 4 Ala. 579.

[3] Watkins *v.* Inge, 24 Kans. 612.

[4] Yorty *v.* Paine, 62 Wis. 154.

[5] Chicago &c. Ry. Co. *v.* Langlade County, 56 Wis. 614.

[6] Woodside *v.* Wagg, 71 Me. 207.

[7] Case *v.* State, 69 Ind. 46.

[8] Gunn *v.* Tacket, 67 Ga. 725; Soudant *v.* Wadhams, 46 Conn. 218.

[9] Adams *v.* Tator, 42 Hun (N. Y.) 384.

[10] State *v.* Dierberger, 90 Mo. 369; Douglass *v.* Neil, 7 Heisk. (Tenn.) 438.

[11] Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335; Galbraith *v.* McFarland, 3 Cold. (Tenn.) 267, 91 Am. Dec. 281; Morton *v.* Lee, 28 Kans. 286; Threadgill *v.* Railroad Co. 73 N. C. 178; Wapello County *v.* Bigham, 10 Iowa 39, 74 Am. Dec. 370.

[12] Hamlin *v.* Kassafer, 15 Oreg. 456, 3 Am. St. Rep. 176; Plymouth *v.* Painter, 17 Conn. 585, 44 Am Dec. 574.

[13] Hamlin *v.* Kassafer, 15 Oreg. 456, 3 Am. St. Rep. 176; Hooper *v* Goodwin, 48 Me. 80; Tucker *v.* Aiken, 7 N. H. 113; McCraw *v.* Williams, 33 Gratt. (Va.) 510, where CHRISTIAN, J., says: "A mere usurper is one who intrudes himself into an office which is vacant, and ousts the incumbent without any color of title whatever, and his acts are void in every respect."

[14] State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

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§ 322. **Officer de Facto and Officer de Jure can not both hold at same Time.**—It is evident that two different persons can not, at the same time, be in the actual occupation and exercise of an office for which one incumbent only is provided by law. There can not, therefore, be an officer *de jure* and another officer *de facto* in possession of the same office at the same time. Hence if the officer *de jure* is in, there is no room for an officer *de facto;* and if the officer *de facto* is in, the officer *de jure* can not be in also.[1]

§ 323. **Two Officers de Facto can not hold at same Time.**—For like reasons there can not, at the same time, be two different officers *de facto* in possession of an office for which one incumbent only is provided by law.[2]

§ 324. **Can not be Officer de Facto where there is no Office.**—So, in the very nature of the case, there can be no officer *de facto* where no officer *de jure* is provided for by law, or, as is said in one case, "there can be no officer, either *de jure* or *de facto*, if there be no office to fill."[3]

"Where the law has provided that an office may legally be filled," says CAMPBELL, J., "then the acts of an incumbent may be valid although not lawfully appointed, because the public, being bound to know the law, know that somebody may or should fill the place and perform the duties; and possession would as to them be evidence of title.

But where the law itself negatives the idea that there can be a legal incumbent, any one assuming to act assumes what every one is bound to know is not a legal office, and his acts can not be effectual for any purpose."[4]

[1] Boardman *v.* Halliday, 10 Paige (N. Y.) 232; Conover *v.* Devlin, 15 How. (N. Y.) Pr. 470; Cohn *v.* Beal, 61 Miss. 398.

[2] Hamlin *v.* Kassafer, 15 Oreg. 456; 3 Am St. Rep. 176; Conover *v.* Devlin, 15 How. Pr. 470; McCahon *v.* Commissioners, 8 Kans. 438; Boardman *v.* Halliday, 10 Paige (N. Y.) 232; Morgan *v.* Quackenbush, 23 Barb. (N. Y.) 80.

[3] Carleton *v.* People, 10 Mich. 250; Norton *v.* Shelby County, 118 U. S. 425; Yorty *v.* Paine, 62 Wis. 154; Cole *v.* Black River Falls, 57 Wis. 110; *In re* Hinkle, 31 Kans. 712; Burt *v.* Winona, 31 Minn. 472, per MITCHELL, J.; Leach *v.* People, 123 Ill. 420, 12 N. E. Rep. 726; People *v.* White, 24 Wend. (N. Y.) 539; *Ex parte* Snyder, 64 Mo. 58.

[4] Carleton *v.* People, 10 Mich. 250, 258.

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§ 325. **Office de Facto can not exist under constitutional Government.**—Offices in the United States are created by, or in pursuance of, the respective constitutions of the State and Federal governments, and can not exist unless so ordained. Hence it is held that while there may be officers *de facto*, an office *de facto* can not exist under a constitutional government.[1]

Where, however, the government is entirely revolutionized and all its departments are usurped by force, then, it is said, prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries; and in such cases the acts of a *de facto* executive, a *de facto* judiciary and a *de facto* legislature must be recognized as valid.[2]

§ 326. **Office created by unconstitutional Statute not de Facto.**—In the same line, it is held that an office created by an unconstitutional statute is not even an office *de facto*, nor is the person who assumes to exercise it an officer *de facto*.[3] "The idea of an officer," says Mr. Justice FIELD, "implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as in-

[1] Hildreth *v.* McIntire, 1 J. J. MARSH. (Ky.) 206, 19 Am. Dec. 61; Hawver *v.* Seldenridge, 2 W. Va. 274, 94 Am. Dec. 532; Norton *v.* Shelby County, 118 U. S. 425, 446; Petition of Hinkle, 31 Kans. 712; *contra*, Burt *v.* Winona, 31 Minn. 472.

[2] Hildreth *v.* McIntire, 1 J. J. MARSH. (Ky.) 206, 19 Am. Dec. 61; Hawver *v.* Seldenridge, 2 W. Va. 274, 94 Am. Dec. 532.

[3] Norton *v.* Shelby County, 118 U. S. 425.

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operative as though it had never been passed. * * * Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached."[1]

§ 327. **But Officer may be de Facto though chosen under unconstitutional Statute.**—But the rule laid down in the last section does not conflict with the fourth subdivision of the definition of Chief Justice BUTLER heretofore referred to, *i. e.* one chosen "under color of an election or an appointment by or pursuant to a public, unconstitutional law before the same is adjudged to be so."[2] This subdivision, says Mr. Justice FIELD, "refers not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing."[3]

§ 328. **Acts of Officer de Facto valid as to Public.**—Third persons who have occasion to deal with a public officer and to rely upon his acts, finding a person in the apparent possession of the office and ostensibly exercising its functions lawfully and with the acquiescence of the public, can neither be expected to know, nor to investigate, in every instance, his title to the office or his eligibility to election to it. As to them, he must be held to be, what he appears to be, the lawful occupant of the office. This rule is demanded by public policy as the only one affording protection to the public.

It is well settled, therefore, that the lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of the office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it.[4]

[1] In Norton *v.* Shelby County, 118 U. S. 425, 442.

[2] See *ante*, § 318

[3] In Norton *v.* Shelby County, 118 U. S. 425, 446. See also Cole *v.* Black River Falls, 57 Wis. 110.

[4] Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335; State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409; Wilcox *v.* Smith, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; Hamlin *v.* Kassafer, 15 Oreg. 456, 3 Am. St. Rep. 176; Creighton *v.* Commonwealth, 83 Ky. 142, 4 Am. St. Rep. 143; Burton *v.* Patton, 2 Jones (N. C.) L. 124, 62 Am. Dec. 194; State *v.* Williams, 5 Wis 308, 68 Am. Dec. 65; Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169; Hawver *v.* Seldenridge, 2 W. Va. 274, 94 Am. Dec. 532; Burke *v.* Elliott, 4 Ired. L. 355; 42 Am. Dec. 142; Farmers' Bank *v.* Chester, 6 Humph. (Tenn.) 458, 44 Am.

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But the acts done must be such as might lawfully be done by an officer *de jure*, for the acts of an officer *de facto*, when declared void by the constitution or a statute, can not be held valid upon any assumed principle of public expediency.[1]

So the rule can not apply where the defects in the title of the assumed officer are notorious, and the persons dealing with him have notice of the facts.[2]

§ 329. **Same Subject—Illustrations.**—Illustrations of the rule that the acts of *de facto* officers are valid as respects the rights of third persons, are numerous.

Thus the following acts have been held valid:—The approval by the governor of acts of the legislature, though he holds over, and continues to act as governor after the expiration of his term and after his successor has taken the oath of office, upon the assumption of his re-election in pursuance of the certificate of the State canvassers;[3] the probate of a deed by a deputy clerk who has not taken the oath of office, but who was duly appointed and has assumed the duties;[4] the judgment of a justice of the peace, though he was not duly elected or qualified,[5] or whose term of

Dec. 318; McGregor *v.* Balch, 14 Vt. 428, 39 Am. Dec. 231; Fowler *v.* Bebee, 9 Mass. 231, 6 Am. Dec. 62; People *v.* Collins, 7 Johns. (N. Y.) 551; Smith *v.* Bondurant, 74 Ga. 416, 58 Am. Rep. 438; Cary *v.* State, 76 Ala. 78, 58 Am. Rep. 440, *n.*; People *v.* Staton, 73 N. C. 546, 21 Am. Rep. 479; McKinstry *v.* Tanner, 9 Johns. (N. Y.) 135; Gilmore *v.* Holt, 4 Pick. (Mass.) 257; McKim *v.* Somers, 1 Penn. 297; Douglass *v.* Wickwire, 19 Conn. 489; Green *v.* Burke, 23 Wend. (N. Y.) 490; Conover *v* Devlin, 15 How. Pr. 470; St. Louis County Court *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355; Gumberts *v.* Express Co., 28 Ind. 181; Kaufman *v.* Stone, 25 Ark. 336; Eaton *v.* Harris, 42 Ala. 491; Cooper *v.* Moore, 44 Miss. 386; State *v.* Lewis, 22 La. Ann. 33; Jhons *v.* People, 25 Mich. 498; Cahill *v.* Insurance Co., 2 Dougl. (Mich.) 124; Druse *v.* Wheeler, 22 Mich. 439; Stockle *v.* Silsbee, 41 Mich. 619; Morrison *v.* Sayre, 40 Hun (N. Y.) 465; State *v.* Farrier, 47 N. J. L. 383; Chiles *v.* State, 45 Ark. 143; Sharp *v.* Thompson, 100 Ill. 447; Woodside *v.* Wagg, 71 Me. 207; Bliss *v.* Day, 68 Me. 201; People *v.* Lieb, 85 Ill. 484; State *v.* McJunkin, 7 S. C. 21; Peirce *v.* Weare, 41 Iowa, 378; McLean *v.* State, 8 Heisk. (Tenn.) 22; *Ex parte* Strang, 21 Ohio St. 610; Cooper *v.* Moore, 44 Miss. 386; State *v.* Tolan, 33 N. J. L. 195; McCormick *v.* Fitch, 14 Minn. 252.

[1] Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

[2] Conway *v.* City of St. Louis, 9 Mo App. 488.

[3] State *v.* Williams, 5 Wis. 308, 68 Am. Dec. 65.

[4] Farmers &c. Bank *v.* Chester, 6 Humph. (Tenn.) 458, 44 Am. Dec. 318.

[5] Mallet *v.* Mining Co., 1 Nev. 188,

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office has in fact expired,[1] where he is acting in the discharge of the office and is generally recognized as the legal officer; a levy made by a constable who is in discharge of the office, though he has not given the required bond;[2] the act of a clerk in marking a paper "filed," after the expiration of his term, but while he is still in the possession of the office;[3] a license issued by a clerk elected and acting, though under Confederate authority;[4] a conviction had,[5] or a recognizance taken,[6] before a regularly acting justice, though he was appointed under an unconstitutional statute,[7] or had forfeited his office by the acceptance of an incompatible one;[8] the service of a legal notice by a constable whose term of office had expired but who was generally supposed to be a constable and was notoriously acting as such;[9] the levy of a tax by a board of supervisors elected and acting but under an unconstitutional statute;[10] the attestation of an affidavit by a notary after the expiration of his term, both parties acting in good faith;[11] a sale for taxes, though made by an officer elected to fill a vacancy unlawfully created.[12]

§ 330. **Title of Officer de Facto can not be questioned collaterally.**—As a necessary postulate from the same principle of public policy from which the rule of the preceding section is deduced is the other rule, equally well settled, that the title of the officer *de facto*, and the validity of his acts, cannot be collaterally questioned in proceedings to which he is not a party, or which were not instituted to determine their validity.[13]

90 Am. Dec. 484. See also Johnson *v.* McGinley, 76 Me. 432; *Ex parte* Johnson, 15 Neb. 512.

[1] Hamlin *v.* Kassafer, 15 Oreg. 456, 3 Am. St. Rep. 176.

[2] Gunn *v.* Tackett 67 Ga. 725; Soudant *v.* Wadhams, 46 Conn. 218.

[3] Galbraith *v.* McFarland, 3 Cold. (Tenn.) 267, 91 Am. Dec. 281.

[4] Ward *v.* State, 2 Cold. (Tenn.) 605, 91 Am. Dec. 270.

[5] State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

[6] Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89.

[7] State *v.* Carroll, *supra*.

[8] Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374. See also Woodside *v.* Wagg, 71 Me. 207.

[9] Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335.

[10] Leach *v.* People, 122 Ill. 420, 36 Alb. L. Jour. 194.

[11] Smith *v.* Bondurant, 74 Ga. 416, 58 Am. Rep. 438; Cary *v.* State, 76 Ala. 78, 58 Am. Rep. 440, note.

[12] Watkins *v.* Inge, 24 Kans. 612.

[13] Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; Stockle *v.* Silsbee, 41 Mich. 615; Jhons *v.* People, 25 Mich. 499; Cahill *v.* Ins. Co., 2 Doug. (Mich.) 124; Druse *v.* Wheeler,

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§ 331. **De Facto Officer can not recover Compensation.**—But while the acts of the *de facto* officer are thus valid as to third persons, he can not himself acquire rights based upon his defective title.

It is well settled, therefore, that he can not maintain an action to recover the salary, fees or other compensation attached to the office.[1]

"It is the settled doctrine in this State," says the court in New York,[2] "that the right to the salary and emoluments of a public office attach to the true and not to the mere colorable title, and in an action brought by a person claiming to be a public officer, for the fees or compensation given by law, his title to the office is in issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency merely gives no right to the salary or compensation. [3]

The right of the intruder to recover is denied, not upon the ground of actual fraud on his part, for it often happens that he is in not under a claim of right, but under a *prima facie* title, which he cannot or may not know to be invalid; nor upon the ground that he is a mere volunteer, and that the government should not be obliged to pay him for his services, for in most cases they are rendered in good faith, and under the expectation, both on his part and on the part of the public, that he is to receive the emoluments of the office. The principle is, that the

22 Mich. 439; Kaufman *v.* Stone, 25 Ark. 336; Eaton *v.* Harris, 42 Ala. 491; Cooper *v.* Moore, 44 Miss. 386; Gumberts *v.* Express Co., 28 Ind. 181; State *v.* Lewis, 22 La. Ann. 33.

[1] Meehan *v.* Hudson, 46 N. J. L. 276, 50 Am. Rep. 421; Matthews *v.* Supervisors, 53 Miss. 715, 24 Am. Rep. 715; Christian *v.* Gibbs, 53 Miss. 314; Commonwealth *v.* Slifer, 25 Penn. St. 23, 64 Am. Dec. 680; Riddle *v.* Bedford County, 7 Serg. & R. (Penn.) 386; Dilton *v.* Myers, 3 Pa. L. J. 169; Mayfield *v.* Moore, 53 Ill. 428, 5 Am. Rep. 52; McCue *v.* Wapello County, 56 Iowa, 698, 41 Am. Rep. 134; People *v.* Potter, 63 Cal. 127; Meagher *v.* Storey County, 5 Nev. 244; Philadelphia *v.* Given, 60 Penn. St. 136; Kimball *v.* Alcorn, 45 Miss. 151; People *v.* Smythe, 28 Cal. 21.

[2] Dolan *v.* Mayor, 68 N. Y. 274, 23 Am. Rep. 168.

[3] Citing People *v.* Hopson, 1 Den. (N. Y.) 574; People *v.* Nostrand, 46 N. Y. 382; People *v.* Tieman, 30 Barb. (N. Y.) 193; Mayor *v.* Flagg, 6 Abb. Pr. 296; Lightly *v.* Clouston, 1 Taunt. 112; Prescott *v.* Hays, 42 N. H. 56; Riddle *v.* Bedford County, 7 Serg. & R. 392.

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right follows the true title, and the courts will not aid the intruder by permitting him to recover the compensation which rightfully belongs to another."

§ 332. **But if Payment is made to Officer de Facto, Officer de Jure can not recover it from Government.**—But it is held that if payment of the salary or other compensation be made by the government, in good faith, to the office *de facto*, while he is still in possession of the office, the government cannot be compelled to pay it a second time to the officer *de jure* when he has recovered the office, at least where the officer *de facto* held by color of title.[1]

"It is plain," says ANDREWS, J., "that in many cases the duty imposed upon the fiscal officers of the State, counties or cities to pay official salaries, could not be safely performed unless they are justified in acting upon the apparent title of claimants. The certificate of boards of canvassers certifying the election of a person to an elective office is *prima facie* evidence of the title of the person whose election is certified. But it often happens that, by reason of irregularities in conducting the election, or the admission of disqualified voters, the apparent title is overthrown and another person is adjudged to be rightfully entitled to the office. But this can seldom, if ever, be ascertained, except after a judicial inquiry; and in case of an appointed officer, the validity of the appointment often depends upon complicated questions of law or fact. If fiscal officers, upon whom the duty is imposed

[1] Auditors *v.* Benoit, 20 Mich. 176, 4 Am. Rep. 382. (COOLEY, J., dissented in a forcible opinion.) Dolan *v.* Mayor, 68 N. Y. 274, 23 Am. Rep. 168; Commissioner *v.* Anderson, 20 Kans. 298, 27 Am. Rep. 171; Smith *v.* Mayor, 37 N. Y. 518; Conner *v.* Mayor, 5 N. Y. 285; Parker *v.* Supervisors, 4 Minn. 59; McAffee *v.* Russell, 29 Miss. 84, 97; Wheatly *v.* Covington, 11 Bush (Ky.) 18, 22; Queen *v.* Mayor, 13 Ad. & El. 30; Shaw *v.* Pima County, — Ariz. —, 18 Pac. Rep. 273; Selby *v.* Portland, 14 Oreg. 243, 58 Am. Rep. 307; Hannon *v.* Grizzard, 96 N. C. 293, 2 S. E. Rep. 600; McManus *v.* Brooklyn, 5 N. Y. Supplement 424.

But the contrary is held in California: People *v.* Smythe, 28 Cal. 21; Carroll *v.* Siebenthaler, 37 Cal. 193.

In Matthews *v.* Supervisors, 53 Miss. 715, 24 Am. Rep. 715, the court per CHALMERS, J., approve the dissenting opinion of COOLEY, J., in Auditors *v.* Benoit, *supra*.

See also Philadelphia *v.* Rink, — Penn. —, 2 Atl. Rep. 505, and Andrews *v.* Portland, 79 Me. 484, 10 Atl. Rep. 458.

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to pay official salaries, are only justified in paying them to the officer *de jure*, they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making the payment, to go behind the commission and investigate and ascertain the real right and title. This, in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer *de jure*, without inquiring whether another has the better right."[1]

§ 333. **De Jure Officer may recover Salary paid de Facto Officer.**—But it is held that the *de jure* officer, when he has established his title and gained possession of his office, may recover from the *de facto* officer who has wrongfully held possession of it, the salary, fees or other emoluments received by the latter while holding the office.[2] In an Illinois case, where the *de facto* officer had held in good faith, the court permitted him to deduct "a reasonable allowance for the necessary expenses in earning the fees and emoluments;" but said that had he intruded without pretense of legal right, a different rule would have been applied.[3] In Michigan, one who had been wrongfully kept out of the office by a claimant thereto was permitted to recover from

[1] In Dolan *v.* Mayor, *supra*.

[2] Nichols *v.* MacLean (1886) 101 N. Y. 526, 54 Am. Rep. 730; Kessel *v.* Zeiser, 102 N. Y. 114, 55 Am. Rep. 769; People *v.* Nolan, 101 N. Y. 569; Rule *v.* Tait, 38 Kans. 765; Mayfield *v.* Moore, 53 Ill. 428, 5 Am. Rep. 52; People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131; Glasscock *v.* Lyons, 20 Ind. 1; Currey *v.* Wright, 9 Lea (Tenn.) 247; Bier *v.* Gorrell, 30 W. Va. 95; Stoddard *v* Williams, 65 Cal. 472; Hunter *v.* Chandler, 45 Mo. 452; Comstock *v.* Grand Rapids, 40 Mich. 397; United States *v.* Addison, 6 Wall. (U. S.) 291; Dorsey *v.* Smyth, 28 Cal. 21; Dolan *v.* Mayor, 68 N. Y. 274, 23 Am. Rep. 168; Douglass *v.* State, 31 Ind. 429; Petit *v.* Rousseau, 15 La. Ann. 239; Sigur *v.* Crenshaw, 10 La. Ann. 297; Vaux *v.* Jefferen, 2 Dyer 114; Pybus *v.* Mitford, 1 Mod. 122; Howard *v.* Wood, 2 Lev. 245; Arris *v.* Stukeley, 2 Mod. 260; Lee *v.* Drake, 2 Salk. 468; Boyter *v.* Dodsworth, 6 T. R. 681; Webb's Case, 8 Cokes' Rep. 90; Green *v.* Hewett, Peake 182; Crosbie *v.* Hurley, 1 Alcock & Nap. 431.

[3] Mayfield *v.* Moore, 53 Ill. 428, 5 Am. Rep. 52.

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the latter the whole official salary, without any deduction for the services of the incumbent.[1]

In New Jersey, however, the right of the *de jure* officer, who has ousted a *de facto* officer holding in good faith, to recover from the latter the fees of the office received by him, is denied, especially where the *de facto* officer would have been subject to a penalty for not accepting the office. The cases, cited in the note, from California, Indiana, Michigan, Louisiana and New York, were distinguished upon the ground that the statute in those States expressly permits one who has recovered the office to also recover the damages he had sustained by reason of the usurpation.[2]

So the officer *de jure* may not recover the salary paid to one who was appointed to fill the vacancy caused by the resignation of an officer who had been held to be entitled to it, though this finding was afterwards reversed and the plaintiff held to have the true title.[3]

§ 334. **De Jure Officer can not recover on Bond of de Facto Officer.** But though the *de jure* officer may thus recover of the officer *de facto*, the damages sustained by reason of the intru-

[1] People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131.

[2] Stuhr *v.* Curran, 15 Vroom (N. J.) 181, 43 Am. Rep. 353, BEASLEY, C. J., delivered an elaborate dissenting opinion holding the right of recovery. See also the subsequent case of Meehan *v.* Hudson, 46 N. J. L. 276, 50 Am. Rep. 421, where the court say of Stuhr *v.* Curran: "It was not the design of the judgment in the Court of Errors, nor is it its legitimate effect, to give countenance or encouragement to those who are willing by force or fraud to obtrude in places lawfully assigned to others, nor to permit such person to profit by the emoluments belonging thereto. The reasons which protect one who has performed the services belonging to a public officer, under an appointment apparently regular and legal, in ignorance of and without the means of ascertaining, defects in his title, and where his refusal to serve would leave a vacancy in office, whether such reasons be weak or strong, have no application to a case like this. In such a case we cannot doubt that in some form the officer *de jure* would be entitled in law to demand and have compensation for the injury done him by such an intruder. If payment be made to the officer *de facto* the public will be protected from further claim, as the disbursing officer is not bound to know the title by which an actual incumbent holds, and the rival claims to the funds must be litigated between the individual claimants."

[3] Nichols *v.* Branham, 84 Va. 923, 6 S. E. Rep. 463.

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sion, the sureties upon the bond of the *de facto* officer are not liable. "A careful review of the cases," it is said in a late case in Tennessee, "leads to the conclusion that, whether the action be for the recovery of specific salary due and uncollected by the usurper, or fees earned and unappropriated, or for damages *eo nomine*, the action is but an action for damages, and is a personal action against the intruder," and it was held that the sureties upon the officer's bond for the faithful performance of his duty were not liable.[1]

§ 335. **Public can not recover Salary voluntarily paid to Officer de Facto.**—But the public cannot recover, as paid under a mistake of law, money paid as salary to one who if not an officer *de jure* has acted as an officer *de facto*.[2]

§ 336. **Officer de Facto liable for Malfeasance.**—"A person who undertakes an office and is in office," says Chief Justice RUFFIN, "though he might not have been duly appointed, and, therefore, may have a defeasable title or not have been competent to serve therein, is yet, from the possession of its authorities and the enjoyment of its emoluments, bound to perform all the duties, and liable for their omission, in the same manner as if the appointment were strictly legal and his right perfect."

It is, therefore, held that the officer *de facto* is criminally liable for malfeasance in his assumed office,[3] and he may be subjected to a penalty prescribed for a violation of his duty.[4] He must also respond in damages at the suit of him who is injured thereby.[5] By assuming the office and undertaking to exercise it, he estops himself from denying that he is legally chargeable with its due performance.[6]

§ 337. **May be punished for Embezzlement.**—So the officer

[1] Curry *v.* Wright, 86 Tenn. 636.

[2] Badeau *v.* United States, 130 U. S. 439 9 S. C. Rep. 579.

[3] Diggs *v.* State, 49 Ala. 311; State *v.* Long, 76 N. C. 254; State *v.* Cansler, 75 N. C. 442; Neale *v.* Overseers, 5 Watts (Penn.) 538; State *v.* Goss, 69 Me. 22.

[4] Bedford *v.* Rice, 58 N. H. 446.

[5] Allen *v.* Archer, 49 Me. 346; Bearce *v.* Fossett, 34 Me. 575; Longacre *v.* State, 3 Miss. 637; Sandwich *v.* Fish, 2 Gray (Mass.) 298; Williamstown *v.* Willis, 15 Gray (Mass.) 427; Johnston *v.* Wilson, 2 N. H. 202; Horn *v.* Whittier, 6 N. H. 88; Jones *v.* Scanland, 6 Humph. (Tenn.) 195; Trescott *v.* Moan, 50 Me. 347; Wentworth *v.* Gove, 45 N. H. 160.

[6] Billingsley *v.* State, 14 Md. 369; Borden *v.* Houston, 2 Tex. 594.

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de facto, who has assumed the office and received money by virtue of it, is an officer within the meaning of the statutes punishing embezzlement.[1]

§ 338. **Must respond for his Negligence.**—An officer *de facto* is also liable civilly in damages to individuals who have received injury from his negligent omission or performance of a duty owing to them by reason of the office which he has assumed to exercise.[2]

In this respect he stands in much the same position as an agent who has gratuitously undertaken the performance of a service, and is held bound to conform to the instructions he receives.[3]

§ 339. **May be required to act, by Mandamus.**—Having assumed the office, the officer *de facto* must perform the duties adhering to it, and the performance of them may be enforced by mandamus.[4]

§ 340. **But Officer de Facto incurs no Liability by ceasing to act.**—But the officer *de facto* is not bound to remain in the office or to continue to exercise its functions, and hence he will not, in general, incur liability to individuals,[5] or become subject to a statutory penalty[6] for omitting to act further when he expressly disavows his authority and ceases to act because he is doubtful of his right to do so.

"Yet perhaps," said Mr. Bishop, "in special circumstances, as where the refusal is to take a particular step constituting a part of a whole which he has taken upon himself to do, his not doing of the part, when he might have declined the whole, will subject him to punishment."[7]

§ 341. **Is liable upon his Bond.**—As has previously been stated, the sureties upon an official bond, by virtue of which the officer has been inducted into office, can not, when called upon to answer for his official defaults, escape liability upon the ground

[1] State *v.* Goss, 69 Me. 42; Fortenberry *v* State, 56 Miss, 286.

[2] Longacre *v.* State, 3 Miss. 637.

[3] See Mechem on Agency, § 478.

[4] Runion *v.* Latimer, 6 Rich. (S. C.) 126; Kelly *v.* Wimberly, 61 Miss. 548.

[5] Olmsted *v.* Dennis, 77 N. Y. 378.

[6] Bentley *v.* Phelps, 27 Barb. (N. Y.) 524.

[7] 1 Crim. Law (7th ed.) § 464.

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that their principal was not eligible or was not properly elected or did not qualify in the prescribed manner.[1]

§ 342. **When he sues or defends in his own Right must show valid Title.**—But though the acts of the *de facto* officer are valid as respects the rights of third persons, they are void as to himself.[2] He can not, therefore, as has been seen, build up rights in himself based upon his occupancy of the office, as, for example, the right to recover the salary;[3] neither can he, when sued for acts, which only a valid title to the office will justify, escape liability as a trespasser by showing himself to be the officer *de facto*. Unless he can show himself to be the officer in law as well as in fact, authorized as such to do the act complained of, he will be liable as any other trespasser.[4]

§ 343. **His Title can not be tried collaterally.**—As has been seen in an earlier section, the title of the officer *de facto* can not be tried collaterally, but only in a direct proceeding brought to determine that very question.[5]

§ 344. **Quo Warranto is the Remedy.**—In this, as in other cases where it is desired to try the title to the office, *quo warranto* is the remedy to be applied, unless a special statutory remedy has been substituted in its place.[6]

§ 345. **Injunction will not lie to prevent his acting.**—Injunction, therefore, will not lie to prevent the officer *de facto* from continuing to exercise the functions of the office.[7]

[1] See *ante*, § 296, and cases cited. See also Case *v.* State, 69 Ind. 46.

[2] Olmsted *v.* Dennis, 77 N. Y. 377; Riddle *v.* Bedford County, 7 Serg. & R. (Penn.) 386; People *v.* Hopson, 1 Den. (N. Y.) 574; Hamlin *v.* Dingman, 5 Lans. (N. Y.) 61; People *v.* Nostrand, 46 N. Y. 875; Nichols *v.* MacLean, 101 N.Y. 526, 54 Am. Rep. 730.

[3] *Ante*, § 331.

[4] People *v.* Weber, 89 Ill. 347; People *v.* Weber, 86 Ill. 283; Miller *v.* Callaway, 32 Ark. 666, citing Patterson *v.* Miller, 2 Met. (Ky.) 493; Rodman *v.* Harcourt, 4 B. Mon. (Ky.) 229; People *v.* Hopson, 1 Den. (N. Y.) 574; Green *v.* Burke, 23 Wend. (N. Y.) 490; Riddle *v.* Bedford County, 7 Serg. & R. (Penn.) 386; Keyser *v.* Commissioners, 2 Rawle (Penn.) 139; Fowler *v.* Beebe, 9 Mass. 231, 6 Am. Dec. 62; Nichols *v.* MacLean, 101 N.Y. 526, 54 Am. Rep. 730.

[5] See *ante*, § 330. See also Hagner *v.* Heyberger, 7 Watts & S. (Penn.) 104, 42 Am. Dec. 220.

[6] Hagner *v.* Heyberger, 7 Watts & S. (Penn.) 104, 42 Am. Dec. 220; Bean *v.* Thompson, 19 N. H. 290, 49 Am. Dec. 154.

[7] Hagner *v.* Heyberger, 7 Watts & S. (Penn.) 104, 42 Am. Dec. 220.

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§ 322. **Officer de Facto and Officer de Jure can not both hold at same Time.**—It is evident that two different persons can not, at the same time, be in the actual occupation and exercise of an office for which one incumbent only is provided by law. There can not, therefore, be an officer *de jure* and another officer *de facto* in possession of the same office at the same time. Hence if the officer *de jure* is in, there is no room for an officer *de facto;* and if the officer *de facto* is in, the officer *de jure* can not be in also.[1]

§ 323. **Two Officers de Facto can not hold at same Time.**—For like reasons there can not, at the same time, be two different officers *de facto* in possession of an office for which one incumbent only is provided by law.[2]

§ 324. **Can not be Officer de Facto where there is no Office.**—So, in the very nature of the case, there can be no officer *de facto* where no officer *de jure* is provided for by law, or, as is said in one case, "there can be no officer, either *de jure* or *de facto*, if there be no office to fill."[3]

"Where the law has provided that an office may legally be filled," says CAMPBELL, J., "then the acts of an incumbent may be valid although not lawfully appointed, because the public, being bound to know the law, know that somebody may or should fill the place and perform the duties; and possession would as to them be evidence of title.

But where the law itself negatives the idea that there can be a legal incumbent, any one assuming to act assumes what every one is bound to know is not a legal office, and his acts can not be effectual for any purpose."[4]

[1] Boardman *v.* Halliday, 10 Paige (N. Y.) 232; Conover *v.* Devlin, 15 How. (N. Y.) Pr. 470; Cohn *v.* Beal, 61 Miss. 398.

[2] Hamlin *v.* Kassafer, 15 Oreg. 456; 3 Am St. Rep. 176; Conover *v.* Devlin, 15 How. Pr. 470; McCahon *v.* Commissioners, 8 Kans. 438; Boardman *v.* Halliday, 10 Paige (N. Y.) 232; Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 80.

[3] Carleton *v.* People, 10 Mich. 250; Norton *v.* Shelby County, 118 U. S. 425; Yorty *v.* Paine, 62 Wis. 154; Cole *v.* Black River Falls, 57 Wis. 110; *In re* Hinkle, 31 Kans. 712; Burt *v.* Winona, 31 Minn. 472, per MITCHELL, J.; Leach *v.* People, 123 Ill. 420, 12 N. E. Rep. 726; People *v.* White, 24 Wend. (N. Y.) 539; *Ex parte* Snyder, 64 Mo. 58.

[4] Carleton *v.* People, 10 Mich. 250, 258.

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§ 325. **Office de Facto can not exist under constitutional Government.**—Offices in the United States are created by, or in pursuance of, the respective constitutions of the State and Federal governments, and can not exist unless so ordained. Hence it is held that while there may be officers *de facto*, an office *de facto* can not exist under a constitutional government.[1]

Where, however, the government is entirely revolutionized and all its departments are usurped by force, then, it is said, prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries; and in such cases the acts of a *de facto* executive, a *de facto* judiciary and a *de facto* legislature must be recognized as valid.[2]

§ 326. **Office created by unconstitutional Statute not de Facto.**—In the same line, it is held that an office created by an unconstitutional statute is not even an office *de facto*, nor is the person who assumes to exercise it an officer *de facto*.[3] "The idea of an officer," says Mr. Justice FIELD, "implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as in-

[1] Hildreth *v.* McIntire, 1 J. J. MARSH. (Ky.) 206, 19 Am. Dec. 61; Hawver *v.* Seldenridge, 2 W. Va. 274, 94 Am. Dec. 532; Norton *v.* Shelby County, 118 U. S. 425, 446; Petition of Hinkle, 31 Kans. 712; *contra*, Burt *v.* Winona, 31 Minn. 472.

[2] Hildreth *v.* McIntire, 1 J. J. MARSH. (Ky.) 206, 19 Am. Dec. 61; Hawver *v.* Seldenridge, 2 W. Va. 274, 94 Am. Dec. 532.

[3] Norton *v.* Shelby County, 118 U. S. 425.

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operative as though it had never been passed. * * * Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached."[1]

§ 327. **But Officer may be de Facto though chosen under unconstitutional Statute.**—But the rule laid down in the last section does not conflict with the fourth subdivision of the definition of Chief Justice BUTLER heretofore referred to, *i. e.* one chosen "under color of an election or an appointment by or pursuant to a public, unconstitutional law before the same is adjudged to be so."[2] This subdivision, says Mr. Justice FIELD, "refers not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing."[3]

§ 328. **Acts of Officer de Facto valid as to Public.**—Third persons who have occasion to deal with a public officer and to rely upon his acts, finding a person in the apparent possession of the office and ostensibly exercising its functions lawfully and with the acquiescence of the public, can neither be expected to know, nor to investigate, in every instance, his title to the office or his eligibility to election to it. As to them, he must be held to be, what he appears to be, the lawful occupant of the office. This rule is demanded by public policy as the only one affording protection to the public.

It is well settled, therefore, that the lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of the office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it.[4]

[1] In Norton *v.* Shelby County, 118 U. S. 425, 442.

[2] See *ante*, § 318

[3] In Norton *v.* Shelby County, 118 U. S. 425, 446. See also Cole *v.* Black River Falls, 57 Wis. 110.

[4] Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335; State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409; Wilcox *v.* Smith, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; Hamlin *v.* Kassafer, 15 Oreg. 456, 3 Am. St. Rep. 176; Creighton *v.* Commonwealth, 83 Ky. 142, 4 Am. St. Rep. 143; Burton *v.* Patton, 2 Jones (N. C.) L. 124, 62 Am. Dec. 194; State *v.* Williams, 5 Wis 308, 68 Am. Dec. 65; Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169; Hawver *v.* Selden-ridge, 2 W. Va. 274, 94 Am. Dec. 532; Burke *v.* Elliott, 4 Ired. L. 355; 42 Am. Dec. 142; Farmers' Bank *v.* Chester, 6 Humph. (Tenn.) 458, 44 Am.

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But the acts done must be such as might lawfully be done by an officer *de jure*, for the acts of an officer *de facto*, when declared void by the constitution or a statute, can not be held valid upon any assumed principle of public expediency.[1]

So the rule can not apply where the defects in the title of the assumed officer are notorious, and the persons dealing with him have notice of the facts.[2]

§ 329. **Same Subject—Illustrations.**—Illustrations of the rule that the acts of *de facto* officers are valid as respects the rights of third persons, are numerous.

Thus the following acts have been held valid:—The approval by the governor of acts of the legislature, though he holds over, and continues to act as governor after the expiration of his term and after his successor has taken the oath of office, upon the assumption of his re-election in pursuance of the certificate of the State canvassers;[3] the probate of a deed by a deputy clerk who has not taken the oath of office, but who was duly appointed and has assumed the duties;[4] the judgment of a justice of the peace, though he was not duly elected or qualified,[5] or whose term of

Dec. 318; McGregor *v.* Balch, 14 Vt. 428, 39 Am. Dec. 231; Fowler *v.* Bebee, 9 Mass. 231, 6 Am. Dec. 62; People *v.* Collins, 7 Johns. (N. Y.) 551; Smith *v.* Bondurant, 74 Ga. 416, 58 Am. Rep. 438; Cary *v.* State, 76 Ala. 78, 58 Am. Rep. 440, *n.*; People *v.* Staton, 73 N. C. 546, 21 Am. Rep. 479; McKinstry *v.* Tanner, 9 Johns. (N. Y.) 135; Gilmore *v.* Holt, 4 Pick. (Mass.) 257; McKim *v.* Somers, 1 Penn. 297; Douglass *v.* Wickwire, 19 Conn. 489; Green *v.* Burke, 23 Wend. (N. Y.) 490; Conover *v* Devlin, 15 How. Pr. 470; St. Louis County Court *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355; Gumberts *v.* Express Co., 28 Ind. 181; Kaufman *v.* Stone, 25 Ark. 336; Eaton *v.* Harris, 42 Ala. 491; Cooper *v.* Moore, 44 Miss. 386; State *v.* Lewis, 22 La. Ann. 33; Jhons *v.* People, 25 Mich. 498; Cahill *v.* Insurance Co., 2 Dougl. (Mich.) 124; Druse *v.* Wheeler, 22 Mich. 439; Stockle *v.* Silsbee, 41 Mich. 619; Morrison *v.* Sayre, 40 Hun (N. Y.) 465; State *v.* Farrier, 47 N. J. L. 383; Chiles *v.* State, 45 Ark. 143; Sharp *v.* Thompson, 100 Ill. 447; Woodside *v.* Wagg, 71 Me. 207; Bliss *v.* Day, 68 Me. 201; People *v.* Lieb, 85 Ill. 484; State *v.* McJunkin, 7 S. C. 21; Peirce *v.* Weare, 41 Iowa, 378; McLean *v.* State, 8 Heisk. (Tenn.) 22; *Ex parte* Strang, 21 Ohio St. 610; Cooper *v.* Moore, 44 Miss. 386; State *v.* Tolan, 33 N. J. L. 195; McCormick *v.* Fitch, 14 Minn. 252.

[1] Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

[2] Conway *v.* City of St. Louis, 9 Mo App. 488.

[3] State *v.* Williams, 5 Wis. 308, 68 Am. Dec. 65.

[4] Farmers &c. Bank *v.* Chester, 6 Humph. (Tenn.) 458, 44 Am. Dec. 318.

[5] Mallet *v.* Mining Co., 1 Nev. 188,

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office has in fact expired,[1] where he is acting in the discharge of the office and is generally recognized as the legal officer; a levy made by a constable who is in discharge of the office, though he has not given the required bond;[2] the act of a clerk in marking a paper "filed," after the expiration of his term, but while he is still in the possession of the office;[3] a license issued by a clerk elected and acting, though under Confederate authority;[4] a conviction had,[5] or a recognizance taken,[6] before a regularly acting justice, though he was appointed under an unconstitutional statute,[7] or had forfeited his office by the acceptance of an incompatible one;[8] the service of a legal notice by a constable whose term of office had expired but who was generally supposed to be a constable and was notoriously acting as such;[9] the levy of a tax by a board of supervisors elected and acting but under an unconstitutional statute;[10] the attestation of an affidavit by a notary after the expiration of his term, both parties acting in good faith;[11] a sale for taxes, though made by an officer elected to fill a vacancy unlawfully created.[12]

§ 330. **Title of Officer de Facto can not be questioned collaterally.**—As a necessary postulate from the same principle of public policy from which the rule of the preceding section is deduced is the other rule, equally well settled, that the title of the officer *de facto*, and the validity of his acts, cannot be collaterally questioned in proceedings to which he is not a party, or which were not instituted to determine their validity.[13]

90 Am. Dec. 484. See also Johnson *v.* McGinley, 76 Me. 432; *Ex parte* Johnson, 15 Neb. 512.

[1] Hamlin *v.* Kassafer, 15 Oreg. 456, 3 Am. St. Rep. 176.

[2] Gunn *v.* Tackett 67 Ga. 725; Soudant *v.* Wadhams, 46 Conn. 218.

[3] Galbraith *v.* McFarland, 3 Cold. (Tenn.) 267, 91 Am. Dec. 281.

[4] Ward *v.* State, 2 Cold. (Tenn.) 605, 91 Am. Dec. 270.

[5] State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

[6] Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89.

[7] State *v.* Carroll, *supra*.

[8] Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374. See also Woodside *v.* Wagg, 71 Me. 207.

[9] Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335.

[10] Leach *v.* People, 122 Ill. 420, 36 Alb. L. Jour. 194.

[11] Smith *v.* Bondurant, 74 Ga. 416, 58 Am. Rep. 438; Cary *v.* State, 76 Ala. 78, 58 Am. Rep. 440, note.

[12] Watkins *v.* Inge, 24 Kans. 612.

[13] Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; Stockle *v.* Silsbee, 41 Mich. 615; Jhons *v.* People, 25 Mich. 499; Cahill *v.* Ins. Co., 2 Doug. (Mich.) 124; Druse *v.* Wheeler,

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§ 331. **De Facto Officer can not recover Compensation.**—But while the acts of the *de facto* officer are thus valid as to third persons, he can not himself acquire rights based upon his defective title.

It is well settled, therefore, that he can not maintain an action to recover the salary, fees or other compensation attached to the office.[1]

"It is the settled doctrine in this State," says the court in New York,[2] "that the right to the salary and emoluments of a public office attach to the true and not to the mere colorable title, and in an action brought by a person claiming to be a public officer, for the fees or compensation given by law, his title to the office is in issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency merely gives no right to the salary or compensation. [3]

The right of the intruder to recover is denied, not upon the ground of actual fraud on his part, for it often happens that he is in not under a claim of right, but under a *prima facie* title, which he cannot or may not know to be invalid; nor upon the ground that he is a mere volunteer, and that the government should not be obliged to pay him for his services, for in most cases they are rendered in good faith, and under the expectation, both on his part and on the part of the public, that he is to receive the emoluments of the office. The principle is, that the

22 Mich. 439; Kaufman *v.* Stone, 25 Ark. 336; Eaton *v.* Harris, 42 Ala. 491; Cooper *v.* Moore, 44 Miss. 386; Gumberts *v.* Express Co., 28 Ind. 181; State *v.* Lewis, 22 La. Ann. 33.

[1] Meehan *v.* Hudson, 46 N. J. L. 276, 50 Am. Rep. 421; Matthews *v.* Supervisors, 53 Miss. 715, 24 Am. Rep. 715; Christian *v.* Gibbs, 53 Miss. 314; Commonwealth *v.* Slifer, 25 Penn. St. 23, 64 Am. Dec. 680; Riddle *v.* Bedford County, 7 Serg. & R. (Penn.) 386; Dilton *v.* Myers, 3 Pa. L. J. 169; Mayfield *v.* Moore, 53 Ill. 428, 5 Am. Rep. 52; McCue *v.* Wapello County, 56 Iowa, 698, 41 Am. Rep. 134; People *v.* Potter, 63 Cal. 127; Meagher *v.* Storey County, 5 Nev. 244; Philadelphia *v.* Given, 60 Penn. St. 136; Kimball *v.* Alcorn, 45 Miss. 151; People *v.* Smythe, 28 Cal. 21.

[2] Dolan *v.* Mayor, 68 N. Y. 274, 23 Am. Rep. 168.

[3] Citing People *v.* Hopson, 1 Den. (N. Y.) 574; People *v.* Nostrand, 46 N. Y. 382; People *v.* Tieman, 30 Barb. (N. Y.) 193; Mayor *v.* Flagg, 6 Abb. Pr. 296; Lightly *v.* Clouston, 1 Taunt. 112; Prescott *v.* Hays, 42 N. H. 56; Riddle *v.* Bedford County, 7 Serg. & R. 392.

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right follows the true title, and the courts will not aid the intruder by permitting him to recover the compensation which rightfully belongs to another."

§ 332. **But if Payment is made to Officer de Facto, Officer de Jure can not recover it from Government.**—But it is held that if payment of the salary or other compensation be made by the government, in good faith, to the office *de facto*, while he is still in possession of the office, the government cannot be compelled to pay it a second time to the officer *de jure* when he has recovered the office, at least where the officer *de facto* held by color of title.[1]

"It is plain," says ANDREWS, J., "that in many cases the duty imposed upon the fiscal officers of the State, counties or cities to pay official salaries, could not be safely performed unless they are justified in acting upon the apparent title of claimants. The certificate of boards of canvassers certifying the election of a person to an elective office is *prima facie* evidence of the title of the person whose election is certified. But it often happens that, by reason of irregularities in conducting the election, or the admission of disqualified voters, the apparent title is overthrown and another person is adjudged to be rightfully entitled to the office. But this can seldom, if ever, be ascertained, except after a judicial inquiry; and in case of an appointed officer, the validity of the appointment often depends upon complicated questions of law or fact. If fiscal officers, upon whom the duty is imposed

[1] Auditors *v.* Benoit, 20 Mich. 176, 4 Am. Rep. 382. (COOLEY, J., dissented in a forcible opinion.) Dolan *v.* Mayor, 68 N. Y. 274, 23 Am. Rep. 168; Commissioner *v.* Anderson, 20 Kans. 298, 27 Am. Rep. 171; Smith *v.* Mayor, 37 N. Y. 518; Conner *v.* Mayor, 5 N. Y. 285; Parker *v.* Supervisors, 4 Minn. 59; McAffee *v.* Russell, 29 Miss. 84, 97; Wheatly *v.* Covington, 11 Bush (Ky.) 18, 22; Queen *v.* Mayor, 13 Ad. & El. 30; Shaw *v.* Pima County, — Ariz. —, 18 Pac. Rep. 273; Selby *v.* Portland, 14 Oreg. 243, 58 Am. Rep. 307; Hannon *v.* Grizzard, 96 N. C. 293, 2 S. E. Rep. 600; McManus *v.* Brooklyn, 5 N. Y. Supplement 424.

But the contrary is held in California: People *v.* Smythe, 28 Cal. 21; Carroll *v.* Siebenthaler, 37 Cal. 193.

In Matthews *v.* Supervisors, 53 Miss. 715, 24 Am. Rep. 715, the court per CHALMERS, J., approve the dissenting opinion of COOLEY, J., in Auditors *v.* Benoit, *supra*.

See also Philadelphia *v.* Rink, — Penn. —, 2 Atl. Rep. 505, and Andrews *v.* Portland, 79 Me. 484, 10 Atl. Rep. 458.

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to pay official salaries, are only justified in paying them to the officer *de jure*, they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making the payment, to go behind the commission and investigate and ascertain the real right and title. This, in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer *de jure*, without inquiring whether another has the better right."[1]

§ 333. **De Jure Officer may recover Salary paid de Facto Officer.**—But it is held that the *de jure* officer, when he has established his title and gained possession of his office, may recover from the *de facto* officer who has wrongfully held possession of it, the salary, fees or other emoluments received by the latter while holding the office.[2] In an Illinois case, where the *de facto* officer had held in good faith, the court permitted him to deduct "a reasonable allowance for the necessary expenses in earning the fees and emoluments;" but said that had he intruded without pretense of legal right, a different rule would have been applied.[3] In Michigan, one who had been wrongfully kept out of the office by a claimant thereto was permitted to recover from

[1] In Dolan *v.* Mayor, *supra*.

[2] Nichols *v.* MacLean (1886) 101 N. Y. 526, 54 Am. Rep. 730; Kessel *v.* Zeiser, 102 N. Y. 114, 55 Am. Rep. 769; People *v.* Nolan, 101 N. Y. 569; Rule *v.* Tait, 38 Kans. 765; Mayfield *v.* Moore, 53 Ill. 428, 5 Am. Rep. 52; People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131; Glasscock *v.* Lyons, 20 Ind. 1; Currey *v.* Wright, 9 Lea (Tenn.) 247; Bier *v.* Gorrell, 30 W. Va. 95; Stoddard *v* Williams, 65 Cal. 472; Hunter *v.* Chandler, 45 Mo. 452; Comstock *v.* Grand Rapids, 40 Mich. 397; United States *v.* Addison, 6 Wall. (U. S.) 291; Dorsey *v.* Smyth, 28 Cal. 21; Dolan *v.* Mayor, 68 N. Y. 274, 23 Am. Rep. 168; Douglass *v.* State, 31 Ind. 429; Petit *v.* Rousseau, 15 La. Ann. 239; Sigur *v.* Crenshaw, 10 La. Ann. 297; Vaux *v.* Jefferen, 2 Dyer 114; Pybus *v.* Mitford, 1 Mod. 122; Howard *v.* Wood, 2 Lev. 245; Arris *v.* Stukeley, 2 Mod. 260; Lee *v.* Drake, 2 Salk. 468; Boyter *v.* Dodsworth, 6 T. R. 681; Webb's Case, 8 Cokes' Rep. 90; Green *v.* Hewett, Peake 182; Crosbie *v.* Hurley, 1 Alcock & Nap. 431.

[3] Mayfield *v.* Moore, 53 Ill. 428, 5 Am. Rep. 52.

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the latter the whole official salary, without any deduction for the services of the incumbent.[1]

In New Jersey, however, the right of the *de jure* officer, who has ousted a *de facto* officer holding in good faith, to recover from the latter the fees of the office received by him, is denied, especially where the *de facto* officer would have been subject to a penalty for not accepting the office. The cases, cited in the note, from California, Indiana, Michigan, Louisiana and New York, were distinguished upon the ground that the statute in those States expressly permits one who has recovered the office to also recover the damages he had sustained by reason of the usurpation.[2]

So the officer *de jure* may not recover the salary paid to one who was appointed to fill the vacancy caused by the resignation of an officer who had been held to be entitled to it, though this finding was afterwards reversed and the plaintiff held to have the true title.[3]

§ 334. **De Jure Officer can not recover on Bond of de Facto Officer.** But though the *de jure* officer may thus recover of the officer *de facto*, the damages sustained by reason of the intru-

[1] People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131.

[2] Stuhr *v.* Curran, 15 Vroom (N. J.) 181, 43 Am. Rep. 353, BEASLEY, C. J., delivered an elaborate dissenting opinion holding the right of recovery. See also the subsequent case of Meehan *v.* Hudson, 46 N. J. L. 276, 50 Am. Rep. 421, where the court say of Stuhr *v.* Curran: "It was not the design of the judgment in the Court of Errors, nor is it its legitimate effect, to give countenance or encouragement to those who are willing by force or fraud to obtrude in places lawfully assigned to others, nor to permit such person to profit by the emoluments belonging thereto. The reasons which protect one who has performed the services belonging to a public officer, under an appointment apparently regular and legal, in ignorance of and without the means of ascertaining, defects in his title, and where his refusal to serve would leave a vacancy in office, whether such reasons be weak or strong, have no application to a case like this. In such a case we cannot doubt that in some form the officer *de jure* would be entitled in law to demand and have compensation for the injury done him by such an intruder. If payment be made to the officer *de facto* the public will be protected from further claim, as the disbursing officer is not bound to know the title by which an actual incumbent holds, and the rival claims to the funds must be litigated between the individual claimants."

[3] Nichols *v.* Branham, 84 Va. 923, 6 S. E. Rep. 463.

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sion, the sureties upon the bond of the *de facto* officer are not liable. "A careful review of the cases," it is said in a late case in Tennessee, "leads to the conclusion that, whether the action be for the recovery of specific salary due and uncollected by the usurper, or fees earned and unappropriated, or for damages *eo nomine*, the action is but an action for damages, and is a personal action against the intruder," and it was held that the sureties upon the officer's bond for the faithful performance of his duty were not liable.[1]

§ 335. **Public can not recover Salary voluntarily paid to Officer de Facto.**—But the public cannot recover, as paid under a mistake of law, money paid as salary to one who if not an officer *de jure* has acted as an officer *de facto*.[2]

§ 336. **Officer de Facto liable for Malfeasance.**—"A person who undertakes an office and is in office," says Chief Justice RUFFIN, "though he might not have been duly appointed, and, therefore, may have a defeasable title or not have been competent to serve therein, is yet, from the possession of its authorities and the enjoyment of its emoluments, bound to perform all the duties, and liable for their omission, in the same manner as if the appointment were strictly legal and his right perfect."

It is, therefore, held that the officer *de facto* is criminally liable for malfeasance in his assumed office,[3] and he may be subjected to a penalty prescribed for a violation of his duty.[4] He must also respond in damages at the suit of him who is injured thereby.[5] By assuming the office and undertaking to exercise it, he estops himself from denying that he is legally chargeable with its due performance.[6]

§ 337. **May be punished for Embezzlement.**—So the officer

[1] Curry *v.* Wright, 86 Tenn. 636.

[2] Badeau *v.* United States, 130 U. S. 439 9 S. C. Rep. 579.

[3] Diggs *v.* State, 49 Ala. 311; State *v.* Long, 76 N. C. 254; State *v.* Cansler, 75 N. C. 442; Neale *v.* Overseers, 5 Watts (Penn.) 538; State *v.* Goss, 69 Me. 22.

[4] Bedford *v.* Rice, 58 N. H. 446.

[5] Allen *v.* Archer, 49 Me. 346; Bearce *v.* Fossett, 34 Me. 575; Longacre *v.* State, 3 Miss. 637; Sandwich *v.* Fish, 2 Gray (Mass.) 298; Williamstown *v.* Willis, 15 Gray (Mass.) 427; Johnston *v.* Wilson, 2 N. H. 202; Horn *v.* Whittier, 6 N. H. 88; Jones *v.* Scanland, 6 Humph. (Tenn.) 195; Trescott *v.* Moan, 50 Me. 347; Wentworth *v.* Gove, 45 N. H. 160.

[6] Billingsley *v.* State, 14 Md. 369; Borden *v.* Houston, 2 Tex. 594.

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de facto, who has assumed the office and received money by virtue of it, is an officer within the meaning of the statutes punishing embezzlement.[1]

§ 338. **Must respond for his Negligence.**—An officer *de facto* is also liable civilly in damages to individuals who have received injury from his negligent omission or performance of a duty owing to them by reason of the office which he has assumed to exercise.[2]

In this respect he stands in much the same position as an agent who has gratuitously undertaken the performance of a service, and is held bound to conform to the instructions he receives.[3]

§ 339. **May be required to act, by Mandamus.**—Having assumed the office, the officer *de facto* must perform the duties adhering to it, and the performance of them may be enforced by mandamus.[4]

§ 340. **But Officer de Facto incurs no Liability by ceasing to act.**—But the officer *de facto* is not bound to remain in the office or to continue to exercise its functions, and hence he will not, in general, incur liability to individuals,[5] or become subject to a statutory penalty[6] for omitting to act further when he expressly disavows his authority and ceases to act because he is doubtful of his right to do so.

"Yet perhaps," said Mr. Bishop, "in special circumstances, as where the refusal is to take a particular step constituting a part of a whole which he has taken upon himself to do, his not doing of the part, when he might have declined the whole, will subject him to punishment."[7]

§ 341. **Is liable upon his Bond.**—As has previously been stated, the sureties upon an official bond, by virtue of which the officer has been inducted into office, can not, when called upon to answer for his official defaults, escape liability upon the ground

[1] State *v.* Goss, 69 Me. 42; Fortenberry *v* State, 56 Miss, 286.

[2] Longacre *v.* State, 3 Miss. 637.

[3] See Mechem on Agency, § 478.

[4] Runion *v.* Latimer, 6 Rich. (S. C.) 126; Kelly *v.* Wimberly, 61 Miss. 548.

[5] Olmsted *v.* Dennis, 77 N. Y. 378.

[6] Bentley *v.* Phelps, 27 Barb. (N. Y.) 524.

[7] 1 Crim. Law (7th ed.) § 464.

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that their principal was not eligible or was not properly elected or did not qualify in the prescribed manner.[1]

§ 342. **When he sues or defends in his own Right must show valid Title.**—But though the acts of the *de facto* officer are valid as respects the rights of third persons, they are void as to himself.[2] He can not, therefore, as has been seen, build up rights in himself based upon his occupancy of the office, as, for example, the right to recover the salary;[3] neither can he, when sued for acts, which only a valid title to the office will justify, escape liability as a trespasser by showing himself to be the officer *de facto*. Unless he can show himself to be the officer in law as well as in fact, authorized as such to do the act complained of, he will be liable as any other trespasser.[4]

§ 343. **His Title can not be tried collaterally.**—As has been seen in an earlier section, the title of the officer *de facto* can not be tried collaterally, but only in a direct proceeding brought to determine that very question.[5]

§ 344. **Quo Warranto is the Remedy.**—In this, as in other cases where it is desired to try the title to the office, *quo warranto* is the remedy to be applied, unless a special statutory remedy has been substituted in its place.[6]

§ 345. **Injunction will not lie to prevent his acting.**—Injunction, therefore, will not lie to prevent the officer *de facto* from continuing to exercise the functions of the office.[7]

[1] See *ante*, § 296, and cases cited. See also Case *v.* State, 69 Ind. 46.

[2] Olmsted *v.* Dennis, 77 N. Y. 377; Riddle *v.* Bedford County, 7 Serg. & R. (Penn.) 386; People *v.* Hopson, 1 Den. (N. Y.) 574; Hamlin *v.* Dingman, 5 Lans. (N. Y.) 61; People *v.* Nostrand, 46 N. Y. 675; Nichols *v.* MacLean, 101 N. Y. 526, 54 Am. Rep. 730.

[3] *Ante*, § 331.

[4] People *v.* Weber, 89 Ill. 347; People *v.* Weber, 86 Ill. 283; Miller *v.* Callaway, 32 Ark. 666, citing Patterson *v.* Miller, 2 Met. (Ky.) 493; Rodman *v.* Harcourt, 4 B. Mon. (Ky.) 229; People *v.* Hopson, 1 Den. (N. Y.) 574; Green *v.* Burke, 23 Wend. (N. Y.) 490; Riddle *v.* Bedford County, 7 Serg. & R. (Penn.) 386; Keyser *v.* Commissioners, 2 Rawle (Penn.) 139; Fowler *v.* Beebe, 9 Mass. 231, 6 Am. Dec. 62; Nichols *v.* MacLean, 101 N. Y. 526, 54 Am. Rep. 730.

[5] See *ante*, § 330. See also Hagner *v.* Heyberger, 7 Watts & S. (Penn.) 104, 42 Am. Dec. 220.

[6] Hagner *v.* Heyberger, 7 Watts & S. (Penn.) 104, 42 Am. Dec. 220; Bean *v.* Thompson, 19 N. H. 290, 49 Am. Dec. 154.

[7] Hagner *v.* Heyberger, 7 Watts & S. (Penn.) 104, 42 Am. Dec. 220.

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§ 346. **Mandamus will not lie to install Officer de Jure.**— So where an office is already filled by an officer *de facto* who is discharging its duties, mandamus will not lie to compel the admission of one claiming to be the officer *de jure*, but resort must be had to *quo warranto*.[1]

[1] Duane *v.* McDonald, 41 Conn. 517.

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CHAPTER IX.

OF THE VALIDITY OF CONTRACTS CONCERNING OFFICES AND OFFICERS.

§ 347. Purpose of this Chapter.
348. The Doctrine of Public Policy.
349. Contracts opposed to Public Policy are void.

I. CONTRACTS TO SECURE APPOINTMENTS OR ELECTION TO OFFICE.

350. Agreements to appoint one to Office are void.
351. Contracts to procure Appointment to Office are void.
352. Same Rule applies to private Offices and Employments.
353. Contracts for procuring or improperly influencing Elections are void.
354. Same Subject—What Services are legitimate.
355. Contracts diminishing Competition for Offices are void.

II. CONTRACTS FOR THE SALE OF OFFICES.

356. Contracts for the Sale of Public Offices are void.
357. Contracts to resign Office in another's Favor are void.
358. Contracts for Exchange of Offices are void.

III. CONTRACTS FOR INFLUENCING OFFICERS AND OFFICIAL ACTION.

359. Contracts for improperly influencing official Action are void.
360. Contract to improperly influence legislative Action are void.
§ 361. Same Subject — Legitimate Services.
362. Procuring Contracts from Government or Heads of Departments.
363. Same Subject—Illustrations.
364. Contracts to procure Allowance of Claims.
365. Contracts to procure Compromise of Crime or Discontinuance of criminal Proceedings.
366. Contracts for procuring Pardons.
367. Same Subject—How where Conviction illegal.
368. Contracts leading to Violation of Duty are void.
369. Contracts imposing Restraints upon Performance of Duty are void.

IV. CONTRACTS RESPECTING THE EMOLUMENTS OF PUBLIC OFFICERS.

370. Contract that Stranger shall receive all of the Emoluments is void.
371. Contract that Stranger shall receive Part of the Emoluments is void.
372. Contract to surrender all or Part of Emoluments to the Public is void.
373. And Election procured by such Contract is void.
374. Contracts to pay additional Compensation for Performance of Duty are void.

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§ 375. Contract to pay for Services in independent Employment is valid.
376. Contract to pay Reward for Performance of official Duty not valid.
377. Contract to accept Less than legal Compensation is not binding.
378. Contract to waive legal Means for collecting Compensation is void.

V. CONTRACTS RESPECTING DIVISION OF FEES WITH DEPUTIES.

§ 379. Where all Fees belong to Principal he may contract for Portion of those earned by Deputy.
380. But Contract to pay Principal a fixed Sum at all Events is void.
381. Where Fees legally belong to Deputy, Contract to divide these is void.

§ 347. **Purpose of this Chapter.**—No discussion of the subject of this treatise can be complete which does not deal to some extent with the question of the validity of the contracts which may be made concerning public offices and officers, and this seems to be an appropriate place for it.

It is not the purpose to discuss those questions which are common to all contracts by whomsoever entered into, but simply those which stand upon some ground peculiar to the general subject. Of this class, the question most frequently arising is that which finds its source in the principles of public policy.

§ 348. **The Doctrine of Public Policy.**—By "public policy," says a writer upon that subject, is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law.[1]

§ 349. **Contracts opposed to Public Policy are void.**—The application of this principle is well stated by Chief Justice BRICKELL in a recent case,[2] as follows: "All agreements or contracts, having for their object that which is repugnant to public justice, or violative of public policy, or offensive to good morals, or contrary to statutory provisions, or in derogation of the principles of the common law relating to the public peace or security, and injurious to the community, are void; 'and the reason

[1] Greenhood on Pub. Pol. 2. quoting Lord Brougham in Egerton *v.* Brownlow, 4 H. L. Cas. 1.

[2] Robertson *v.* Robinson, 65 Ala. 610, 39 Am. Rep. 17.

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why the common law says such contracts are void is for the public good.' "

Distributing this matter under several heads, there will be considered—

I.

CONTRACTS TO SECURE APPOINTMENT OR ELECTION TO OFFICE.

§ 350. **Agreement to appoint one to Office void.**—"It is the duty of the officer having a power of appointing," says LEARNED, P. J.,[1] "to make the best appointment in his power according to his judgment *at the time when he makes the appointment.* The public have a right to demand this. And it is against public policy that he should be deprived of the exercise of his best judgment by a contract previously made. If he has promised the office to one person and has since discovered that the public will be better served by another, he must be at liberty to make the better appointment. And that too, although no such absolute disqualification may exist in regard to the person to whom it was first promised, as would form a defense to an action for damages, if such an action could be maintained on the promise. Whatever may be the practice, appointments are in theory made for the public good. That is the reason why the appointee may not purchase his office. In a similar way, though not to the same extent, the public good would be injured if a promise to make an appointment were held to be legally binding, so as to control the exercise of that judgment which the appointing officer ought to exercise when he makes an appointment. This is not a question as to the lawfulness of arrangements between the sheriff and his deputies as to their fees. The fees may be his. But the right of appointment is not the property of the appointing officer. And he has no right to barter it, or to dispose of it. It is merely a political power entrusted to him, to be exercised, not to be sold."

§ 351. **Contracts to procure Appointment to Office are void.**—Contracts to procure the appointment of a person to public

[1] In Hager v. Catlin, 18 Hun (N. Y.) 448. In this case the sheriff of the county had agreed to appoint the plaintiff one of the deputies.

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office fall within the same principles. These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power must necessarily lower the character of the appointments to the great detriment of the public good. Agreements for compensation to procure these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy.[1]

§ 352. **Same Rule applies to private Offices and Employments.** —The same principles apply to contracts to procure private offices and employments, as well as those which are public or political in their nature. Open and fair presentation of an applicant's qualifications for the position is legitimate, and such presentation may lawfully be undertaken for a compensation, where the agent's relations to the subject-matter and the appointing power will permit, and the fact that he comes as a hired advocate is disclosed.

But where it is contemplated that the agent is to conceal his agency and assume the position of a disinterested friend or adviser;[2] or where the appointment is to be sought by bringing

[1] Tool Co. *v.* Norris, 2 Wall. (U. S.) 45; Gray *v.* Hook, 4 N. Y. 449; Gaston *v.* Drake, 14 Nev. 175, 33 Am. Rep. 548; Filson *v.* Himes, 5 Penn. St. 452, 47 Am. Dec. 422; Faurie *v.* Morin, 4 Martin (La.) 39, 6 Am. Dec. 701; Outon *v.* Rodes, 3 A. K. Marsh. (Ky.) 432, 13 Am. Dec. 193; Hager *v.* Catlin, 18 Hun (N. Y.) 448; Haas *v.* Fenton, 8 Kans. 601; Liness *v.* Hesing, 44 Ill. 113, 92 Am. Dec. 153.

[2] See Bollman *v.* Loomis, 41 Conn. 581, where A. for a fee from C. undertook to pose as the confidential friend and adviser of B. and thus induce him to purchase property of C. "This," says Chief Justice SHAW, in Fuller *v.* Dame, 18 Pick. (Mass.) 472, in speaking of this rule, "is founded upon the general consideration of fitness and expediency. Such advice and solicitation, in whatever form the agency may be exerted, are understood to be disinterested and to flow from a single regard to the interests of the parties. They are lawful only so far as they are free and disinterested. If such advice and solicitation, thus understood to be pure and disinterested, may be justly offered from mercenary motives, they would produce all the consequences of absolute misrepresentation and falsehood. It is understood to be the offer of

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to bear personal influence or persuasion;[1] or where the undertaking of the commission at all is inconsistent with duties already assumed or imposed by law, the contract is repugnant to the public policy.[2]

Thus where A, an attorney, employed B, the agent of C, to endeavor to persuade C to discharge a certain other attorney he was then employing, and to employ A instead, and promised B, by way of compensation, to divide with him such fees as A might receive, it was held that the agreement was void.[3] So a contract that in consideration of B's purchasing of A certain stock in a corporation, A would procure B's appointment as treasurer[4] or cashier[5] thereof, is void. Such appointments should be made because of the personal fitness of the applicant, and not because the appointing power is open to personal influence or can be bought for a price. So A, who has been requested to recommend to C, a suitable person for employment whom he could endorse as in every way responsible and reliable, cannot lawfully undertake to secure the position for B in consideration of B's paying him a fee.[6]

§ 353. **Contracts for procuring or improperly influencing Elections are void.**—Purity of elections, and the free, fair and intelligent exercise of the ballot, uninfluenced by other considerations than the candidate's fitness and the general good of the

disinterested good offices, and the measure proposed, to be recommended by the unbiased judgment of the person offering it; whereas, it is in fact an offer flowing from unavowed motives of pecuniary interest, and the recommendation is the result of a judgment biased by a hope of a large reward. If rewards might be taken in consideration of the exertion of direct or indirect influence, either by the person acting under it, or by others who should be influenced and moved by him, it would destroy all confidence, it would lead to false and unfair representations and dealings, and be productive of infinite mischief."

[1] See note 3, *post.*

[2] See note 3, 4 and 5, *post.*

[3] Byrd *v.* Hughes, 84 Ill. 174, 25 Am. Rep. 442; Meguire *v.* Corwine, 101 U. S. 108.

[4] Guernsey *v.* Cook, 120 Mass. 501; Noyes *v.* Marsh, 123 Mass. 286; Jones *v.* Scudder, 2 Cin. Sup. Ct. 178.

[5] As of a National Bank, Noel *v.* Drake, 28 Kans. 265, 42 Am. Rep. 162; see also Railroad Co. *v.* Ryan, 11 Kans. 602; Haas *v.* Fenlon, 8 Kans. 601; Tool Co. *v.* Norris, 2 Wall. (U. S.) 45.

[6] Holcomb *v.* Weaver, 136 Mass. 265, 17 Reporter, 401.

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community, are of paramount public importance, and any agreement for the rendition of services which have for their object, or which legitimately tend to, the introduction of other elements, as the bribery of voters or the bringing to bear upon them of personal influence, solicitation or persuasion, is, in accordance with the principles already referred to, clearly opposed to public policy and void.

Thus where one who was a candidate for the office of district attorney, employed another to "use all of his influence" with the voters of the county to secure the candidate's election, and who promised as compensation therefor, that if he should be elected, he would divide the fees of the office with the other, the court said: "Such a contract cannot be upheld. Its tendency was to corrupt the people upon whose integrity and intelligence the safety of the State and Nation depends,—to lead voters to work for individual interests rather than the public welfare."[1]

So where one agreed to render services in procuring the election of a certain candidate to the office of sheriff upon consideration that if successful he should be appointed deputy, the court held the agreement void.[2] And where one for money or other personal profit, agrees to use his influence in an election against what he believes to be for the public good, the contract is void, though as a matter of fact, he uses no unlawful means.[3]

§ 354. **Same Subject—What Services legitimate.**—But it is not unlawful for a candidate for a public office, particularly where his candidacy extends over a considerable territory, to employ another to make public speeches in his behalf, or to prepare, print or distribute arguments upon the questions at issue, or to use other open and honorable means to promote the success of his candidacy, where the object is to convince the understandings of the voters by public means and not to bring personal or

[1] Gaston *v.* Drake, 14 Nev. 175, 33 Am. Rep. 548; Martin *v.* Wade, 37 Cal. 168; see also Swayze *v.* Hull, 3 Halstead (N. J.) 54, 14 Am. Dec. 399. An agreement to pay another to "work and canvass" voters for the purpose of securing the promisor's nomination for an office is void. Keating *v.* Hyde, 23 Mo. App. 555.

[2] Stout *v.* Ennis, 28 Kans. 706. And a like ruling was made in Robertson *v.* Robinson, 65 Ala. 610, 39 Am. Rep. 17. See also Salling *v.* McKinney, 1 Leigh (Va.) 42, 19 Am. Dec. 722; Groton *v.* Waldoborough, 11 Me. 306, 26 Am. Dec. 530.

[3] Nichols *v.* Mudgett, 32 Vt. 546.

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other improper influences to bear upon their weaknesses or prejudices.[1]

§ 355. **Contract diminishing Competition for Office is void.** —Contracts by which open and honorable competition for appointment or election to public office is diminished, discouraged or removed, are opposed to public policy, as having a tendency, among other things, to deteriorate the public service and to prevent the selection of the best candidates. An agreement, therefore, that, if one of two candidates for appointment will withdraw, the other will, if successful, pay him half of the fees of the office is void and will not be enforced.[2]

II.

CONTRACTS FOR THE SALE OF OFFICES.

§ 356. **Contracts for the Sale of public Offices are void.**— "By the theory of our government," says AMES, C. J.,[3] "all offices, whether civil or military, whether general or professional, are trusts held solely for the public good, and in which no man can have a property to sell, or can acquire one by purchase. Appointments to them are presumed to be made solely upon the principle of *detur digniori;* and the office is to be borne by the appointee for the public good, as long as his services are required in it; and any practice whereby the bare consideration of money is brought to bear in any form upon such appointment to or

[1] "There is a clear distinction," says LEWIS, P. J. in Keating *v.* Hyde, 23 Mo. App. 555, "between the purchase of services to be devoted only to an advertising of the fact that one is or desires to be a candidate, and the purchase of services to be employed in advocating his peculiar merit and eligibility so as to influence the choice of the voter. No public policy forbids the making of compensation, under agreement or otherwise, for printing or distributing announcements, or for the employment of any proper agency which may bring the fact of a person's candidacy more prominently before the public eye. The information thus disseminated is essential to the intelligent determination of the voter's choice. But it becomes a very different thing when money is paid or promised for efforts to control the voter's free agency in selecting the object of his suffrage." See also Murphy *v.* English, 64 How. Pr. (N. Y.) 362.

[2] Gray *v.* Hook, 4 N. Y. 449; Hunter *v.* Nolf, 71 Penn. St. 282.

[3] In Eddy *v.* Capron, 4 R. I. 394, 67 Am. Dec. 541, citing Ellis *v.* Ruddle,

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resignation of office, conflicts with and degrades this great principle and policy. The services performed under such appointments are paid for by salary or fees, presumed to be adjusted by law to the precise point of adequate remuneration for them. Any premium paid to obtain office, other than that which the law establishes or regulates, interferes with this adjustment, and tempts to peculation, overcharges and frauds in the effort to restore the balance thus disturbed. In short, without dwelling longer upon so obvious a policy as that involved in such transactions, the moral sense of every person educated in a free country anticipates all reasonings upon such a subject, and, as it were, instinctively condemns all agreements impugning this policy as at war with the whole theory of our government."

Such sales of and traffickings in public offices are usually forbidden by express statute, but the principles of the common law alike declare them void.

§ 357. **Contracts to resign Office in another's Favor are void.** —In accordance with these principles, a contract is void, as against public policy, whereby a public officer agrees to resign his office in another's favor or to give another a chance of promotion or appointment to the office.[1]

2 Lev. 151; Graeme *v.* Wroughton, 32 Eng. L. & Eq. 561; Meredith *v.* Ladd, 2 N. H. 517; Carleton *v.* Whitcher, 5 N. H. 196,200; Outon *v.* Rodes, 3 A. K. Marsh (Ky.) 433, 13 Am. Dec. 193; Tappan *v.* Brown, 9 Wend. (N. Y.) 175; Gray *v.* Hook, 4 N Y. 449; Becker *v.* Ten Eyck, 6 Paige (N. Y.) 68; Hopkins *v.* Prescott, 4 M. G. & S. 578, 56 Eng Com. L. 578, 596; Harrington *v.* Du Chatel, 1 Bro. C. C. 124; Parsons *v.* Thompson, 1 H. Black, 322.

Sale of a public office is void, but purchaser being *in pari delecto* can not recover the money paid. Groton *v.* Waldoborough, 11 Me. 306, 26 Am. Dec. 530.

[1] A draft drawn in consideration of the resignation of an officer in the drawer's favor is void, although there was no promise to recommend the drawer's appointment, and although the resigning officer had already resolved to remove to another State, and merely wished to get back money previously paid by him to the drawer for resigning the same office in his favor. Eddy *v.* Capron, 4 R. I. 394, 67 Am. Dec. 541. So a bond given to secure repayment of money for buying resignation of an officer that there might be a promotion, is void. Graeme *v.* Wroughton, 11 Excheq. 146, 32 Eng. L. & Eq. 561. So is an agreement to secure an officer half pay for life in consideration of his retiring from service. Parsons *v.* Thompson, 1 H. Black, 322, and a note given in consideration of a resignation. Outon *v.* Rodes, 3 A. K. Marsh (Ky.) 432, 13 Am. Dec. 193.

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§ 358. **Contracts for Exchange of Office are void.**—For like reasons, also, a contract by which one agrees to pay another officer a sum of money if he will exchange offices with him is void.[1]

III.

CONTRACTS FOR INFLUENCING OFFICERS AND OFFICIAL ACTION.

§ 359. **Contracts for improperly influencing official Action are void.**—It is an obvious principle of public policy that public officers in determining upon and pursuing any course of official action or conduct should be influenced and guided only by considerations of the public welfare and a desire to faithfully, honestly and impartially perform their official duty. Any contract or undertaking, therefore, which has for its purpose or legitimately tends to substitute for these considerations those which are based upon the personal weakness, obligations, friendship or cupidity of the officer are clearly opposed to public policy and void. Thus—

§ 360. **Contracts to improperly influence legislative Action are void.**—It is of the utmost importance to the preservation and protection of the State that the sources of its legislative enactments be kept uncontaminated by any improper or debasing influence. Considerations of the public good, motives of high policy, arguments based solely upon the true interests of the people, are the only elements which can properly enter into the question of the right discharge of the important functions of the legislator. Personal solicitation, private intrigue, secret persuasion, arguments based upon the legislator's duty or obligations to individuals or societies or parties, to say nothing of offers of personal or pecuniary profit or advancement, are utterly hostile to the public good. Courts of law and equity have not been slow to recognize this evil, or to declare that all attempts to influence the course of legislation by secret or sinister means, or even by using personal influence, solicitation or persuasion with the

Same rule applies in case of office of a corporation. Forbes *v.* McDonald, 54 Cal. 98.

[1] Stroud *v.* Smith, 4 Houst. (Del.) 448.

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members of the legislative body, are inconsistent with sound public policy.

Any contract, therefore, for services to be performed in procuring or attempting to procure the passage or defeat of any public or private act by the use of any improper means or the exercise of undue influence, or by using personal solicitation, influence or persuasion with the members is void;[1] and any agree-

[1] Clippinger *v.* Hepbaugh, 5 Watts & Serg. (Penn.) 315, 40 Am. Dec. 519; Marshall *v.* Baltimore & Ohio R. R. Co, 16 How. (U. S.) 314; Tool Co. *v.* Norris, 2 Wall. (U. S.) 45; Trist *v.* Child, 21 Wall. (U. S.) 441; Weed *v.* Black, 2 McArthur (D. C.) 268, 29 Am. Rep. 618; McBratney *v.* Chandler, 22 Kan. 692; Kansas Pacific Ry. Co. *v.* McCoy, 8 Kan. 538; Harris *v.* Simonson, 28 Hun (N. Y.) 318; Mills *v.* Mills, 40 N. Y. 543, 100 Am. Dec. 535; Frost *v.* Belmont, 6 Allen (Mass.) 152; Powers *v.* Skinner, 34 Vt. 274, 80 Am. Dec. 677; Bryan *v.* Reynolds, 5 Wis. 200, 68 Am. Dec. 55; Elkhart County Lodge *v.* Crary, 98 Ind. 238, 49 Am. Rep. 746; Oscanyan *v.* Arms Co. 103 U. S. 261; Sweeney *v.* McLeod, 15 Oreg. 330; Cary *v.* Western Union Tel. Co. 47 Hun (N. Y.) 610.

In Trist *v.* Child, *supra*, Mr. Justice SWAYNE well says, "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of universal history. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

"The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interests of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

"If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every

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ment for the payment of a fee for such services is likewise void,[1] particularly where it is made contingent upon success, because in such a case there would be a stronger incentive to the exercise of personal and sinister means to effect the object.

And so jealously do the courts scrutinize such contracts that they condemn the very appearance of evil, and it matters not that in the particular case nothing improper was done or was expected to be done. It is enough that the employment tends directly to such results.[2]

right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

"If the instances were numerous, open and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

"It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views we follow the lead of reason and authority."

[1] Clippinger *v.* Hepbaugh, 5 Watts & Serg. (Penn.) 315, 40 Am. Dec. 519; Wood *v.* McCann, 6 Dana (Ky.) 366; Gil *v.* Williams, 12 La. Ann. 219, 68 Am. Dec. 767.

[2] Clippinger *v.* Hepbaugh, *supra;* Mills *v.* Mills, *supra;* McKee *v.* Cheney, 52 Howard, Pr. (N. Y.) 144; Gil *v.* Williams, *supra*; Powers *v.* Skinner, *supra;* Atcheson *v.* Mallon,

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§ 361. **Same Subject—Legitimate Services.**—It is not to be understood, however, that every contract for services to be rendered in endeavoring to procure or defeat legislation is unlawful. Services may be rendered, public in their nature and intended to reach the understandings of the legislators rather than to exercise any personal influence over them, which are perfectly legitimate.

Thus a person may lawfully be employed to draft a petition, attend the taking of testimony, collect facts, prepare arguments and to submit them publicly, either before a committee of the legislature or the legislature itself, if permitted to do so, "because," as it is said by a learned judge, "a public discussion could not tend to deceive or corrupt the legislature, while personal solicitation and influence might produce that result." [1]

§ 362. **Procuring Contracts from Government or Heads of Departments.**—Employments of this nature rest upon the same principles as those considered in the preceding section. It is legitimate and proper to lay before the officer having the matter in charge, facts, information and arguments intended for the public good and calculated to enlighten the understanding and secure wise and intelligent action. Parties desiring to furnish to the government its necessary supplies, or to undertake the performance of its public works, may lawfully employ an agent to present their bids or offers; to call attention to their facilities for the proper performance of their undertakings, and to make, in

43 N. Y. 147, 3 Am. Rep. 678; Spence *v.* Harvey, 22 Cal. 337; Thomas *v.* Caulkett, 57 Mich. 392, 58 Am. Rep. 369.

"It matters not," says ROGERS, J. in Clippinger *v.* Hepbaugh, *supra*, "that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts, or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal."

[1] Bryan *v.* Reynolds, 5 Wis. 200, 68 Am. Dec. 55; Trist *v.* Child, 21 Wall. (U. S.) 441; Sedgwick *v.* Stanton, 14 N. Y. 289; Wildey *v.* Collier, 7 Md. 273; Miles *v.* Thorne, 38 Cal. 335, 99 Am. Dec. 381; Coquillard *v.* Bearss, 21 Ind. 479, 83 Am. Dec. 362.

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their behalf, such public and open arguments in favor of their propositions as they may be afforded opportunity.[1]

[1] Trist *v.* Child, 21 Wall. (U. S.) 441; Stanton *v.* Embrey, 93 U. S. 548; Lyon *v.* Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Pease *v.* Walsh, 49 How. Pr. (N. Y.) 269; Southard *v.* Boyd, 51 N. Y. 177; Cummins *v.* Barkalow, 4 Keyes, (N. Y.) 514; Howland *v.* Coffin, 47 Barb. (N. Y.) 653.

Thus in Beal *v.* Polhemus, 67 Mich. 130, 34 N. W. Rep. 532; Polhemus gave Beal a note to be paid "as soon as the postoffice is moved into" a building which Beal was then erecting on property near that belonging to Polhemus, the latter believing that its location there would enhance the value of his own property. Beal was an active and prominent politician, but while there was some evidence that he had said in relation to similar contracts with other parties that he could control the senators from his State, there was no evidence that he made any such representations to Polhemus, or that the using of any such influence constituted any part of the consideration of the contract. The postoffice was duly moved into the building, but Polhemus refused to pay the note, alleging it to be invalid as against public policy. In an action to recover upon it the trial court found as a fact that in securing the postoffice to be placed and located in his building, Beal used no undue influence upon any department or officers of the government, and was not guilty of any corruption or corrupt practice in making the contract, and did no more than any honorable man might do in renting his building to the government for the use of a postoffice, and he was allowed to recover. In the Supreme Court, MORSE, J. said: "Mr. Beal had a perfect right to be heard before any officer of the government or any department of the same, as to the merits of his building as a place for the location of the postoffice. It is not shown by the findings or the evidence in the case that he used any improper means to gain his point, or even that he influenced any senator or representative in Congress, or any officer of the government, to interfere in his behalf. He went to Washington personally, and, while there, secured the location of the office where he wanted it; but there is not the slightest testimony that he used any undue means to accomplish his end. We can not presume that he used his personal power, which is said to have been very great, in a corrupt or unseemly manner, or in violation of any public policy. For aught we know, he appeared as any citizen might and has a right to do, before the proper office at Washington, and stated the merits of his claim so convincingly and conclusively that the location desired seemed to be the most proper and available one. Certainly there could be nothing wrong in this. It is true, there is evidence in relation to some of the contracts, not in suit, that Beal boasted that he could control the senators from this State, and that he must have money to go to Washington to do so; but there is no testimony that either one of them lifted a hand or said a word in his behalf. And there is nothing to show that in the present case he made any such representations to obtain the contract. The defendant agreed to pay a certain sum upon the accomplishment of an object in which he saw a future benefit to

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But where the employment contemplates the bringing to bear of improper, sinister or personal influence, or where its natural and legitimate tendency is in that direction, particularly where compensation is made contingent upon success, it is opposed to public policy and void.[1]

§ 363. **Same Subject—Illustrations.**—Thus in a leading case decided by the Supreme Court of the United States, one Norris had been employed by the Providence Tool Company to endeavor to obtain from the War Department an order for a large number of muskets, and, for his compensation, he was to receive whatever the Government should agree to pay for each musket above a certain sum. Norris thereupon set himself to work, to use his own language, "concentrating influence at the War Department," and finally succeeded in obtaining a favorable contract. Afterwards a dispute arose between him and the tool company, as to the amount of his commission, and he brought an action to recover it.

The Supreme Court, by Mr. Justice FIELD, said: "The question then is this: Can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other cle-

his property. That object was attained, and he has had the benefit he desired. There is no valid reason why he should not fulfil the contract on his part, as Beal promptly fulfilled his part of the agreement."

[1] But in a case very similar to the one last cited, the party had given his notes in consideration that the owners of the building "would use all proper persuasion to secure the location of the postoffice in their room." One of the owners was a personal friend of the Postmaster-General and represented to him that the location was a suitable one and urged upon him the propriety of placing the postoffice in their building, and this was done. The court, however, held that the agreement was against public policy, and that the notes were void. Elkhart County Lodge *v.* Crary, 98 Ind. 238, 49 Am. Rep. 746. See also Filson *v.* Himes, 5 Penn. St. 452, 47 Am. Dec. 423; Spence *v.* Harvey, 22 Cal. 336, 83 Am. Dec. 69; Hutchen *v.* Gibson, 1 Bush (Ky.) 270.

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ment can lawfully enter into the transaction so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other element into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds. * * * Agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception."[1]

§ 364. **Contract to procure Allowance of Claims.**—Contracts for services to be rendered in the prosecution of claims against governments and municipal bodies stand upon the same footing. As is said by a learned judge in a case involving the right of an attorney to recover upon such a contract: "Professional services, to prepare and advocate just claims for compensation, are as legitimate as services rendered in court in arguing a cause to convince a court or jury that the claim presented, or the defence set up against a claim presented by the other party, ought to be allowed or rejected. Parties in such cases require advocates, and the legal profession must have a right to accept such employment, and to receive compensation for their services; nor can courts of justice adjudge such contracts illegal, if they are free from any taint of fraud, misrepresentation or unfairness."[2]

But where the contract contemplates that the allowance of the claim is to be sought by using improper means or by bringing personal solicitation, influence or persuasion to bear upon the officer vested with the duty of decision, the undertaking is unlawful and the courts will not enforce it.[3]

[1] Tool Co. *v.* Norris, 2 Wall. (U. S.) 45; and the same rule was laid down and applied in Oscanyan *v.* Arms Co. 103 U. S. 261.

[2] CLIFFORD, J. in Stanton *v.* Embrey, 93 U. S. 548; Burbridge *v.* Fackler, 2 McArthur (D. C.) 407. The open and fair presentation of facts and arguments in such cases is unobjectionable. Coquillard *v.* Bearss, 21 Ind. 479, 83 Am. Dec. 362.

[3] Devlin *v.* Brady, 32 Barb. (N. Y.) 518.

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§ 365. **Contracts to procure Compromise of Crime or Discontinuance of criminal Proceedings.**—It is a high requirement of the public policy that crimes should be investigated and punished, and the law frowns upon all attempts to suppress investigation or to defeat the administration of justice. Any contract, therefore, for services to be rendered for the purpose of stifling prosecutions, or of obstructing, delaying or preventing the due course of public justice in its efforts to punish crime is opposed to public policy and void.

Thus an agreement with an attorney, for a contingent fee, to settle a criminal case so as to avoid a prosecution;[1] an agreement to pay one for endeavoring to induce the complainant in a prosecution for felony to discontinue the proceedings;[2] an undertaking for compensation to endeavor to prevent the finding of an indictment, and, if found, to endeavor to have the public authorities dismiss it;[3] an agreement for a contingent fee to use one's influence with a prosecuting attorney to induce him to bring about a lighter punishment than otherwise, and to permit the accused to turn State's evidence with the hope of receiving a pardon therefor;[4] and an agreement with an attorney to attempt to induce the sheriff to refrain from arresting A, who is charged with murder, the object being to give A an opportunity to escape,[5] are void.

§ 366. **Contracts for procuring Pardons.**—The same general principles which underlie the questions just discussed, govern here. An agent or attorney may lawfully be employed to attend an open or public hearing of the executive or board of pardons, and make such legitimate arguments and present such petitions, memorials, statements of fact and evidence as are appropriate to bring before the pardoning power all the considerations which may be properly taken into account in behalf of the convicted

[1] Ormerod *v.* Dearman, 100 Penn. St. 561, 45 Am. Rep. 391.

[2] Rhodes *v.* Neal, 64 Ga. 704, 37 Am. Rep. 93.

[3] Barron *v.* Tucker, 53 Vt. 338, 38 Am. Rep. 684.

[4] Wright *v.* Rindskopf, 43 Wis. 344.

[5] Arrington *v.* Sneed, 18 Tex. 135; See also Buck *v.* First National Bank, 27 Mich. 293, 15 Am. Rep. 189; Haines *v.* Lewis, 54 Iowa 301, 37 Am. Rep. 202; McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67; Dodson *v.* Swan, 2 W. Va. 511, 98 Am. Dec. 787.

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person;[1] but all employments having for their object or natural tendency the using of any improper or sinister means, or which contemplate the exercise of personal influence or solicitation, especially if for a contingent fee, are looked upon by the law as demoralizing in their tendency, opposed to public policy and void, even though in the particular case no improper means were used or contemplated.[2]

§ 367. **Same Subject—How when Conviction illegal.**—But where the conviction was unwarranted, as because the court had no jurisdiction, or where there was a grave doubt as to the constitutionality of the statute under which the conviction was had,

[1] Chadwick *v.* Knox, 31 N. H. 226, 64 Am. Dec. 329; Bremsen *v.* Engler, 49 N. Y. Super. Ct. 172; Formby *v.* Pryor, 15 Ga. 258; Bird *v.* Breedlove, 24 Ga. 623. "It is not at once apparent," says BELL, J.; in Chadwick *v.* Knox, *supra*, "that it is not lawful and proper for a party who is suffering the punishment of a crime to apply to the pardoning power for a remission of his sentence; and as far as we are aware, no censure has been regarded as attaching to such an application, either in law or morals. It seems to us equally reasonable for any other person who believes it his duty to make such application in behalf of another, to present the case to the executive, with such petitions, memorials, statements of fact and evidence as are suitable to satisfy the pardoning power of the propriety of the relief desired, and we think no censure can be justly attached to any person for his exertions in such a case if the measures adopted are consistent with the facts of the case, and with the truth and honesty of all parties concerned, while any effort to obtain such pardon by falsehood and misrepresentation, or by any species of fraudulent contrivance, or by prostituting the influence resulting from official station, or from personal relation to the pardoning power, is entirely forbidden by law.

A person in prison can do little to aid himself in bringing his case to the consideration of the executive. For everything that must be done without the walls of the prison, the convict is compelled to rely on the assistance of those who have their liberty. Such assistance may be afforded from motives of charity and compassion, or the motive may be in part kindness and in part an expectation that the party relieved will be ready to afford a suitable compensation for the services and expenses; or the party in prison may employ another to do such acts as may be rightfully and properly done for his relief and contract to pay him for his services, and to repay him his expenses. Such a contract, if the parties contemplate only a resort to legal and proper measures, is free from any just exception, and binding upon the parties."

[2] Hatzfield *v.* Gulden, 7 Watts (Penn.) 152, 31 Am. Dec. 750; Thompson *v.* Wharton, 7 Bush (Ky.) 563, 3 Am. Rep. 306; Haines *v.* Lewis, 54 Iowa, 301, 37 Am. Rep. 202; Kribben *v.* Haycraft, 26 Mo. 396; McGill's Admr. *v.* Burnett, 7 J. J. Marsh. (Ky.) 640.

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no rule of public policy would be violated by legitimate endeavor to secure the pardon or release of the accused.[1]

§ 368. **Contracts leading to Violation of Duty are void.**—So any contract which has for its object or consideration or which naturally and legitimately tends to induce a public officer to neglect, ignore, violate or exceed his official duty, or to make him less zealous, earnest or diligent in its discharge than the law requires, is contrary to public policy and void.

Thus a contract to pay money or to indemnify in consideration that a sheriff shall levy upon a void writ,[2] or shall seize the goods of a stranger to it,[3] or shall seize exempt property,[4] or shall make a false return,[5] or neglect to serve a writ[6] or permit a prisoner to escape,[7] is void.

§ 369. **Contracts imposing Restraints upon Performance of Duty are void.**—As in the cases noted in the preceding section, any contract by which a public officer imposes restraints or creates obstructions to the future impartial and untrammelled discharge of his duty are void, as where the officer agrees that he will in the future appoint a certain person to an office[8] or that he will annually, for a term of years, renew a liquor license.[9]

IV.

CONTRACTS RESPECTING THE EMOLUMENTS OF PUBLIC OFFICERS.

§ 370. **Contract that Stranger shall receive all of the Emoluments is void.**—An agreement whereby one person, in consideration of receiving another's assistance in obtaining an office, agrees

[1] Thompson *v.* Wharton, *supra;* Timothy *v.* Wright, 8 Gray (Mass.) 522.

[2] Collier *v.* Windham, 27 Ala. 291, 62 Am. Dec. 767.

[3] Prewitt *v.* Garrett, 6 Ala. 128, 41 Am. Dec. 40; Morgan *v.* Hale, 12 W. Va. 713.

[4] Hunter *v.* Agee, 5 Humph. (Tenn.) 57.

[5] Knipe *v.* Hobart, 1 Lutw. 596.

[6] Hodsdon *v.* Wilkins, 7 Me. 113, 20 Am. Dec. 347.

[7] Love *v.* Palmer, 7 Johns. (N. Y.) 159; Webber *v.* Blunt, 19 Wend. (N. Y.) 188, 32 Am. Dec. 445; Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232.

[8] Hager *v.* Catlin, 18 Hun (N. Y.) 448.

[9] City of Jackson *v.* Bowman, 39 Miss. 671.

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that the latter may receive all the fees and emoluments of the office, is void, and no action can be maintained upon it.[1]

§ 371. **Contract that Stranger shall receive Part of the Emoluments is void.**—So a contract whereby one person in consideration of the assistance of another, either in influence,[2] or money,[3] agrees to divide the emoluments with the latter is likewise void, "Contracts," it is said in one case,[4] "by which parties agree to bestow their money and services to secure the election of candidates for public office, and the candidates in consideration thereof agree, if elected, to share with such parties the profits and income of their offices, corrupt and poison the very source of political power in republican governments."

§ 372. **Contract to surrender all or part of Emoluments to Public is void.**—So a contract by which the officer agrees, in consideration of his appointment or election, to surrender to the public the fees or salary of the office in whole or in part,[5] or to receive something else in compensation than that which the law provides,[6] is void.

Where, however, the officer had expressly released all claims for salary in consideration of a given sum, the court refused to permit him to impeach his release by showing that it was filed prior to the election for the purpose of inducing electors to vote for him. The parties were held to be in *pari delicto*, and the court left them where it found them.[7]

§ 373. **Election procured by such Contract is void.**—Such a contract also amounts, in legal effect, to bribery in its largest sense, and invalidates the officer's election, if procured thereby, and he may be removed upon *quo warranto*.[8]

[1] Garforth *v.* Fearon, 1 H. Bl. 327.

[2] Gray *v.* Hook, 4 N. Y. 449; Hunter *v.* Nolf, 71 Penn. St. 282.

[3] Martin *v.* Wade, 37 Cal. 168.

[4] RHODES, J., in Martin *v.* Wade, *supra*.

[5] See Carrothers *v.* Russell, 53 Iowa 346, 36 Am. Rep. 222; State *v.* Collier, 72 Mo. 13, 37 Am. Rep. 417; State *v.* Purdy, 36 Wis. 213, 17 Am. Rep. 485; State *v.* Church, 5 Oreg. 375, 20 Am. Rep. 746.

[6] Liverpool *v.* Wright, 28 L. J. ch. 868.

[7] Harvey *v.* Tama County, 53 Iowa 228.

[8] State *v.* Collier, 72 Mo. 13, 37 Am. Rep. 417; Carrothers *v.* Russell, 53 Iowa 346, 36 Am. Rep. 222; State *v.* Purdy, 36 Wis. 213, 17 Am. Rep. 485. See also Tucker *v.* Aiken, 7 N. H. 113; Alvord *v.* Collin, 20 Pick. (Mass.) 423.

In People *v.* Thornton, 25 Hun (N.

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§ 374. **Contracts to pay additional Compensation for Performance of Duty are void.**—It is the presumption of the law that the salary, fees or other compensation which it has fixed as the reward for the performance of official duty are adequate, and the officer, by accepting the office, impliedly agrees to perform its duties for the reward so prescribed. To permit him to exact more as a condition to the performance of his duty would be to countenance and encourage official exaction and oppression. To enforce a voluntary promise to pay him more, would be to countenance and encourage bribery and corruption in respect to public officials.

All contracts, therefore, whether made by the public[1] or by individuals,[2] and whether voluntary or exacted, to pay a public officer for the performance of an act which the law makes it his duty to perform without pay,[3] or to pay him a compensation in addition to that which the law has fixed, are opposed to public policy and void.

So a contract to pay extra compensation for incidental or collateral services properly belonging to or forming a part of his office is void,[4] as is also an express allowance of a claim for such services against the public.[5]

§ 375. **Contract to pay for Services in independent Employment is valid.**—But a contract to pay a public officer for lawful

Y.) 456, it is held that while such contracts are opposed to public policy, they do not *per se*, in the absence of a constitutional or statutory provision to that effect, invalidate the election.

[1] See *post* § 861. Bayha *v.* Webster County, 18 Neb. 131; People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377; Haynes *v.* State, 3 Humph. (Tenn.) 480, 39 Am. Dec. 187; Turpen *v.* Commissioners, 7 Ind. 172; Miami *v.* Blake, 21 Ind. 82; United States *v.* Smith, 1 Bond C. C. 68; Lancaster County *v.* Fulton, — Penn. —, 18 Atl. Rep. 384; Huffman *v.* Commissioners, 25 Kans. 64.

[2] See *post*, § 862. Wilcoxson *v.* Andrews, 66 Mich. 553; Peck *v.* Bank, 51 Mich. 353; Burk *v.* Webb, 32 Mich. 174; Vandercook *v.* Williams, 106 Ind. 345; Fort Wayne *v.* Lehr, 88 Ind. 62; Willemin *v.* Bateson, 63 Mich. 309; Hatch *v.* Mann, 15 Wend. (N. Y.) 44; Trundle *v.* Riley, 17 B. Mon. (Ky.) 396.

[3] Preston *v.* Bacon, 4 Conn. 471; Neustadt *v.* Hall, 58 Ill. 172.

[4] Decatur *v.* Vermillion, 77 Ill. 315; Rowe *v.* Kern County, 72 Cal. 353; Sidway *v.* Park Commissioners, 120 Ill. 496.

[5] Adams County *v.* Hunter, — Iowa —, 43 N. W. Rep 280; Griffin *v.* Clay County, 63 Iowa 413.

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services rendered by him in an independent employment, not forming a part of his official duty, is valid.[1]

§ 376. **Contract to pay Reward for Performance of official Duty not valid.**—For reasons similar to those which condemn contracts to pay an officer increased compensation for the performance of his legal duty, it is held that he can not recover from the public[2] or from an individual[3] a reward offered by either for the performance of that which it was his legal duty to perform without reward.

But where the act is one which is not within the scope of his duty and which his office does not require him to perform, a contract to pay a reward for its performance is not invalid.[4]

§ 377. **Contract to accept Less than legal Compensation is not binding.**—So it is held that a contract to accept less than the compensation prescribed by law is opposed to public policy and void. "If by contract" says the Supreme Court of Iowa,[5] "he may take less, why may not the parties contract for an enlarged compensation? We think a contract whereby an officer agrees to accept a less or greater compensation than is prescribed by statute, * * * is contrary to public policy and void."[6]

§ 378. **Contract to waive legal Means for collecting Compensation is void.**—So a contract whereby the officer agrees not to avail himself of a statutory mode of enforcing the collection of his compensation is opposed to public policy and void.[7]

[1] See *post*, § 862, Evans *v.* Trenton, 24 N. J. L. 764; Niles *v.* Muzzy, 33 Mich. 61, 20 Am. Rep. 670; McBride *v.* Grand Rapids, 47 Mich. 236, s. c. 49 Mich. 239; United States *v.* Brindle, 110 U. S. 688.

[2] Pool *v.* Boston, 5 Cush. (Mass.) 219.

[3] Kick *v.* Merry, 23 Mo. 72, 66 Am. Dec. 658; Stamper *v.* Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Smith *v.* Whildin, 10 Penn. St. 89, 49 Am. Dec. 572; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Gillmore *v.* Lewis, 12 Ohio 281; Day *v.* Putnam Ins. Co. 16 Minn. 408; Warner *v.* Grace, 14 Minn. 487; Marking *v.* Needy, 8 Bush (Ky.) 22; Brown *v.* Godfrey, 33 Vt. 120.

[4] See *post*, § 885; Davis *v.* Munson, 43 Vt. 676, 5 Am. Rep. 315; Hayden *v.* Souger, 56 Ind. 45, 26 Am. Rep. 1; Morrell *v.* Quarles, 35 Ala. 544.

[5] Hawkeye Ins. Co. Brainard, 72 Iowa 130, 132.

[6] Citing Gilman *v.* Des Moines V. Ry. Co. 40 Iowa 200; McConkey *v.* Chapman, 58 Iowa 281; Boardman *v.* Thompson, 25 Iowa 487; Adye *v.* Hanna, 47 Iowa 264, and distinguishing the case at bar from Willemin *v.* Bateson, 63 Mich. 309, 29 N. W. Rep. 734.

[7] Hawkeye Ins. Co. *v.* Brainard, 72

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V.

CONTRACTS RESPECTING DIVISION OF FEES WITH DEPUTIES.

§ 379. **Where all Fees belong to Principal he may contract for Portion of those earned by Deputy.**—Where the duties of an office are such as may be performed by a deputy, and the fees attached to the office belong primarily to the principal, he may agree with his deputy to allow him a fixed compensation for his services, or that the deputy shall permit the principal to retain a certain proportion of the profits of the office.[1] So if a deputy be appointed to an office having uncertain profits, an agreement with the deputy that the latter shall allow the principal a fixed sum *out of such profits* is good, because the deputy is to pay out of the profits only, and cannot be charged for more than he receives.[2]

§ 380. **But Contract to pay Principal fixed Sum at all Events is void.**—But an agreement of a deputy to allow to his principal a sum in gross, not payable out of the profits of the office, and which may, therefore, exceed such profits, is a sale of the office and void.[3] So it is, also, where an office consisting of uncertain fees is granted to a deputy, together with all the fees, reserving to the principal a certain sum to be paid at all events.[4]

§ 381. **Where Fees legally belong to Deputy, Contract to**

Iowa 130, 132. In this case a justice of the peace agreed that in all suits brought before him by the insurance company, he would demand and collect no fees unless the company collected them of the defendant. The question whether, notwithstanding the agreement, he could recover his legal fees was held not to be before the court. See on this point, Willemin *v.* Bateson, 63 Mich. 309; Wilcoxson *v.* Andrews, 66 Mich. 553, where the question is answered in the negative.

[1] Becker *v.* Ten Eyck, 6 Paige (N. Y.) 68; Mott *v.* Robbins, 1 Hill (N. Y.) 21, 37 Am. Dec. 286; Welch *v.* Baden, 3 Keb. 717; Gulliford *v.* De-Cardonell, 2 Salk. 466; Ballantine *v.* Irwin, Fort. 368; Machen *v.* Stanyon, 1 Bro. P. C. 133.

[2] Becker *v.* Ten Eyck, *supra;* Mott *v.* Robbins, *supra.*

[3] Becker *v.* Ten Eyck, 6 Paige (N. Y.) 68; Godolphin *v.* Tudor, 2 Salk. 478; Mott *v.* Robbins, 1 Hill (N. Y.) 21, 37 Am. Dec. 286.

[4] Becker *v.* Ten Eyck, 6 Paige (N. Y.) 68; Mott *v.* Robbins, 1 Hill (N. Y.) 21, 37 Am. Dec. 286; Garforth *v.* Fearon, 1 H. Bl. 327; Salling *v.* McKinney, 1 Leigh (Va.) 42, 19 Am. Dec. 722.

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divide these is void.—So where the fees do not all belong to the principal primarily, but a portion of them are attached by law to the office of the deputy as such, an agreement by the deputy to divide these with the principal, if appointed, amounts to a purchase of the office and is therefore void.[1]

[1] Tappan *v.* Brown, 9 Wend. (N. Y.) 175. Here the deputy, on being appointed, agreed to receive a fixed salary instead of the fees to which he was by law entitled. The agreement was held void, and the officer could therefore not recover the salary, nor could he recover the fees, because by entering into this agreement he had, under the statute, forfeited his office.

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BOOK II.

OF THE TERMINATION OF THE OFFICER'S AUTHORITY.

CHAPTER I.

IN GENERAL.

§ 382. Purpose of Book II.
383. Variety of Methods.

§ 382. **Purpose of Book II.**—Having in the preceding Book considered the nature of a public office and how a person may be chosen and qualified for it, it now remains to be seen how the authority and duties imposed by the office may be terminated.

§ 383. **Variety of Methods.**—It will be evident that this may be accomplished in a variety of ways. The most natural of these is by the expiration of the term for which he was chosen, but the officer may also resign or abandon his office or be removed from it by competent authority. The office itself may also be abolished. Each of these methods will be the subject of a separate chapter.

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CHAPTER II.

BY THE EXPIRATION OF HIS TERM.

§ 384. In general.
385. What is meant by Term.
386. When Term begins.
387. Legislature can not change Term fixed by the Constitution.
388. In other cases Legislature may prescribe.
389. Legislature may change Term.
390. Construction of Laws fixing Term.
391. Subsequent Terms presumed to be of same Length as first.
392. Presumption from Order of Appointment.
393. Presumption from Times for Appointment.
394. Incumbent estopped by his own Interpretation.
395. Governor can not enlarge Term by the Commission.

I. WHERE DURATION OF TERM IS FIXED.

396. Expiration of Term dissolves Officer's Authority.
397. How when authorized to hold over.
398. Officer who has held for full Constitutional Period can not hold over.
§ 399. When officer holds over notwithstanding Resignation.
400. Provision for holding over do not apply to Office declared forfeited.
401. Right to hold over does not revive on Death of Successor.
402. Officers filling Vacancies in elective Offices hold only till next Election.
403. What is meant by "next regular election."
404. Right to hold over applies to Officers elected by Legislature.

II. WHERE DURATION OF TERM IS UNCERTAIN.

405. Office created for Performance of a single Act terminates upon its Performance.
406. Officer holding during Pleasure of appointing Power removable at Will.
407. Office vacated by Abolishment of appointing Power.
408. Office vacated by Repeal of Law creating it.

§ 384. **In general.**—The most natural and frequent method by which a public officer ceases to be such is by the expiration of the term for which he was elected or appointed. The question of when this event has occurred depends upon a number of considerations, the most prominent of which, perhaps, are whether he was originally elected or appointed.—1. For a definite term, or 2. For a term dependent upon some act or event, as during the pleasure of the appointing power.

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Each of these subdivisions will be separately treated. But certain preliminary questions may well be noticed first. Thus—

§ 385. **What is meant by "Term."**—The word *term*, when used in reference to the tenure of office, means ordinarily a fixed and definite time, and does not apply to appointive offices held at the pleasure of the appointing power.[1]

§ 386. **When Term begins.**—Statutes creating public offices usually prescribe the limits of the terms provided for, fixing the dates at which they shall begin and end. The date for the commencement of the term is ordinarily fixed for some appreciable period after the election or appointment, in order to give the newly chosen officer time to arrange his affairs and to qualify in the prescribed manner.

Where, however, no time is fixed, the term will begin on the date of the election,[2] in the case of elective officers, and at the date of the appointment where the officer is appointed.[3]

Where the term runs "from" a certain date, the day of the date is excluded in the computation.[4]

§ 387. **Legislature can not change Term fixed by the Constitution.**—Where the term of the officer is fixed by the constitution, the legislature can neither extend nor abridge it.[5]

So where the constitution directs that a certain officer shall be elected by the people, and authorizes the legislature to fix the

[1] Speed *v.* Crawford, 3 Metc. (Ky.) 207.

[2] State *v.* Constable, 7 Ohio 7; Marshall *v.* Harwood, 5 Md. 423; Hughes *v.* Buckingham, 5 S. & M. (Miss.) 632. Where statute provides for office, but fixes no date for its commencement, though requiring a commission to be issued, the commission will be held to have issued within a reasonable time, and the office will date from then. Brodie *v.* Campbell, 17 Cal. 11.

[3] Attorney-General *v.* Love, 10 Vroom (N. J.) 476, 23 Am. Rep. 234. Where no time is fixed, party may enter as soon as he has received his certificate and has qualified. McGee *v.* Gill, 79 Ky. 106; Haight *v.* Love, 39 N. J. L. 14, s. c. 39 N. J. L. 476, 23 Am. Rep. 234. The commission does not fix the term, and is simply evidence of the right to the office. State *v.* Chapin, 110 Ind. 272, 11 N. East. Rep. 317.

[4] Best *v.* Polk, 18 Wall. (U. S.) 112.

[5] State *v.* Brewster, 44 Ohio St. 589, 9 N. East. Rep. 849; Goodin *v.* Thoman, 10 Kans. 191; Grieble *v.* State, 111 Ind. 369, 12 N. East. Rep. 700; Pursel *v.* State, 111 Ind. 519, 13 N. East. Rep. 1003; Douglass *v.* State, 31 Ind. 429; Howard *v.* State, 10 Ind. 99.

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term and prescribe the time and place of the election, and the length of the term has been fixed and the officer elected, an act of the legislature extending the term of the present incumbent is unconstitutional and void.[1]

So where the constitution provides that an officer shall hold at the pleasure of the appointing power, a statute prescribing that he shall hold for a fixed term is invalid.[2]

But a constitutional provision that the term of no officer should be extended to a longer period than that for which such officer was elected or appointed, was held not to be intended to, and did not prevent the legislature from making reasonable changes in the times for electing public officers, and the fact that a statute for that purpose had the effect incidentally to extend the time of the present incumbent, did not render it unconstitutional.[3]

§ 388. **In other Cases Legislature may prescribe.**—But where no such constitutional limitation intervenes, the fixing or altering of the term of public officers is entirely within the control of the legislature,[4] or of the inferior municipal bodies to which it has delegated the power.[5]

§ 389. **Legislature may change the Term.**—So, in the absence of such constitutional prohibitions, the legislature may change the length of the term, even after the election or appointment,[6] though it is held that such a change will not be deemed to affect the term of the present incumbents in the absence of a clearly expressed intention so to do.[7]

§ 390. **Construction of Laws fixing Term.**—Where a consti-

[1] People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302, disapproving of People *v.* Oulton, 28 Cal. 44, and distinguishing People *v.* Batchelor, 22 N. Y. 128.

[2] People *v.* Perry, — Cal. —, 21 Pac. Rep. 423.

[3] State *v.* McGovney, 92 Mo. 428, 8 West. Rep. 720, following State *v.* Ranson, 73 Mo. 89.

[4] State *v.* Bailey, 33 N. W. Rep. 778, s. c. *sub nom.* Matter of Jordan, 37 Minn. 174; State *v.* Howe, 25 Ohio St. 588, 18 Am. Rep. 321.

Legislature may shorten term not fixed by the constitution. Taft *v.* Adams, 3 Gray (Mass.) 126.

[5] Chandler *v.* Lawrence, 128 Mass. 213.

[6] Matter of Jordan, 37 Minn. 174, s. c. *sub nom.* State *v.* Bailey, 33 N. W. Rep. 778; *In re* Bulger, 45 Cal. 553; Wilcox *v.* Rodman, 46 Mo. 322.

But note People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302, in § 387, *ante*.

[7] Farrell *v.* Pingree, — Utah —, 16 Pac. Rep. 813.

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tutional provision prescribing the term of a public office is uncertain or doubtful in its construction, that interpretation will be adopted which limits the term to the shortest time.[1]

§ 391. **Subsequent Terms presumed to be of same Length as first.**—Where a statute provided that an officer shall be elected to hold for a certain time, as for two years and until his successor is elected and qualified, but does not prescribe the length of subsequent terms, it will be presumed that they were to be of the same length as the first and that biennial elections were intended.[2]

§ 392. **Presumption from Order of Appointment.**—Where an appointment was made of two persons to fill two vacancies in the same body but of unequal lengths, without designating which was to fill the vacancy of the first class and which of the second, it was presumed that it was the intention that the person first named should fill the vacancy of the first class and the person last named the other.[3]

§ 393. **Presumption from Times for Appointment.**—So where the statute provided that a certain officer should be appointed *annually*, and an appointment was made without designating the length of the term, it was presumed to be for one year.[4]

§ 394. **Incumbent estopped by own Interpretation.**—An incumbent of an office who placed a certain construction upon the provisions fixing the term of his office, by entering upon it on a given day as the day when it commences, and who has subsequently held for the full period fixed by law, is estopped to deny to his successor the same interpretation and must vacate the office when the term expires as he has himself fixed it.[5]

§ 395. **Governor can not enlarge Term by the Commission.**—Where the term for which an officer is to hold is fixed by law, the governor can not enlarge it or confer extended powers, by issuing a commission in which a greater term is named.[6]

[1] Wright *v.* Adams, 45 Tex. 134.
[2] State *v.* Pearcy, 44 Mo. 159.
[3] People *v.* Richmond County, 20 N. Y. 252.
[4] Buffalo *v.* Mackay, 15 Hun (N. Y.) 204.
[5] Pursel *v.* State, 111 Ind. 519, 12 N. East. Rep. 1003; Grieble *v.* State, 111 Ind. 369, 12 N. East. Rep. 700.
[6] Hench *v.* State, 72 Ind. 297.

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I.

WHERE DURATION OF TERM IS FIXED.

§ 396. **Expiration of Term dissolves Officer's Authority.**—Upon the expiration of the officer's term, unless he is authorized by law to hold over, his rights, duties and authority as a public officer must *ipso facto* cease.[1]

§ 397. **How when authorized to hold over.**—It is usually provided by law that officers elected or appointed for a fixed term shall hold not only for that term but until their successors are elected and qualified. Where this provision is found, the office does not become vacant upon the expiration of the term if there is then no successor elected and qualified to assume it, but the present incumbent will hold until his successor is elected and qualified, even though it be beyond the term fixed by law.[2]

Where, however, no such provision is made the question of the right of the incumbent to hold over is not so clear, but the prevailing opinion in this country seems to be that, unless such holding over be expressly or impliedly prohibited, the incumbent may continue to hold until some one else is elected and qualified to assume the office.[3]

[1] Badger *v.* United States, 93 U. S. 599; People *v.* Tieman, 8 Abb. Pr. (N. Y.) 359, 30 Barb. 193.

[2] Walker *v.* Ferrill, 58 Ga. 512; Jones *v.* Jefferson, 66 Tex. 576; State *v.* Harrison, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. East Rep. 384; Tuley *v.* State, 1 Ind. 500; Miller *v.* Burger, 2 Ind. 337; Baker *v.* Kirk, 33 Ind. 517; State *v.* Berg, 50 Ind. 496; Gosman *v.* State, 106 Ind. 203; Elam *v.* State, 75 Ind. 518; Weir *v.* Bush, 4 Litt. (Ky.) 433; *In re* Lawhorne, 18 Gratt. (Va) 85; State *v.* Howe, 25 Ohio St. 588, 18 Am. Rep. 321.

[3] Dillon's Munic. Corp. (3d ed.) § 219, citing People *v.* Runkle, 9 Johns. (N. Y.) 147; Slee *v.* Bloom, 5 Johns. (N. Y.) Ch. 366, 378; 2 Kent Com. 238; Kelsey *v.* Wright, 1 Root (Conn.) 83; Smith *v.* Natchez Steamboat Co. 1 How. (Miss.) 479; Lynch *v.* Lafland, 4 Cold. (Tenn.) 96; South Bay &c., Co. *v.* Gray, 30 Me. 547; Elmendorf *v.* Mayor, 25 Wend. (N. Y.) 693.

See also State *v.* Harrison, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N.W. Rep. 384, adopting same view, and citing Tuley *v.* State, 1 Ind. 500; People *v.* Runkle, 9 Johns. (N. Y.) 147; Trustees *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; McCall *v.* Byram Mfg. Co., 6 Conn. 428; State *v.* Fagan, 42 Conn. 32; Sparks *v.* Farmers' Bank, 3 Del. Ch. 274; Stratton *v.* Oulton, 28 Cal. 44; People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302.

See also holding to same effect: Chandler *v.* Bradish, 23 Vt. 416;

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Such a rule seems to be demanded by the most obvious requirements of public policy, for without it there must frequently be cases where, from a failure to elect or a refusal or neglect to qualify, the office would be vacant and the public service entirely suspended.

§ 398. **Officer who has held for full constitutional Period can not hold over.**—But notwithstanding a general provision that the incumbent of an office shall hold over until the election and qualification of his successor, yet where the incumbent has, at the expiration of his term, held for the full period permitted by the constitution, as where that instrument forbids the same person from holding the same office for more than a given number of years, he can not hold over, but the office will become vacant where his successor dies before qualifying.[1]

§ 399. **When Officer holds over notwithstanding Resignation.**—Under such a provision that the present incumbent shall hold over until his successor is elected and qualified, it is held that, so far as this is necessary for the protection of the public, the officer will be deemed to continue in office until his successor is elected and qualified, notwithstanding the previous acceptance of his resignation.[2]

"The resignations," says Mr. Justice HUNT, "may be made to and accepted by the officers named; but to become perfect, they depend upon and must be followed by an additional fact, to wit, the appointment of a successor, and his qualification. When it is said in the statute that the resignation may be thus accepted, it is like to the expiration of the term of office. In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor."

The contrary rule, however, prevails in New York.[4]

§ 400. **Provisions for holding over do not apply to Office declared forfeited.**—But the provisions authorizing the incumbent to hold over to await the election and qualification of his

Overseers *v.* Sears, 22 Pick. (Mass.) 122; People *v.* Fairbury, 51 Ill. 149.

[1] Gosman *v.* State, 106 Ind. 203.

[2] Jones *v.* Jefferson, 66 Tex. 576; Badger *v.* United States, 93 U. S. 599, affirming 6 Bissell (U. S. C. C.) 308.

[3] In Badger *v.* United States, 93 U. S. 599, 603.

[4] Olmsted *v.* Dennis, 77 N. Y. 378.

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successor do not apply to one who has been adjudged, by a competent tribunal, to have forfeited his office, but from the date of the judgment the office became *ipso facto* vacant.[1]

§ 401. **Right to hold over does not revive on Death of Successor.**—But when a successor has been legally elected and qualified, the prior incumbent's right to hold over thereupon ceases, and it does not revive because his successor dies after his qualification, but before the commencement of his term.[2]

Where, however, the successor dies before he has fully qualified, the prior incumbent holds over.[3]

§ 402. **Officers filling Vacancies in elective Offices hold only till next Election.**—Officers elected or appointed to fill vacancies in an elective office are in simply for the remainder of the unexpired term, and hold therefore only until the next regular election.[4] In case of a failure then to elect, however, they would ordinarily hold over.[5]

Where such an officer is to fill the vacancy, by express terms of law "until a successor is elected and qualified," he can be superseded only by one who is duly *elected*, and his holding is not terminated by the *appointment* of a successor.[6]

§ 403. **What is meant by "next regular Election."**—Whether the words "next regular" or "next general" election mean the next election at which officers generally can be elected, or only an election at which, by law, the particular officer in question is to be voted for, is a question upon which the authorities are in conflict. The former view prevails in Kansas,[7] and the latter in North Carolina.[8]

§ 404. **Right to hold over applies to Officers elected by Legislature.**—The right to hold over under a provision of law

[1] Hyde *v.* State, 52 Miss. 665.

[2] State *v.* Seay, 64 Mo. 89, 27 Am. Rep. 206; State *v.* Hopkins, 10 Ohio St. 509.

[3] Commonwealth *v.* Hanley, 9 Penn. St. 517.

[4] Opinion of Judges, 64 Me. 596; State *v.* Seay, 64 Mo. 89, 27 Am. Rep. 206; State *v.* Foster, 36 Kans. 504, 13 Pac. Rep. 841; Parcel *v.* State, 110 Ind. 122, 11 N. East. Rep. 4; People *v.* Wilson, 72 N. C. 155; State *v.* Johns, 3 Oreg. 533.

[5] But see Hagerty *v.* Arnold, 13 Kans. 367.

[6] People *v.* Lord, 9 Mich. 227.

[7] State *v.* Foster, 36 Kans. 504, 13 Pac. Rep. 841. See also State *v.* Johns, 3 Oreg. 533.

[8] People *v.* Wilson, 72 N. C. 155.

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conferring that right upon "any officer," applies as well to those officers who are elected by the legislature as to those elected by the people or appointed by the executive.[1]

II.

WHERE DURATION OF TERM IS UNCERTAIN.

§ 405. **Office created for Performance of a single Act terminates upon its Performance.**—Where an office is created, or an officer is appointed, for the purpose of performing a single act or the accomplishment of a given result, the office terminates and the officer's authority ceases with the accomplishment of the purpose which called it into being.[2]

§ 406. **Officer holding during Pleasure of appointing Power removable at Will.**—So where the officer is appointed to hold during the pleasure of the appointing power, his holding is terminable at the will of the latter.[3] This subject belongs more properly to the chapter on Removals from Office, to which the reader is referred.[4]

§ 407. **Office vacated by Abolishment of appointing Power.**—Offices created and filled by an authority which is itself dependent upon and subservient to a higher power, as in the case of municipal officers and officers appointed by local boards, are vacated by the termination of the power which created them, as by the repeal of a municipal charter[5] or the abolishment of a local board.[6]

§ 408. **Office vacated by Repeal of Law creating it.**—So an office will be vacated if the law or ordinance by which it was created be repealed without reservation.[7]

[1] State *v.* Harrison, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. East Rep. 384.

[2] Bergen *v.* Powell, 94 N. Y. 591. See also Mechem on Agency, § 201; Douvielle *v.* Supervisors, 40 Mich. 585.

[3] Patton *v.* Vaughan, 39 Ark. 211; State *v.* Commissioners, 88 Mo. 144; People *v.* Shear, — Cal. —, 15 Pac. Rep. 92; People *v.* Whitlock, 92 N. Y. 192; State *v.* Doherty, 25 La. Ann. 119, 13 Am. Rep. 131; People *v.* Hill, 7 Cal. 97; Keenan *v.* Perry, 24 Tex. 253.

[4] See *post* §§ 444–462.

[5] Dillon Mun. Corp. § 64.

[6] State *v.* Board, 7 Neb. 42. See Mechem on Agency, § 270.

[7] Chandler *v.* Lawrence, 128 Mass. 213.

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CHAPTER III.

BY RESIGNATION OF THE OFFICE.

§ 409. In general—Officers may resign.
410. Cannot resign until elected and qualified.
411. What constitutes a Resignation.
412. In what Form made.
413. To whom Resignation is to be made.
§ 414. Resignation not complete until it is accepted.
415. What amounts to an Acceptance.
416. When Officer holds until Successor is chosen, notwithstanding Acceptance of his Resignation.
417. Withdrawal of Resignation.
418. Resignation while insane.

§ 409. **In general—Officer may resign.**—It may be said in a general way that a public officer has the right to resign his office at any time, and some authorities have declared this right in unqualified terms.[1] The weight of authority, however, and the obvious dictates of public policy require that the right shall be declared in a much more restricted manner.

Thus it is said by Mr. Justice BRADLEY of the Supreme Court of the United States.[2] "As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and be subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the

[1] People *v.* Porter, 6 Cal. 26; State *v.* Clarke, 3 Nev. 519; Olmsted *v.* Dennis, 77 N. Y. 378; Gates *v.* Delaware County, 12 Iowa 405.

[2] In Edwards *v.* United States, 103 U. S. 471.

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community and of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws."[1]

So it is said by Chief Justice RUFFIN of North Carolina,[2] "It is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted; and that has been so much a matter of course with respect to lucrative offices, as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military. Hence there are on our statute book several acts to compel men to serve in offices. Every man is obliged, upon a general principle, after entering upon his office, to discharge the duties of it while he continues in office, and he can not lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer discharged."

§ 410. **Can not resign until elected and qualified.**—Upon the principle that one can not resign what he does not yet possess, it is held that one who has not been elected to a public office can not resign the same,[3] or if elected, can not resign until the time has arrived when he is entitled by law to possess the same and he has taken the oath and given the required bond and entered upon the discharge of his duties.[4]

§ 411. **What constitutes a Resignation.**—"To constitute a complete and operative resignation," it is said in one case,[5]

[1] Citing 1 Kyd, Corporations, c. 3, sect. 4; Willcock, Corporations, pp. 129, 238, 239; Grant, Corporations, pp. 221, 223, 268; 1 Dillon, Mun. Corp. sect. 163; Rex v. Bower, 1 Barn. & Cres. 585; Rex v. Burder, 4 T. R. 778; Rex v. Lone, 2 Stra. 920; Rex v. Jones, 2 Stra. 1146; Hoke v. Henderson, 4 Dev. (N. C.) L. 1, 25 Am. Dec. 677; Van Orsdall v. Hazard, 3 Hill (N. Y.) 243; State v. Ferguson, 31 N. J. L. 107.

[2] In Hoke v. Henderson, 4 Dev. (N. C.) L. 1, 25 Am. Dec. 677.

[3] Queen v. Blizard, L. R. 2 Q. B. 55.

[4] Miller v. Supervisors, 25 Cal. 93.

[5] Biddle v. Willard, 10 Ind. 62.

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"there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment. Webster and Richardson define the words *resign* and *resignation* substantially thus: to resign is to give back, to give up, in a formal manner, an office; and resignation is the act of giving it up. BOUVIER says, "resignation is the act of an officer by which he declines his office, and renounces the further right to use it."

When, therefore, an unconditional resignation is transmitted to the proper officer with the intention that it shall operate as such, it amounts, so far as the officer making it is concerned, to a resignation.[1]

§ 412. **In what Form made.**—Where by law a resignation is required to be made in any particular form, that form must be substantially complied with; but where no such form is prescribed, no particular mode is required, but the resignation may be made by any method indicative of the purpose.[2] It need not be in writing, unless so required by law.[3]

§ 413. **To whom Resignation is to be made.**—Statutes usually prescribe to whom the resignation of a public officer is to be made, but in the absence of such a provision it is properly made to that officer or body which is by law authorized to act upon it by appointing a successor, or calling an election to fill the vacancy.[4]

§ 414. **Resignation not complete until it is accepted.**—At common law, the resignation of a public officer was not complete, so far as the public is concerned, until it was duly accepted by the proper authorities.[5] And this rule prevails in

[1] State *v.* Clarke, 3 Nev. 519; State *v.* Fitts, 49 Ala. 402.

[2] 1 Dillon Munic. Corp. § 224.

[3] Barbour *v.* United States, 17 Ct. Cl. 1499; Van Orsdall *v.* Hazard, 3 Hill (N. Y.) 243.

[4] Edwards *v.* United States, 103 U. S. 471.

[5] Edwards *v.* United States, 103 U. S. 471, citing 1 Kyd Corp. c. 3, sec. 4; Willcock, Corp. pp. 129, 238, 239; Grant, Corp. pp. 221, 223, 268; 1 Dillon Munic. Corp. § 163; Rex *v.* Bower, 1 B. & C. 585; Rex *v.* Burder, 4 T. R. 778; Rex *v.* Lone, 2 Stra. 920; Rex *v.* Jones, 2 Stra. 1146; Hoke *v.* Henderson, 4 Dev. (N. C.) L. 1, 25 Am. Dec. 677; Van Orsdall *v.* Hazard, 3 Hill (N. Y.) 243; State *v.* Ferguson, 31 N. J. L. 107.

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many of the United States,[1] though not in all,[2] and, except where there is a statutory provision to the contrary, is supported by the weight of both reason and authority. "An officer may certainly resign," says Chief Justice RUFFIN, "but without acceptance his resignation is nothing, and he remains in office." He is, therefore, so far as the rights of third persons are concerned, not only still clothed with the authority, but is subject to the burdens of the office, and he may be compelled to perform the duties,[3] and is liable for their non-performance,[4] as before.

So where, because of the office he seeks to resign, he is ineligible to another office, he continues so until his resignation is accepted.[5]

The reasons upon which this rule is founded have been stated in the opening section of this chapter, and need not be repeated here.

§ 415. **What amounts to an Acceptance.**—The acceptance of the resignation, where this is required, may be manifested either by a formal declaration or by the appointment of a successor.[6]

So where the written resignation of the officer, intended to

[1] Acceptance of the resignation, either expressly or impliedly, held necessary.

Edwards *v.* United States, 103 U. S. 471 (construing the rule in Michigan); State *v.* Clayton, 27 Kans. 442, 41 Am. Rep. 418; Rogers *v.* Slonaker, 32 Kans. 191; Hoke *v.* Henderson, 4 Dev. (N. C.) L. 1, 25 Am. Dec. 677; Van Orsdall *v.* Hazard, 3 Hill (N. Y.) 243; State *v.* Ferguson, 31 N. J. L. 107.

See Oregon *v.* Jennings, 119 U. S. 74.

[2] Acceptance of the resignation is held unnecessary in United States *v.* Wright, 1 McLean (U. S. C. C.) 509; People *v.* Porter, 6 Cal. 26; State *v.* Clarke, 3 Nev. 519; State *v.* Mayor, 4 Neb. 260; State *v.* Fitts, 49 Ala. 402; Bunting *v.* Willis, 27 Gratt. (Va.) 144, 21 Am. Rep. 338; See also Olmsted *v.* Dennis, 77 N. Y. 378; United States *v.* Justices, 10 Fed. Rep. 460.

Acceptance presumed where resignation was filed in proper office without objection: Pace *v.* People, 50 Ill. 432; Gates *v.* Delaware County, 12 Iowa 405.

[3] In Edwards *v.* United States, 103 U. S. 471, mandamus was awarded to compel the performance of official duty, although the officer had tendered his resignation which had not been accepted.

And to the same effect is Thompson *v.* United States, 103 U. S. 480.

[4] But see Olmsted *v.* Dennis, 77 N. Y. 378.

[5] Rogers *v.* Slonaker, 32 Kans. 191; See also Bunting *v.* Willis, 27 Gratt. (Va.) 144, 21 Am. Rep. 338.

[6] Edwards *v.* United States, 103 U. S. 471; Willcock, Corporations 239.

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operate as such, was duly filed in the proper office without objection, and was endorsed as his resignation, it was held that this was a sufficient acceptance, if any was required.[1]

§ 416. **When Officer holds until Successor is chosen notwithstanding Acceptance of his Resignation.**—Where the law expressly provides, as it does in many States, that an officer shall continue to hold his office until his successor is chosen and qualified, he will, notwithstanding the acceptance of his resignation, continue in office and be charged with all its duties and responsibilities until such successor is chosen and qualified.[2]

§ 417. **Withdrawal of Resignation.**—"A prospective resignation," it is said, "may, in point of law, amount but to a notice of intention to resign at a future day, or a proposition to so resign; and, for the reason, that it is not accompanied by a giving up of the office—possession is still retained and may not necessarily be surrendered till the expiration of the legal term of the office, because the officer may recall his resignation—may withdraw his proposition to resign. He certainly can do this at any time before it is accepted; and after it is accepted, he may make the withdrawal by the consent of the authority accepting, where no new rights have intervened."[3]

But in another case in the same court it is held that where the resignation is intended to take effect immediately, and has been delivered with that purpose to the officer authorized to receive it, it can not be withdrawn even with the consent of the latter.[4] And the same ruling has been made in other cases.[5]

So, certainly, an accepted resignation can not be withdrawn,[6] unless, perhaps, in those cases where the power to accept and the power to fill the vacancy are in the same officer or board.

[1] Gates *v.* Delaware County, 12 Iowa, 405; Pace *v.* People, 50 Ill. 432.

[2] Badger *v.* United States, 93 U. S. 599; Jones *v.* Jefferson, 66 Tex. 576; People *v.* Barnett Tp. 100 Ill. 332. But see Amy *v.* Watertown, 130 U. S. 301.

[3] Biddle *v.* Willard, 10 Ind. 62. To same effect, State *v.* Boecker, 56 Mo. 17. See also Rogers *v.* Slonaker, 32 Kans. 191; State *v.* Clarke, 3 Nev. 519.

[4] State *v.* Hauss, 43 Ind. 105, 13 Am. Rep. 384.

[5] Yonkey *v.* State, 27 Ind. 236, 241; Queen *v.* Mayor, 14 Q. B. Div. 908, 38 Eng. Rep. 68.

[6] Pace *v.* People, 50 Ill. 432; Gates *v.* Delaware County, 12 Iowa, 405; State *v.* Fitts, 49 Ala. 402.

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§ 418. **Resignation while insane.**—If the resignation of an officer be made by him while insane, but is accepted by the proper authority in ignorance of the insanity, and his successor is duly appointed, the loss of the office must fall upon him who resigned it.[1]

[1] Blake *v.* United States, 14 Ct. Cl. 462.

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CHAPTER IV.

BY ACCEPTANCE OF ANOTHER OFFICE.

§ 419. In general.

I. BY ACCEPTANCE OF INCOMPATIBLE OFFICE

420. Acceptance of second Office incompatible with first vacates first.
421. Same Subject—Exception.
422. What constitutes Incompatibility.
423. Illustrations of incompatible Offices.
424. Illustrations of Offices not incompatible.
425. No Proceeding necessary to enforce Vacation.
426. Acceptance of second Office is conclusive of Officer's Election to hold that one.

II. BY THE ACCEPTANCE OF A FORBIDDEN OFFICE.

427. In general.
428. Distinction between Eligibility to Election and Power to hold.
429. Acceptance of forbidden Office vacates first.
430. Same Subject—Not when first Office held under different Government.
431. Same Subject—Illustrations of the Rule.

§ 419. **In general.**—It is contrary to the policy of the law that the same individual should undertake to perform inconsistent and incompatible duties. So also, as has been seen, it is frequently provided by constitutions and statutes that officers holding offices of one class or under one authority, shall not also hold an office of a different class or created by a different authority. Prohibitions of the first kind arise under the common law; those of the second are the creature of express constitutional or statutory enactment.

The subject will, therefore, be considered under two heads:

I. By the acceptance of an incompatible office.

II. By the acceptance of a forbidden office.

I.

BY ACCEPTANCE OF INCOMPATIBLE OFFICE.

§ 420. **Acceptance of second Office incompatible with first, vacates first Office.**—It is a well settled rule of the common law

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that he who, while occupying one office, accepts another incompatible with the first, *ipso facto* absolutely vacates the first office and his title is thereby terminated without any other act or proceeding.[1] That the second office is inferior to the first does not affect the rule.[2] And even though the title to the second office fail, as where the election was void, the rule is still the same, nor can the officer then regain possession of his former office to which another person has been appointed or elected.[3]

§ 421. **Same Subject—Exception.**—But an exception is made to the general rule in those cases in which the officer can not vacate the first office by his own act, upon the principle that he will not be permitted to thus do indirectly what he could not do directly. Such an acceptance, it is said, though it may be ground for amotion, does not operate as an *absolute avoidance* in those cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment.

"Upon principle, not conflicting with any of the authorities," says PARKE J., in stating this exception, "it seems that an officer cannot avoid his office by accepting another, unless his office be such as he could determine by his own act simply, or unless that authority concurs in the new appointment which could accept the surrender of or amove from the old one."[4]

Such a concurrence, however, is implied where the power authorized to accept his surrender of the first office appoints him to the second.[5]

§ 422. **What constitutes Incompatibility.**—This incompati-

[1] Milward *v.* Thatcher, 2 T. R. 81; Rex *v.* Patteson, 4 B. & Ad. 9; Rex *v.* Hughes, 5 B. & C. 886; Rex & Tizzard, 9 B. & C. 418; State *v.* Brinkerhoff, 66 Tex. 45; Pooler *v.* Reed, 73 Me. 129; State *v.* Dellwood, 33 La. Ann. 1229; State *v.* West, 33 La. Ann. 1261; Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251; State *v.* Goff, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. Rep. 226; State *v.* Buttz, 9 S. C. 156; People *v.* Carrique, 2 Hill (N. Y.) 93; People *v.* Hanifan, 96 Ill. 420; Cotton *v.* Phillips, 56 N. H. 220; Kenney *v.* Goergen, 36 Minn. 190; Magie *v.* Stoddard, 25 Conn. 565, 68 Am. Dec. 375; People *v.* Nostrand, 46 N. Y. 375; State *v.* Brinkerhoff, 66 Tex. 45; Biencourt *v.* Pasker, 27 Tex. 562; *Ex parte*, Call, 2 Tex. App. 497.

[2] Milward *v.* Thatcher, 2 T. R. 81.

[3] Rex *v.* Hughes, 5 B. & C. 886.

[4] Rex *v.* Patteson, 4 B. & Ad. 9.

[5] State *v.* Brinkerhoff, 66 Tex. 45.

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bility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both.[1]

It seems to be well settled that the mere physical impossibility of one person's performing the duties of the two offices as from the lack of time or the inability to be in two places at the same moment, is not the incompatibility here referred to.[2] It must be an inconsistency in the functions of the two offices, as judge and clerk of the same court, claimant and auditor, and the like.[3] "Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not," says FOLGER J., "that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, *per se*,

[1] Bryan *v.* Cattell, 15 Iowa 538; People *v.* Green, 58 N. Y. 295; Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251; State *v.* Buttz, 9 S. C. 156; People *v.* Green, 5 Daly (N. Y.) 254; State *v.* Goff, 15 R. I. 505, 9 Atl. Rep. 226, 2 Am. St. Rep. 921; State *v.* Brown, 5 R. I. 1, 11; State *v.* Feibleman, 28 Ark. 424.

[2] The definition given in Bacon's Abridgement, Vol. 3, tit. Offices. K. "Offices are said to be incompatible and inconsistent so as to be executed by the same person, when from the multiplicity of business in them they can not be executed with care and ability; or when, their being subordinate and interfering with each other, it induces a presumption they can not be executed with impartiality and honesty," and that by BAGLEY, J., in Rex *v.* Tizzard, 9 B. & C. 418, 421, that "two offices are incompatible where the holder can not in every instance discharge the duties of each," seem in some degree contrary to the text; but the rule in the text is supported by the best considered authorities. See cases cited in preceding note.

[3] See cases cited in note 1 of this section.

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have the right to interfere, one with the other, before they are incompatible at common law."[1]

§ 423. **Illustrations of incompatible Offices.**—In accordance with the rule of the last section it is held that the following offices are incompatible and that the acceptance of the second vacates the first: that of town clerk and that of alderman;[2] that of trial justice and that of deputy sheriff;[3] that of justice of the peace and that of constable,[4] sheriff, deputy sheriff or coroner;[5] that of deputy sheriff and that of justice af the peace;[6] that of a prudential committee and that of auditor of a school district;[7] that of state solicitor and that of member of congress;[8] that of councilman and that of city marshal;[9] that of justice of the district court and that of deputy sheriff;[10] that of postmaster and that of judge of the county court.[11]

§ 424. **Illustrations of Offices not incompatible.**—On the other hand the following offices have been held to be not incompatible: that of school director and that of judge of elections;[12] that of clerk of a school district and that of collector of the district;[13] that of member of the assembly and that of clerk of the court of special sessions;[14] that of supervisor of a county and that of deputy clerk of the circuit court of the county;[15] that of clerk of the district court and that of court commissioner;[16] that of crier and that of messenger of a court.[17]

§ 425. **No proceeding necessary to enforce Vacation.**—As stated in the general rule, the acceptance of the second office

[1] In People *v.* Green, 58 N. Y. 295.

[2] Rex *v.* Tizzard, 9 B. & C. 418.

[3] Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251.

[4] Magie *v.* Stoddard, 25 Conn. 565, 68 Am. Dec. 375; Pooler *v.* Reed, 73 Me. 129.

[5] Opinion of Judges, 3 Maine, 486.

[6] Wilson *v.* King, 3 Littell (Ky.) 457, 14 Am. Dec. 84.

[7] Cotton *v.* Phillips, 56 N. H. 220.

[8] State *v.* Buttz, 9 S. C. 156.

[9] State *v.* Hoyt, 2 Oregon, 246.

[10] State *v.* Goff, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. Rep. 226.

[11] Hoglan *v.* Carpenter, 4 Bush (Ky.) 89.

[12] *In re* District Attorney, 11 Phila. 645.

[13] Howland *v.* Luce, 16 Johns. (N. Y.) 135.

[14] People *v.* Green, 58 N. Y. 295, affirming 5 Daly 254.

[15] State *v.* Feibleman, 28 Ark. 424.

[16] Kenney *v.* Goergen, 36 Minn. 190, 31 N. W. Rep. 210.

[17] Preston *v.* United States, 37 Fed. Rep. 417.

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ipso facto vacates the first. No proceeding, therefore, by *quo warranto* or otherwise, is necessary in order to declare or complete the vacation of the first office, but it may be at once filled again either by appointment or election as the law provides.[1]

§ 426. **Acceptance of second Office is conclusive of Officer's Election to hold that one.**—Upon his election or appointment to the second office, the officer has a right to elect which of the two he will have and retain, but his election must be deemed to be made when he accepts and qualifies for the second.[2]

As is said by APPLETON, C. J., "Where one has two incompatible offices, both can not be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain and fluctuating whim of the office holder to determine. The general rule, therefore, that the acceptance of and qualification for, an office incompatible with one then held is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public."[3]

II.

BY THE ACCEPTANCE OF A FORBIDDEN OFFICE.

§ 427. **In general.**—From motives of public policy, it is frequently provided in the state constitutions and statutes that a person shall not at the same time hold an office of trust or profit both under the State and under the Federal government; that persons holding judicial offices shall not at the same time hold other offices of trust or profit; that a person shall not at the same time hold two offices of trust or profit, and the like.

These provisions often cover substantially the same ground as the common law prohibition against holding incompatible offices;

[1] Rex *v.* Trelawney, 3 Burr 1615; Milward *v.* Thatcher, 2 T. R. 81 Rex *v.* Tizzard, 9 B. & C. 418; People *v.* Hanifan, 96 Ill. 420; State *v.* Dellwood, 33 La. Ann. 1229; People *v.* Carrique, 2 Hill (N. Y.) 93; State *v.* Buttz, 9 S. C. 156; Shell. *v.* Cousins, 77 Va. 328; State *v.* Brinkerhoff, 66 Tex. 45; Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251; Cotton *v.* Phillips, 56 N. H. 220; Pooler *v.* Reed, 73 Me. 129.

[2] State *v.* Brinkerhoff, 66 Tex. 45.

[3] Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251.

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but they also, in many cases, go further than that and arbitrarily prohibit the holding of two offices which the common law might not declare incompatible.

§ 428. **Distinction between Eligibility and Power to hold.**—As has been seen in an earlier portion of the work, it is frequently declared that persons holding one office shall be ineligible to election to another, either generally or of a certain kind. These provisions being held to incapacitate the incumbent of the first office to *election* to the second, it follows that any attempted election to the second is void and that if, by color of it, he attempts to hold the second office he will be removed from it.[1] It is thus the second office which is vacated instead of the first.

In California, however, under a constitutional provision that "no person holding any lucrative office under the United States or any other power, shall be eligible to any civil office of profit under this State," it is held that this means eligibility to *hold* office as well as to be elected to it, and hence disqualifies a person holding a civil office of profit under the state, *e. g.* that of county supervisor, from continuing to hold this office after he had received and entered upon a lucrative office under the United States, as that of postmaster.[2]

§ 429. **Acceptance of forbidden Office vacates first.**—Where, however, it is the *holding* of two offices at the same time which is forbidden by the constitution or the statutes, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited, operates *ipso facto* to absolutely vacate the first.[3]

No judicial determination is therefore necessary to declare the

[1] Crawford *v.* Dunbar, 52 Cal. 36; Vogel *v.* State, 107 Ind. 374; *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538.

[2] People *v.* Leonard, 73 Cal. 230, 14 Pac. Rep. 853.

[3] People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; Shell *v.* Cousins, 77 Va. 328; State *v.* Newhouse, 29 La. Ann. 824; State *v.* Arata, 32 La. Ann. 193; State *v.* Dellwood, 33 La. Ann. 1229; State *v.* West, 33 La. Ann. 1261; State *v.* Draper, 45 Mo. 355; Dickson *v.* People, 17 Ill. 191; Foltz *v.* Kerlin, 105 Ind. 221, 55 Am. Rep. 197; Dailey *v.* State, 8 Blackf. (Ind.) 329; Creighton *v.* Piper, 14 Ind. 182; State *v.* Kirk, 44 Ind. 401, 15 Am. Rep. 239; Lucas *v.* Shepherd, 16 Ind. 368; Howard *v.* Shoemaker, 35 Ind. 111.

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vacancy of the first, but the moment he accepts the new office the old one becomes vacant. As is said in one case, "His acceptance of the one was an absolute determination of his right to the other, and left him 'no shadow of title, so that neither *quo warranto* nor amotion was necessary.'"[1]

§ 430. **Same Subject—Not when first Office held under different Government.**—But an exception is made to this rule where the first office is held under a different government from that which conferred the second.

Thus in Indiana, under a constitutional declaration that no person shall "hold more that one lucrative office at the same time," it was held that where one who at the time of his election to one lucrative office, that of township trustee, holds another lucrative office, that of United States postmaster, he will be compelled to vacate the second office which he held under the State.[2]

"It is doubtless the general rule," said the court by ELLIOTT, J., "that where a man accepts an office held under the State, he vacates another held under the same sovereignty.[3]

But the reason of the rule fails when applied to offices held under different sovereignties, and where the reason of the rule fails, so also does the rule. There is reason for the rule where the offices emanate from the same government, but none where the offices are created by different governments. The National law neither creates nor governs a State office; neither inducts the officer into office nor expels him from it; neither fixes his qualifications nor prescribes his disabilities. On the other hand, the State law exerts no dominion over the Federal officer as an officer, neither prescribes his qualifications nor declares his disabilities, and it is therefore logically inconceivable that the acceptance of an office existing under a State law vacates an office

[1] People *v.* Brooklyn, 77 N. Y, 503, 33 Am. Rep. 659; Whiting *v.* Carrique, 2 Hill (N. Y.) 93; People *v.* Nostrand, 46 N. Y. 381; People *v.* Green, 58 N. Y. 304.

[2] Foltz *v.* Kerlin, 105 Ind. 221, 55 Am. Rep. 197.

[3] Citing Dailey *v.* State, 8 Blackf. (Ind.)329; Lucas *v.* Shepherd, 16 Ind. 368; Creighton *v.* Piper, 14 Ind. 182; Howard *v.* Shoemaker, 35 Ind. 111; Cotton *v.* Phillips, 56 N. H. 220; Milward *v.* Thatcher, 2 T.R. 81; People *v.* Hanifan, 96 Ill. 420; Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251; Shell *v.* Cousins, 77 Va. 328.

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existing under a National law. Where, as here, a man elected to a State office persists in retaining a Federal office, actually remains in it, enjoying its emoluments and discharging its duties, he does not, in legal contemplation and certainly not in fact, vacate it by entering into an office existing under the laws of the State, and for this plain reason the laws of the State do not operate upon Federal offices. Our laws do not extend to offices created by the general government, and no act, that an officer acting under our laws can do, can vacate an office upon which our laws do not operate. Nothing done under our laws can operate where our laws are without effect. We must therefore hold that a man can be expelled from a State office who persists in holding one given him by the Federal government, or we must concede that the courts of Indiana cannot control a citizen who assumes to hold office in direct violation of the Constitution. This concession will not be made."

But this exception made by the court must, it is believed, be limited to the exact state of facts before the court, *i. e.* where the Federal office is accepted last, for if the order of events had been reversed and the Federal office had been accepted second, the court would have had no difficulty in declaring the first vacated under the general rule without making the exception in its application where the offices are held under different sovereignties. And the cases are numerous in which under express provisions the State office has been held vacated by the subsequent acceptance of the Federal office.[1]

§ 431. **Same Subject—Illustrations of the Rule.**—The general rule may be illustrated by the following application of it: Where the constitution provides that no person holding any lucrative office under the State, shall be a member of the general assembly, one who accepts an election to the assembly while holding the office of circuit judge vacates the latter office;[2] where the constitution provides that no person holding an office of honor or profit under the United States shall hold any office of honor or profit under the State, a person who is a director of

[1] See Dickson *v.* People, 17 Ill. 191; People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; State *v.* De Gress, 53 Tex. 387; State *v.* Buttz, 9 S. C. 156.

[2] State *v.* Draper, 45 Mo. 355.

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a State deaf and dumb asylum, vacates this office when he accepts that of United States marshal;[1] where the constitution prohibits one person from holding two lucrative offices at the same time, one who holds the office of county recorder vacates it if he accepts that of county commissioner,[2] or, if holding that of county commissioner, vacates it upon accepting that of deputy treasurer,[3] or, if holding that of prison director, he vacates it upon accepting that of mayor;[4] under a constitutional provision that no person shall hold more than one office of trust or profit at the same time, the office of jury commissioner is vacated by accepting that of police commissioner,[5] member of school board or tax assessor,[6] and that of member of the board of health is vacated by accepting that of jury commissioner;[7] where the constitution provides that "sheriffs shall hold no other office," the acceptance of any second office vacates the first;[8] *a fortiori*, where the charter of a city prohibits an alderman from holding any other office, and provides that by his election to and acceptance of another, his office as alderman shall immediately become vacant, an alderman who is elected to Congress and accepts the office *ipso facto* vacates his office of alderman.[9]

[1] Dickson *v.* People, 17 Ill. 191.
[2] Dailey *v.* State, 8 Blackf. (Ind.) 329.
[3] Lucas *v.* Shepherd, 16 Ind. 368.
[4] Howard *v.* Shoemaker, 35 Ind. 111.
[5] State *v.* Newhouse, 29 La. Ann. 824.
[6] State *v.* Dellwood, 33 La. Ann. 1229; State *v.* West, 33 La. Ann. 1261.
[7] State *v.* Arata, 32 La. Ann. 193.
[8] Shell *v.* Cousins, 77 Va. 328.
[9] People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659.

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CHAPTER V.

BY ABANDONMENT OF OFFICE.

§ 432. In general—What included in this Chapter.

I. BY REFUSING OR NEGLECTING TO QUALIFY.

433. Mere Delay in qualifying no Abandonment.
434. Refusal or Neglect to qualify at all vacates Office.

II. BY REFUSING OR NEGLECTING TO PERFORM DUTIES.

435. Continued Refusal or Neglect to perform Duties constitutes Abandonment.
436. Judgment of Ouster necessary.

III. BY REMOVAL FROM THE DISTRICT.

437. Officer usually required in District for which he was elected.
438. Permanent Removal from District operates as Abandonment.
439 Same Subject—Illustrations.
440. Office once abandoned cannot be resumed.

IV. BY ENGAGING IN REBELLION.

441. Officer who rebels against Government forfeits Office.

V. BY DEATH.

442. Death of single Officer creates Vacancy.
443. Survivor of two or more Officers may execute Office.

§ 432. **In general—What included in this Chapter.**—An office may also become vacant by its abandonment by the officer. Such an abandonment may be evidenced by a variety of acts and events, and, while the classification may not be the best possible, there will, for convenience sake, be treated under this head, the the vacation or abandonment of the office:—

I. By refusing or neglecting to qualify;
II. By refusing or neglecting to perform the duties;
III. By removing from the district;
IV. By engaging in rebellion;
V. By death.

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I.

BY REFUSING OR NEGLECTING TO QUALIFY.

§ 433. **Mere Delay in qualifying no Abandonment.**—As has been seen, statutes requiring qualification for office usually prescribe that the oath shall be taken, and the bond, if any, shall be given within a fixed time after the election or appointment, and declare that a failure to do so shall render the office vacant.[1] But, as has also been seen, these statutes are usually construed to be *directory* only and not mandatory, and that it is therefore held that while the neglect to qualify within the time prescribed may be a cause for forfeiture and may render the officer's title voidable and defeasible, it does not *ipso facto* operate as an absolute vacation of the office.[2] He is at least an officer *de facto*.[3]

If, therefore, notwithstanding the delay, the officer afterwards qualifies, and the public authorities, charged with that duty, accept and approve of his qualification, his default is waived, and his title becomes perfect.[4]

Mere delay, then, in qualifying can not be deemed to be an abandonment of the office.[5]

A fortori is this so where the delay is occasioned not by the fault of the officer but by that of the public authorities, as by a wilful and unjust refusal to issue his certificate [6] or approve his bond.[7]

§ 434. **Refusal or Neglect to qualify at all vacates Office.**—But the continued and absolute refusal or neglect to qualify at all and to enter upon the discharge of his duties, must operate, so far as the delinquent himself is concerned, in vacating his title to the office.[8] The office, however, does not ordinarily be-

[1] See *ante*, § 253.
[2] See *ante*, § 265.
[3] See *ante*, § 329.
[4] City of Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; People *v.* Holley, 12 Wend. (N. Y.) 481; State *v.* Churchill, 41 Mo. 41; State *v.* Porter, 7 Ind. 204; Ross *v.* Williamson, 44 Ga. 501; Cronin *v.* Gundy, 16 Hun (N. Y.) 520; State *v.* Toomer, 7 Rich. (S. C.) 216.
[5] State *v.* Colvig, 15 Oreg. 57; State *v.* Peck, 30 La. Ann. I. 280.
[6] People *v.* Mayworm, 5 Mich. 146.
[7] State *v.* Dahl, 65 Wis. 510.
[8] See *ante*, § 266.

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come vacant inasmuch as the prior incumbent usually holds over.[1]

II.

BY REFUSING OR NEGLECTING TO PERFORM DUTIES.

§ 435. **Continued Refusal or Neglect to perform Duties constitutes Abandonment.**—Public offices are held upon the implied condition that the officer will diligently and faithfully execute the duties belonging to them, and while a temporary or accidental failure to perform them in a single instance or during a short period will not operate as an abandonment,[2] yet if the officer refuses or neglects to exercise the functions of the office for so long a period as to reasonably warrant the presumption that he does not desire or intend to perform the duties of the office at all, he will be held to have abandoned it, not only when his refusal to perform was wilful,[3] but also where, while he

[1] See *ante*, § 397.

[2] Thus a mere temporary inability by sickness to perform the duties, though continuing for fifty days, will not amount to an abandonment. State *v.* Baird, 47 Mo. 301. See also State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367.

[3] People *v.* Hartwell, 67 Cal. 11; King *v.* Rook, Cro. Car. 491; Rex *v.* Wells, 4 Burr, 2004; State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367; People *v.* Kingston, T. R. Co. 23 Wend. (N. Y.) 193, 35 Am. Dec. 551. In this case, C. J. NELSON said:

"It is laid down as a general principle, that if an officer acts contrary to the nature and duty of his office, or refuses to act at all, he forfeits it; and, if granted by patent, he may be turned out by *scire facias:* 5 Bac. 210, 212, tit. Offices and Officers; Earl of Shrewsbury's Case, 9 Co. 50; Sir George Reynel's Case, 9 Co. 98; for in every grant of an office there is an implied condition that the grantee will diligently and faithfully execute the duties of it. Lord Coke says, in the Earl of Shrewsbury's Case, 9 Coke 50, that there are three causes of forfeiture: 1. Abuser; 2. Non-user; and 3. Refusal. The first is where the sheriff or jailer permits a voluntary escape, or abuses the prisoners, etc.; or a forester or parker cuts wood, unless for necessary brush. The second, where the officer is concerned in the administration of justice, or of the commonwealth, and neglects to attend upon his duties; and the third, where he is bound to attend upon request, and refuses; in either case, the office is forfeited. Sickness is an excuse; but in the case of a searcher of a port, voluntary absence when search should be made, is not, King *v.* Rooks, Cro. Car. 491. And Lord Holt held that the voluntary absence of a recorder of Ipswich, he holding a public office, was cause of forfeiture, though no inconvenience ensues: Queen *v.* Baliffs of Ipswich, 2 Ld. Raym. 1237. Mr. Hawkins doubts this, but adds that he who so far neg-

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intended to vacate the office, it was because he in good faith but mistakenly supposed he had no right to hold it.[1]

Where, however, while desiring and intending to hold the office if he has a legal right to do so, and with no desire or intention wilfully or purposely to abandon it, he vacates it in deference to the requirements of a public statute which is afterwards declared unconstitutional, such a surrender will not be deemed an abandonment, and upon the overthrow of the law, during his term, he may recover the office.[2]

lects a public office as plainly to appear to take no care of it, should rather be immediately displaced than the public be in danger of suffering damage: 1 Hawk. 311, b. 1, c. 67, sec. 1. Lord Mansfield, in Rex *v.* Wells Corporation, 4 Burr. 2004, said that a general neglect or refusal to attend to the duties of a public office is a reason of forfeiture—a determined neglect or wilful refusal—but a single instance of omitting to attend when no particular business was expected, nor in fact happened, is a very different case. It is said that one negligent escape by a sheriff is not a cause of forfeiture, but that one voluntary escape is; so of two or more negligent escapes: 5 Bac. 210; 4 Burr. 2007. Thus it will be seen that the franchise of an office held upon the implied condition of diligently and faithfully executing the duties belonging to it, may be forfeited by general neglect, or wilful refusal to perform. The ingredient of a bad or corrupt motive need not enter into the cause: it is enough if the duty is neglected or designedly omitted."

[1] As where the failure to perform was owing to the mistaken opinion that another had been elected and the officer made no attempt to perform for a period of two years. People *v.* Hartwell, 67 Cal. 11.

[2] Turnipseed *v.* Hudson, 50 Miss. 429, 19 Am. Rep. 15. In this case plaintiff was elected to an office in 1871 for the term of four years. In 1873 an act was passed providing for an election in November of that year to fill said office. Among the candidates for such election were the plaintiff and defendant, who entered into an agreement to abide the result of a primary election. At the primary election the defendant was selected and in November he was elected, and thereupon qualified and took possession of the office, plaintiff surrendering the same. The statute was afterwards decided to be unconstitutional and the election void, and plaintiff brought this action to recover possession of the office. *Held* (1), that the plaintiff was not estopped by the agreement with the defendant. (The court cite and discuss upon this point Alexander *v.* Walter, 8 Gill. (Md.) 239, 50 Am. Dec. 688; Dezell *v.* Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628; Taylor *v.* Zepp, 14 Mo. 482, 55 Am. Dec. 113; Phillips *v.* Cooper, 50 Miss. 722; Holman *v.* Johnson, Cowp. 343; Langdon *v.* Doud, 10 Allen (Mass.) 433; Howard *v.* Hudson, 2 El. & B. 1; Audenried *v.* Betteley, 5 Allen (Mass.) 383, 81 Am. Dec. 755; Plumer *v.* Lord, 9 Allen (Mass.) 455, 85 Am. Dec. 773; Jorden *v.* Money, 5 H. L. Cas. 185; White *v.* Walker, 31 Ill. 422; Harris *v.* Brooks, 21 Pick. (Mass.) 195, 32 Am. Dec. 252; Colton *v.* Beardsley, 38 Barb. N. Y. 29; Regina

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§ 436. **Judgment of Ouster necessary.**—But while such an abandonment is clearly a cause for a forfeiture, it is ordinarily held that it does not of itself create a completed vacancy, but that a judicial determination of the fact is necessary to render it conclusive.[1]

III.

BY REMOVAL FROM THE DISTRICT.

§ 437. **Officer usually required to reside in District for which he was elected.**—As has been seen in an earlier section,[2] it is usually provided that public officers shall reside in the district for and from which they are elected, and the statutes generally provide further that the office shall become vacant upon their ceasing to reside within said district. The reasons for these provisions are found in obvious requirements of public policy.

§ 438. **Permanent Removal from District operates as Abandonment.**—Where the law thus requires the officer to reside within the district which he represents, and *a fortiori* so where it expressly declares that his removal from the district shall create a vacancy, a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result.[3]

But a merely temporary removal for a limited time and with no intention to abandon or surrender the office or to cease to perform its duties, will not have this effect.[4]

§ 439. **Same Subject—Illustrations.**—Thus, where a county officer leaves the county with his family with the intention not to return,[5] or goes to another State with the intention of there

v. Greene, 2 Q. B. 460; Butts *v.* Wood, 37 N. Y. 317; Gray *v.* Hook, 4 N. Y. 449; (2), that such agreement and the surrender of the office by plaintiff did not amount to an abandonment or resignation.

[1] Van Orsdall *v.* Hazard, 3 Hill (N. Y.) 243.

[2] See *ante*, § 433.

[3] Yonkey *v.* State, 27 Ind. 236; Curry *v.* Stewart, 8 Bush (Ky.) 560; State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367; Prather *v.* Hart, 17 Neb. 598.

[4] State *v.* Graham, 26 La. Ann. 568, 21 Am. Rep. 551; McGregor *v.* Allen, 33 La. Ann. 870; Curry *v.* Stewart, 8 Bush (Ky.) 560; People *v.* Parker, 3 Neb. 409, 19 Am. Rep. 634; Yonkey *v.* State, 27 Ind. 236.

[5] Prather *v.* Hart, 17 Neb. 598.

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making it his home,[1] or voluntarily enlists in the military service of the United States,[2] he is held to have vacated his office; but a mere temporary absence, as to procure medical treatment[3] or to engage in business for a limited time,[4] or to fill a temporary appointment,[5] where the office may be and is filled by a deputy, does not operate to vacate it.

§ 440. **Office once abandoned cannot be resumed.**—When the vacancy has once become complete by the abandonment of the officer, it can not be resumed by him,[6] nor can he again possess himself of it by an accidental, voluntary or forcible reoccupancy.[7]

IV.

BY ENGAGING IN REBELLION.

§ 441. **Officer who rebels against Government forfeits Office.**—Where a public officer holding an office under the government, rebels against that government and seeks or aids its overthrow, he will be thereby deemed to have forfeited and vacated his office, and no judicial determination is necessary to determine the fact of the forfeiture.[8]

V.

BY DEATH.

§ 442. **Death of single Officer creates vacancy.**—The death of the incumbent of an office, which is by law to be filled by one person only, necessarily renders the office vacant.[9] The fact of the vacancy in such a case and the means to be pursued to fill it, are usually made the subject of statutory enactment.

[1] See Yonkey *v.* State, 27 Ind. 236.
[2] State *v.* Allen, 21 Ind. 517.
[3] McGregor *v.* Allen, 33 La. Ann. 870.
[4] Curry *v.* Stewart, 8 Bush (Ky.) 560.
[5] Yonkey *v.* State, 27 Ind. 236.
[6] Yonkey *v.* State, 27 Ind. 236, citing Hedley *v.* Commissioners, 4 Blackf. (Ind.) 116; State *v.* Jones, 19 Ind. 356; State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367.
[7] State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367, citing Rex *v.* Harris, 1 B. & Ad. 936; Page *v.* Hardin, 8 B. Mon. (Ky.) 648.
[8] Chisholm *v.* Coleman, 43 Ala. 204, 94 Am. Dec. 678.
[9] People *v.* Cowles, 13 N. Y. 350.

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§ 443. **Survivor of two or more Officers may execute Office.** —But where the authority to be exercised is conferred upon two or more officers a different rule applies. While the death of one, of course, terminates his authority and leaves a vacancy to be filled, the whole office is not vacant but, unless the joint action of all is expressly required, the survivors may execute the office. As is said in one case, "A grant of power, in the nature of a public office, to several, does not become void upon the death or disability of one or more. Such a grant of power is not in the nature of a private franchise which, when granted to two without words of survivorship, might not by the rules of the common law, survive the death of one."[2]

[1] People *v.* Palmer, 52 N. Y. 84; Downing *v.* Rugar, 21 Wend. (N.Y.) 178, 34 Am. Dec. 223.

[2] People *v.* Palmer, 52 N. Y. 84.

[See also Mechem on Agency, § 78.

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CHAPTER VI.

BY REMOVAL FROM OFFICE.

§ 444. In general.
445. Power of Removal incident to Power of Appointment when Tenure of Office not fixed by Law.
446. Power to remove municipal Officers.
447. Power of removal in other Cases may be conferred by Law.
448. Power conferred may be absolute or conditional.
449. Consent of Senate or other Body may be required.
450. May be restricted to Removals for Cause.
451. Removals for political Reasons may be prohibited.
452. Power of Removal must be exercised within the Limits fixed.
§ 453. Power to remove does not include Power to suspend.
454. Necessity of Notice and Hearing before Removal.
455. Proceedings for Removal are judicial in their Nature.
456. Right of Courts to review the Proceedings.
457. For what conduct Removed.
458. Same Subject—Illustrations.
459. What constitutes a Removal—Implied Removal.
460. Notice of Removal must be given to the Officer.
461. Removal not effected by revoking Appointment.
462. But Governor may revoke Commission issued by Mistake.

§ 444. **In general.**—Offices may also become vacant by the removal of the incumbent. Removals may occur under a variety of circumstances; they may be (1) arbitrary, or (2) for cause; and the officer removed may have derived his powers (1) from an election by the people, or (2) by appointment by the executive; while his removal may have been (1) after notice and hearing, or (2) without hearing.

§ 445. **Power of Removal incident to Power of Appointment when Tenure of Office not fixed by Law.**—The question whether the power of removal from appointive offices is one which is incident to the power to appoint, is an important one in respect of which much difference of opinion has prevailed. Offices, even though appointive, are usually created to be held for a definite time, as for a given number of years, or during life or good

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behavior. In some cases, however, no such tenure is fixed by law, and the officer must then hold, either expressly or implied, at the will or pleasure of the appointing power, or his tenure must be indefinite, and subject to no will but his own,—a construction which is entirely inconsistent with the spirit of our institutions.

Where, therefore, the tenure of the office is not fixed by law, and no other provision is made for removals, either by the constitution or by statute, it is said to be "a sound and necessary rule to consider the power of removal as incident to the power of appointment."[1]

But this power of arbitrary removal is to be limited to these circumstances, and if the tenure is fixed by law,[2] or if the officer is appointed to hold during the pleasure of some other officer or board than that appointing him,[3] the appointing power cannot arbitrarily remove him.

§ 446. **Power to remove municipal Officers.**—"The power to amove a corporate officer from his office, for reasonable and just cause," says Judge DILLON,[4] "is one of the common law incidents of all corporations. This doctrine, though declared before, has been considered as settled ever since Lord MANSFIELD's judgment in the well known case of the King v. Richardson.[5] It is there denied that there can be no power of amotion unless given by charter or prescription, and the contrary doctrine asserted,—that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental.

But the power to amove, like every other incidental power, is

[1] *Ex parte* Hennen, 13 Peters (U.S.) 230, 259; Newsome *v.* Cocke, 44 Miss. 352, 7 Am. Rep. 686; People *v.* Hill, 7 Cal. 97; Smith *v.* Brown, 59 Cal. 672; People *v.* Shear, 15 Pac. Rep. 92 (Cal.); Williams *v.* Boughner, 6 Cold. (Tenn.) 486; Patton *v.* Vaughan, 39 Ark. 211; People *v.* Durston, 3 N. Y. Supplement 522; People *v.* Commissioners, 73 N. Y. 437; People *v.* Mayor, 5 Barb. (N. Y.) 43. In Dubuc *v.* Voss, 19 La. Ann. 210, 92 Am. Dec. 256, it is said that this rule cannot be deemed to apply to the governors of States, but this exception is not elsewhere followed.

[2] Collins *v.* Tracy, 36 Tex. 546; Keenan *v.* Perry, 24 Tex. 253; People *v.* Hill, 7 Cal. 97; State *v.* Chatburn, 63 Iowa 659, 50 Am. Rep. 760.

[3] Carr *v.* State, 111 Ind. 101.

[4] Dillon's Munic. Corp. § 240.

[5] 1 Burr, 517.

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incident to the corporation at large, and not to any select body or particular part of it, and unless delegated to a select body or part, it must be exercised by the whole corporation, and at a corporate assembly regularly and duly convened. The power to hold such an assembly is, however, implied in the power of amotion."[1]

§ 447. **Power of Removal in other Cases may be conferred by Law.**—But it is a common provision in national, state and municipal governments that the president, governor, mayor or other officer shall have the power to remove for cause officers not only appointive but elective. Such a provision is indispensable to the proper exercise of the public functions and is clearly within the authority of the sovereign power.[2]

§ 448. **Power conferred may be absolute or conditional.**—The power of removal so conferred, like the power to appoint, may be absolute or conditional. It is absolute when it is vested in the unlimited discretion of the removing officer to be exercised at such time and for such reasons as the latter may deem proper and sufficient. It is conditional when the time, the manner or the reason is placed beyond the mere discretion of the removing officer. Thus—

§ 449. **Consent of Senate or other Body may be required.**—Except where the constitution or other paramount authority confers the power upon the executive alone, it is competent to require the consent of the senate, common council or other body to the removal as it is, in many cases, required for his appointment, and where such consent is required, a removal attempted without it is ineffectual.[3] Where the authority of removal is vested in the "appointing power" and the appointing power is vested in the governor by and with the advice and consent of the senate, the consent of the latter body is necessary to a removal.[4]

§ 450. **May be restricted to Removals for Cause.**—So it is frequently provided that the executive shall remove only for a specified cause or "for cause" generally. Where the cause is

[1] Dillon's Munic. Corp. § 241.

[2] People v. Whitlock, 92 N. Y. 191.

[3] People v. Weber, 86 Ill. 283; People v. Freese, 76 Cal. 633, 18 Pac. Rep. 812; Carr v. State, 111 Ind. 101.

[4] People v. Freese, 73 Cal. 633, 18 Pac. Rep. 812.

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thus specified, it amounts to a prohibition to a removal for a different cause.[1] Where no particular cause is so specified, it must rest in the discretion of the executive, subject to the right of the courts to examine as to its existence,[2] to determine what cause shall be sufficient.[3]

The power of removal for cause is a special one, and it must be strictly pursued,[4] but the law will presume in this, as in other cases, that it has not been exercised unlawfully.[5]

§ 451. **Removals for political Reasons may be prohibited.**—It is also provided in many cases that the power of removal shall not be exercised for political reasons only.[6]

§ 452. **Power of Removal must be exercised within the Limits fixed.**—But the power of removal so conferred must be confined within the limits prescribed for it, and must be pursued with strictness. Hence it can be exercised only for the cause specified and in the manner and upon the conditions fixed.[7] And authority to remove for cause cannot be construed as an implied authority to remove at pleasure.[8]

§ 453. **Power to remove does not include Power to suspend.**—Although there is a conflict in the authorities, the better opin-

[1] Commonwealth *v.* Shaver, 3 Watts & S. (Penn.) 338; Dubuc *v.* Voss, 19 La. Ann. 210, 92 Am. Dec. 526; Lowe *v.* Commonwealth, 3 Metc. (Ky.) 237.

[2] See *post*, § 456.

[3] See Patton *v.* Vaughan, 39 Ark. 211; State *v.* Doherty, 25 La. Ann. 119, 13 Am. Rep. 131. Power to remove for causes named or for "other cause" means other *like* causes. State *v.* McGarry, 21 Wis. 496.

[4] Commonwealth *v.* Slifer, 25 Penn. St. 23, 64 Am. Dec. 680.

[5] Dubuc *v.* Voss, 19 La. Ann. 210, 92 Am. Dec. 526.

[6] See State *v.* Board, — N. J. —, 17 Atl. Rep. 112.

[7] Where the power of removal is conferred upon the board of one township, it cannot be exercised by the joint action of the boards of two townships. Crawford *v.* Township Board, 24 Mich. 248.

Records of board's action must show all the facts necessary to give it authority to remove. McGregor *v.* Supervisors, 37 Mich. 388.

Where a two-thirds vote is essential to a removal, less than that will not avail. People *v.* College, 63 How. Pr. 220.

Removal can only be for causes prescribed. Dubuc *v.* Voss, 19 La. Ann. 210, 92 Am. Dec. 526.

Power of removal of officer for cause is a special authority, and must be strictly pursued. Commonwealth *v.* Slifer, 25 Penn. St. 23, 64 Am. Dec. 680.

[8] Mead *v.* Treasurer, 36 Mich. 416.

Under a constitutional provision that persons appointed to fill vacancies in office shall hold until the next

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ion seems to be that the power to *remove* an officer does not include the power to *suspend* him temporarily from the office. A mere suspension would not create a vacancy, and the anomalous and unfortunate condition would exist of an office, an officer, but no vacancy, and of no one whose right and duty it was to execute the office.[1]

§ 454. **Necessity of Notice and Hearing before Removal.**— In those cases in which the office is held at the pleasure of the appointing power, and where the power of removal is exercisable at its mere discretion, it is well settled that the officer may be removed without notice or hearing.[2]

But on the other hand, where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal can not, except by clear statutory authority, be exercised without notice and hearing, but that the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given to the officer of the charges made against him, and he has been given an opportunity to be heard in his defense.[3]

general election, and the qualification of their successors, a board of supervisors may not remove at pleasure one whom they had appointed to fill a vacancy in the office of sheriff. State *v.* Chatburn, 63 Iowa 659, 50 Am. Rep. 760.

Where police commissioners are authorized to appoint a chief of police "for such time as the board shall determine," and appoint one without fixing the term, he holds for the statutory period, and the commissioners, having authority to remove for cause only, cannot remove him at pleasure. State *v.* Commissioners, 14 Mo. App. 297, 88 Mo. 144.

[1] Gregory *v.* New York, 113 N. Y. 416, 21 N. E. Rep. 119; State *v.* Jersey City, 1 Dutch. (N. J.) 536; *Contra*, Shannon *v.* Portsmouth, 54 N. H. 183; State *v.* Lingo, 26 Mo. 496.

[2] State *v.* St. Louis, 90 Mo. 19; Field *v.* Commonwealth, 32 Penn. St. 478; *Ex parte* Hennen, 13 Pet. (U. S.) 230.

[3] Dullam *v.* Willson, 53 Mich. 392, 51 Am. Rep. 128; State *v.* St. Louis, 90 Mo. 19; Bagg's Case, 11 Coke 99; King *v.* Gaskin, 8 T. R. 209; Ramshay's Case, 18 Ad. & El. (N. S.) 190; Williams *v.* Bagot, 3 B. & C. 786; Queen *v.* Archbishop, 1 Ell. & El. 545; Page *v.* Hardin, 8 B. Mon. (Ky.) 672; Willard's Appeal 4 R. I. 601; Field *v.* Commonwealth, 32 Penn. St. 478; State *v.* Bryce, 7 Ohio, pt. 282; Foster *v.* Kansas, 112 U. S. 201; Kennard *v.* Louisiana, 92 U. S. 480.

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It is, however, within the power of the legislature, where it has given the authority to appoint to an office created by it, to authorize the removal of the incumbent without notice or hearing, as when the executive is authorized to remove "for any cause deemed sufficient to himself."[1]

[1] In one or two cases it has been held that where the governor may remove for cause, he is the sole judge of the existence of the cause: State *v.* Doherty, 25 La. Ann. 119, 13 Am. Rep. 131; Patton *v.* Vaughan, 39 Ark. 211, but these cases have not been generally approved or followed.

[1] People *v.* Whitlock, 92 N. Y. 191. Here the mayor of a city was given authority to remove police commissioners "for any cause deemed sufficient to himself." Said DANFORTH, J.: "The next position of the relators raises a more interesting general question; whether they were entitled to have notice or be heard before the final action of the mayor. At common law there could be no doubt as to this. Bagg's Case (11 Coke 99). King *v.* Caskin (8 Term Rep. 209), and many others cited by the learned counsel for the appellants stand upon the principle that no one shall be condemned, unheard, but this, too, when applied to the term of office, is within the control of the legislature, and as it gave the power to appoint, it may also give the power to remove. (Const. Art. 10, § 3; People *ex rel* Sims *v.* Board of Fire Commissioners of the City of New York, 73 N. Y. 437.) In the act before us (Laws of 1881, § 1, chap. 559) the power of removal has been expressly conferred upon the mayor, to be exercised as to him shall seem meet. In People *ex rel.* The Mayor *v.* Nichols (79 N. Y. 582) cited by the appellant, the statute required not only that the cause for removal should exist, but also that the officer should have an opportunity to be heard. The statute before us lacks both conditions. No opportunity to be heard is given, and it is enough if the mayor thinks there is sufficient cause. It may or may not exist, except in his imagination, but his conclusion is final. The diligence of appellants' counsel has found no case like it, and those cited by him do not apply. They require either the actual existence of 'cause,' or 'sufficient cause,' for removal, and so by implication impose investigation before action, or by express language give a hearing to the accused member or official. Here the removal is to be determined summarily, and is intrusted to the unrestrained discretion of the mayor. Nor is this without a precedent. Among other cases, like power is given to the governor over the superintendent of public works, and to the latter over his assistant superintendents. (Const. of N. Y. art. 5, § 3), and to the board of commissioners of the fire department of New York, over certain subordinates. (Laws of 1873, chap. 335, § 28.) Under that statute it was held that the power of removal was to be exercised at pleasure, except in cases where there was an express limitation to a removal after notice and a hearing, and for cause. (People *ex rel.* Sims *v.* Board of Fire Commr's, *supra*)."

See to like effect, Sweeney *v.* Stevens, 46 N. J. L. 344.

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§ 455. **Proceedings for Removal are judicial in their Nature.**—Proceedings for the removal of an officer for cause are judicial in their nature and must be had before tribunals clothed with judicial powers.[1] The fit and appropriate tribunal, therefore, in ordinary cases is the court of law,[2] but this judicial power may be, and often is, expressly conferred upon the governor, mayor or other officer or board having the power of removal.[3]

The proceeding being thus a judicial one, the power must be exercised under the same limitations, precautions and sanctions as in other judicial proceedings.[4]

§ 456. **Right of the Courts to review the Proceedings.**—It follows necessarily from the considerations noticed in the two preceding sections that the question of the regularity of the proceedings by which the removal is attempted must always be open to review in the courts.[5]

§ 457. **For what Conduct removed.**—Statutes authorizing the removal of public officers for cause usually declare what cause shall be deemed sufficient. This cause is often defined with much exactness, but more frequently general terms are used such as official misconduct, mal-administration in office, breach of good

[1] Dullam *v.* Willson, 53 Mich. 392, 51 Am. Rep. 128; State *v.* Pritchard, 36 N. J. L. 101; Page *v.* Hardin, 8 B. Mon. (Ky.) 672.

[2] Page *v.* Hardin, 8 B. Mon. (Ky.) 672.

[3] Thus in Michigan a provision in the constitution authorizing the governor to remove officers for causes specified was held to confer upon him the judicial power to hear and determine as to the existence of the cause. Dullam *v.* Willson, 53 Mich. 392, 51 Am. Rep. 128.

[4] Thus a proceeding before a township board for the removal of an officer of a school district is in the nature of a judicial proceeding, and when one of the board is interested in the subject of the complaint, and the presence of such member is essential to the quorum, the proceeding is void because of the prohibition, common to all judicial tribunals, that no person can sit as a judge in any cause in which he is a party, or in which he is interested. Stockwell *v.* Township Board, 22 Mich. 341.

[5] Dullam *v.* Willson, 53 Mich. 392; 51 Am. Rep. 128; State *v.* St. Louis, 90 Mo. 19; Bagg's Case, 11 Coke 99; King *v.* Gaskin, 8 T. R. 209; Ramshay's Case, 18 Ad. & El. (N. S.) 190; Williams *v.* Bagot, 3 B. & C. 786; Queen *v.* Archbishop, 1 El. & El. 545; Page *v.* Hardin, 8 B. Mon. (Ky.) 672; Willard's Appeal 4 R. I. 601; Field *v.* Commonwealth, 32 Penn. St. 478; State *v.* Bryce, 7 Ohio, pt. 282; Foster *v.* Kansas, 112 U. S. 201; Kennard *v.* Louisiana, 92 U. S. 480.

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behavior, willful neglect of duty, extortion, habitual drunkenness, and the like.

Where no constitutional provision interferes, it must rest with the legislature to determine what causes shall be sufficient to warrant a removal,[1] but where the constitution provides that officers may be removed for a given cause, defining it in terms which have a definite and well understood legal meaning, it is not competent for the legislature to extend its scope by adding or incorporating offenses which do not fall within that meaning. The statement of one cause is an implied prohibition to the legislature's adding to it or extending it to other causes.[2]

Where the removal is to be for *official* misconduct or for misfeasance or mal-administration *in office*, the misconduct which shall warrant a removal of the officer must be such as affects his performance of his duties as an officer and not such only as affect his character as a private individual. In such cases, it is necessary "to separate the character of the man from the character of the officer."[3]

Misconduct,[4] willful mal-administration[5] or breach of good

[1] See *ante*, § 447.

[2] Commonwealth *v.* Williams, 79 Ky. 42, 42 Am. Rep. 204.

Intoxication is not "misfeasance in office," within the meaning of the constitution of Kentucky, and a statute pronouncing it misfeasance and providing for the removal of the officer therefor is unconstitutional. Commonwealth *v.* Williams, *supra*.

But under the Indiana constitution, providing for the removal of public officers for crime, incapacity or negligence, a statute providing for their removal for voluntary intoxication in business hours, or for habitual intoxication, is valid. McComas *v.* Krug, 81 Ind. 327, 42 Am. Rep. 135.

See also State *v.* Gilmore, 20 Kans. 551, 27 Am. Rep. 189.

[3] Commonwealth *v.* Barry, Hardin (Ky.) 229; Commonwealth *v.* Chambers, 1 J. J. Marsh. (Ky.) 160; Commonwealth *v.* Williams, *supra*.

[4] State *v.* Leach, 60 Me. 58, 11 Am. Rep. 172.

[5] Minkler *v.* State, 14 Neb. 181. In this case COBB, J., says: "Counsel draw a distinction between the legal meaning of the prefixes, *mal* and *mis*, and in effect claim that while the county surveyor was guilty of *mis*-administration, he was not guilty of *mal*-administration. But whatever there may be in the original meaning of the two words, we find them used in the law books almost or quite interchangeably, indicating a regard for euphony of sound rather than a distinction in meaning.

Thus in Bouvier's Law Dictionary, under the word mal-practice, in Latin *mala-praxis*, we find the several definitions of *willful mal practice*, *negligent mal practice*, and *ignorant mal praxis*. Certainly the prefix *mal* is not used in the two last cases to signify intentional wrong.

In the case of Coite *v.* Lynes, 33

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behavior,[1] in office, do not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or the official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or malicious motive.[2]

An officer will not, ordinarily, be removed for the misconduct of his deputy, unless he has directed, ratified or participated in it.[3]

§ 458. **Same Subject—Illustrations.**—Illustrations of these rules are numerous and will show their application.

Thus repeated acts of removal of government section cornerstones by a county surveyor, although under a claim of right so to do for the purpose of rectifying the original government survey, amount to "willful mal-administration in office" justifying his removal;[4] the act of a county clerk in knowingly permitting official records to be materially altered,[5] or in falsely certifying to fictitious records,[6] is a "breach of good behavior," for which he may be removed, although he had no corrupt motive; the act of a register of deeds in falsely certifying over his official signature, that he had examined a title and found it unencumbered, is "misconduct in office," which will justify his removal.[7]

Conn. 109, the court use the following language: 'For a misfeasance strictly is a default in not doing a lawful act in a proper manner—omitting to do it as it should be done, while malfeasance is the doing of an act wholly wrongful and unlawful, and nonfeasance is an omission to perform a required duty at all, or total neglect of duty.'

The phrase mal-administration is not found in any of the law dictionaries, but we cannot be far wrong in giving it the signification of wrong administration, and we believe that to be the sense in which the legislature used it in framing the section under consideration. Certainly, the prefix *mal* could not have been therein used in the sense of corruption or oppression, as these are both expressly provided for by other clauses of the same section.

The word *willful* or *willfully* is variously construed. Abbott, in his law dictionary, says that it is a term used in averring or describing an act, particularly one charged as a crime, to show that it was done with free activity of the perpetrator's will."

[1] Commonwealth *v.* Barry, Hardin (Ky) 229; Commonwealth *v.* Chambers, 1 J. J. Marsh. (Ky.) 160.

[2] Minkler *v.* State, 14 Neb. 181.

[3] State *v.* Budd, 39 La. Ann. 232 (case of a sheriff).

[4] Minkler *v.* State, 14 Neb. 181.

[5] Commonwealth *v.* Barry, Hardin (Ky.) 229.

[6] Commonwealth *v.* Chambers, 1 J. J. Marsh. (Ky.) 160.

[7] State *v.* Leach, 60 Mo. 58, 11 Am. Rep. 172.

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"When an officer acting in his official capacity," said the court in the last case, "and under his official signature does an act which has relation and refers to matters belonging to his department, and under his particular charge, and he acts knowingly, designedly, falsely, and the act is one calculated to mislead, and one that in its nature may be used for purposes of fraud or imposition, it is misconduct in office within the intent of this statute. And this, although no actual corruption by bribery or otherwise is proved."

So it is misconduct in office, authorizing their removal, for superintendents of the poor to draw orders on the county treasurer in favor of persons without whose knowledge they themselves draw the money and then compel the payees to take from themselves at exorbitant prices such goods as they see fit to give them; or to use their official power and the poor fund to coerce the recipients of their favor to vote under their dictation; or not to refund to the treasurer money which has been repaid to them by persons to whom they have afforded temporary relief.[1]

It is misconduct in office, for which he may be removed, for a county attorney to wilfully and persistently refuse to prosecute a certain class of cases, *e. g.*, violations of the liquor law, though he does so because he believes the sentiment of the community is opposed to the prosecution,[2] or for a county clerk to wilfully and persistently refuse to perform his duties as clerk of the board of county commissioners, though he expressly bases his refusal upon the ground that he believes that their contemplated action is illegal.[3]

So demanding and receiving illegal fees constitute "official misconduct" for which an officer may be removed;[4] but bribing a voter previous to the election is not misconduct in office,[5] though receiving bribes while in office is such.[6]

§ 459. **What constitutes a Removal—Implied Removals.**—A removal from office may be express or implied.[7] Where it is

[1] Gager *v.* Supervisors, 47 Mich 167.

[2] State *v.* Foster, 32 Kans. 13, 113 U. S. 201.

[3] State *v.* Allen, 5 Kans. 213.

[4] Brackenridge *v.* State, — Tex. —, 11 S. W. Rep. 630.

[5] Commonwealth *v.* Shaver, 3 Watts & S. (Penn.) 338.

[6] State *v.* Jersey City, 1 Dutch. (N. J.) 536.

[7] People *v.* Carrique, 2 Hill (N. Y.) 93; Bowerbank *v.* Morris, J. B. Wal-

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expressly made, no question can ordinarily arise either as to its purpose or effect. But in the case of an implied removal, more room for doubt may exist. The question most frequently arising in this connection is as to the effect of a second appointment where the incumbent under the first has not been expressly removed.

It has been held that, where an officer is appointed to hold during the pleasure of the appointing power, the appointment of another person operates as an implied removal of the first.[1]

"Whether this result could follow," said COOLEY, J., "where the term of office is fixed by law and is to continue for a definite period unless an actual removal takes place, would seem to have been doubted by the Supreme Court of New York,[2] but we do not feel called upon to decide the point in this case. A removal cannot be made without an intent to remove: and here it is clear that the council did not suppose they were exercising their power to remove, and they cannot therefore be held to have intended it." It was therefore held that the appointment of a second at a time when it was erroneously supposed the term of the first had expired, could not be deemed to be an implied removal of the first, even though the council had the power of removal at pleasure, there being no intent to remove, but only to fill a supposed vacancy.[3]

§ 460. **Same Subject—Notice of his Removal must be given to the Officer.**—"Where an office is held during the pleasure of the appointing power," says LEWIS, C. J., "a removal may be either express, that is, by a notification that the officer is removed; or implied, by the appointment of another person to the same office. But it has been decided that in either case the removal is not completely effected until notice actually received by the person removed. An office held during pleasure is not distinguishable from other cases of revocable authority. The officer has authority to act until notice of revocation."[4]

lace (U. S. C. C.) 119; Commonwealth *v.* Slifer, 25 Penn. St. 23, 64 Am. Dec. 630.

[1] People *v.* Carrique, 2 Hill (N. Y.) 93; Stadler *v.* Detroit, 13 Mich. 346; Commonwealth *v.* Slifer, 25 Penn. St. 23, 64 Am. Dec. 680.

[2] People *v.* Carrique, 2 Hill (N. Y.) 93. In such a case there is no implied removal. Commonwealth *v.* Slifer, 25 Penn. St. 23, 64 Am. Dec. 680.

[3] Stadler *v.* Detroit, 13 Mich. 346. See also People *v.* Lord, 9 Mich. 227.

[4] Commonwealth *v.* Slifer, 25 Penn.

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§ 461. **Removal not effected by revoking Appointment.**—When an officer is removable only for cause, and where he is not removable by the same power which appointed him, the appointing power can not effect his removal indirectly by rescinding or revoking his appointment after it is complete.[1] When the appointing power has once acted and the appointee has accepted the office and done what is required of him upon its acceptance, his title to the office becomes complete, and he can then be removed only in the regular way.[2]

§ 462. **But Governor may revoke Commission issued by Mistake.**—But where the governor has issued a commission to one person through mistake, supposing him to be duly elected, he may upon discovery of the error revoke the commission so issued, and reissue it to the person legally entitled to it.[3]

St. 23, 64 Am. Dec. 680, citing Bowerbank *v.* Morris, J. B. Wall. C.C. 124; Crew *v.* Vernon, Cro. Car. 97; Atkyns *v.* Clare, 1 Vent. 400; Newland *v.* Shephard, 2 P. Wms. 194, 19 Vin. Abr. 451, pl. 3; Seint John's Case, 5 Co. 71; Boucher *v.* Wiseman, Cro. Eliz. 440; Fitz's Case, *Id.* 12; *Ex parte* Hennen, 13 Pet. (U. S.) 260; Smyth *v.* Latham, 9 Bing. 692.

[1] Attorney-general *v.* Love, 10 Vroom (N. J.) 476, 23 Am. Rep. 234; Ewing *v.* Thompson, 48 Penn St. 372; People *v.* Reid, — Colo. —, 17 Pac. Rep. 302.

[2] Marbury *v.* Madison, 1 Cranch (U. S.) 137.

[3] Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49; State *v.* Capers, 37 La. Ann. 747.

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CHAPTER VII.

BY LEGISLATIVE ACTION.

§ 463. An Office is not a Contract.
464. An Office is not Property.
465. Statutory Offices may be altered or abolished by Legislature.
466. Municipal Offices may be abolished.
467. Constitutional Offices cannot be impaired.

§ 463. **An Office is not a Contract.**—Except in North Carolina,[1] it is now well settled that there is no contract, either express or implied, between a public officer and the government whose agent he is.[2] "The latter," says a learned judge, "enters into no agreement that he shall receive any particular compensation for the time he shall hold office; nor, in the case of a statutory office, that the office itself shall continue any definite period. Where the constitution limits the compensation, it is beyond legislative control; but that makes no contract. The people have the control in their sovereign capacity, as the legislature has in statutory offices. * * * On the part of the officer, there is still less in the nature of a contract. Whether he holds under a constitution or a statute, he is under no obligation to discharge his duties a single day. He may resign at any time and no power of the government can prevent him. The legislature may attach penalties to a refusal to serve in a public station, but that does not affect the question."[3]

Legislative control over an office, then, is not prohibited by that provision of the Constitution of the United States forbidding the impairment of the obligation of contracts.[4]

§ 464. **An Office is not Property.**—Neither, except in North

[1] Hoke v. Henderson, 4 Dev. (N.C.) L. 1, 25 Am. Dec. 677.

[2] Connor v. New York, 2 Sandf. (N. Y.) 355, 5 N. Y. 285; Commonwealth v. Bacon, 6 Serg. & R. (Penn.) 322; Commonwealth v. Mann, 5 Watts & S. 418; Butler v. Pennsylvania, 10 How. (U. S.) 402; Koontz v. Franklin County, 76 Penn. St. 154.

[3] In Connor v. New York, *supra*.

[4] Butler v. Pennsylvania, 10 How. (U. S.) 402.

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Carolina,[1] can a public office be regarded as the property of the incumbent.[2]

"Public offices," says RUGGLES, C. J., "are not incorporeal hereditaments, nor have they the character or qualities of grants. They are agencies. With few exceptions, they are voluntarily taken, and may, at any time, be resigned. They are created for the benefit of the public, and are not granted for the incumbent. Their terms are fixed with a view to public utility and convenience, and not for the purpose of granting the emoluments during that period to the office-holder." [3]

§ 465. **Statutory Offices may be altered or abolished by the Legislature.**—Where, then, an office is created by statute, it may, in the absence of constitutional prohibitions, be entirely abolished,[4] or its term may be increased or diminished,[5] or the manner of filling it may be changed,[6] or its compensation may be altered,[7] or its duties may be diminished or increased,[8] at the will of the legislature at any time, even though done during the term for which the then incumbent was elected or appointed.

So the legislature may declare the office vacant,[9] or may trans-

[1] King *v.* Hunter, 65 N. C. 603, 6 Am. Rep. 754; Brown *v.* Turner, 70 N. C. 93; Vann *v.* Pipkin, 77 N.C. 408.

[2] Connor *v.* New York, 5 N. Y. 285; State *v.* Douglass, 26 Wis. 428, 7 Am. Rep. 87; Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325; State *v.* Davis, 44 Mo. 129.

[3] In Connor *v.* New York, *supra*.

[4] State *v.* Douglass, 26 Wis. 428, 7 Am. Rep. 87; Wilcox *v.* Rodman, 46 Mo. 322; *In re* Bulger, 45 Cal. 553; Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 328; Bryan *v.* Cattell, 15 Iowa 538.

[5] Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325; Butler *v.* Pennsylvania, 10 How. (U. S.) 402; Walker *v.* Peelle, 48 Ind. 264; Taft *v.* Adams, 3 Gray (Mass.) 126; People *v.* Haskell, 5 Cal. 357.

[6] Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325; State *v.* Davis, 44 Mo. 129.

[7] Commonwealth *v.* Bacon, 6 Serg. & R. (Penn.) 322; Commonwealth *v.* Mann, 5 Watts & S. (Penn.) 418; Butler *v.* Pennsylvania, 10 How. (U. S.) 402; Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325; Farwell *v.* Rockland, 62 Me. 298; Barker *v.* Pittsburgh, 4 Barr (Penn.) 51; Connor *v.* New York, 5 N. Y. 291; Taft *v.* Adams, 3 Gray (Mass.) 126; People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377; Warner *v.* People, 2 Denio (N. Y.) 272, 43 Am. Dec. 740.

[8] Bunting *v.* Gales, 77 N. C. 283; Hoke *v.* Henderson, 4 Dev. (N.C.) L. 1, 25 Am. Dec. 677; Attorney-General *v.* Squires, 14 Cal. 13; Bryan *v.* Cattell, 15 Iowa 538; Rhodes *v.* Hampton, 101 N. C. 629, 8 S. E. Rep. 219.

[9] People *v.* Van Gaskin, 5 Mont. 352; Denver *v.* Hobart, 10 Nev. 28; State *v.* Davis, 44 Mo. 129.

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fer its duties to another officer,[1] although the effect may be to remove the officer in the middle of his term, or to abolish his office by leaving it devoid of duties.

§ 466. **Municipal Offices may be abolished.**—The same general principles apply to municipal offices. They may be abolished, altered, extended or vacated by the municipal authority which created them,[2] or by the legislature by which the corporation itself was created.[3]

So where the legislature has conferred upon a municipal board the authority to create offices, the board may abolish the offices so created, though the term of the incumbent has not expired.[4]

But where the statute provides for an office with a salary attached to be fixed by the board of supervisors, the latter can not virtually abolish the office by cutting down the salary to a nominal sum.[5]

§ 467. **Constitutional Offices can not be impaired.**—But where the tenure and term of office are fixed by the constitution different considerations apply. Such provisions as the constitution makes are beyond the power of the legislature to alter or destroy.[6]

Thus where a State constitution provides for the election of sheriffs and fixes the term of office, though it does not define what powers, rights and duties shall attach or belong to the office, the legislature has no power to take from a sheriff a part of the duties and functions usually appertaining to the office, and transfer it to an officer appointed in a different manner and holding the office by a different tenure.[7]

So where the constitution provides for the election of judges

[1] Attorney-General *v.* Squires, 14 Cal. 13.

[2] Augusta *v.* Sweeney, 44 Ga. 463, 9 Am. Rep. 172; Dillon's Munic. Corp. § 231.

[3] See People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 108; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202.

[4] Ford *v.* Commissioners, — Cal. —, 22 Pac. Rep. 278.

[5] De Soto County *v.* Westbrook, 64 Miss. 312.

[6] Commonwealth *v.* Gamble, 62 Penn. St. 343, 1 Am. Rep. 422; King *v.* Hunter, 65 N. C. 603, 6 Am. Rep. 754; State *v.* Brunst, 26 Wis. 428, 7 Am. Rep. 87; Foster *v.* Jones, 79 Va. 642, 52 Am. Rep. 637; State *v.* Choate, 11 Ohio 511; State *v.* Messmore, 14 Wis. 170; Howard *v.* State, 10 Ind. 99.

[7] State *v.* Brunst, 26 Wis. 428, 7 Am. Rep. 87; King *v.* Hunter, 65 N. C. 603, 6 Am. Rep. 754.

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and fixes their jurisdiction and term of office, a judicial district created by an act of the legislature cannot, during the constitutional term of the judge elected therein, be abolished by a subsequent act which repeals the first and transfers the territory to another district.[1] But where a judge has been elected by the legislature, the legislature may lawfully reduce his district to the minimum extent as fixed by the constitution, though the effect be to decrease his compensation.[2]

[1] Commonwealth v. Gamble, 62 Penn. St. 343, 1 Am. Rep. 422; Commonwealth v. Mann, 5 Watts & S. (Penn.) 403; People v. Dubois, 23 Ill. 547; State v. Messmore, 14 Wis. 163.

[2] Foster v. Jones, 79 Va. 642, 53 Am. Rep. 637.

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CHAPTER VIII.

BY IMPEACHMENT.

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§ 468. **Purpose of this Chapter.**—The last method to be here considered by which the removal of a public officer may be effected is that of impeachment. Great difficulty is experienced in dealing with this subject, not only because it is a proceeding very rarely resorted to, but also because it proceeds before a special tribunal having peculiar powers and because much uncertainty and conflict of opinion exists in regard to its scope and application. A brief summary of its main features is, therefore, all that will be here attempted.

THE AUTHORITY TO IMPEACH.

§ 469. **Declared by the Constitution.**—The authority to institute and carry on the extraordinary proceeding by impeachment is one conferred by the constitutions of the United States and of the States respectively. The constitution of the United States provides that "The president, vice-president, and all civil officers of the United States, shall be removed from office on

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impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanors."[1]

Provisions more or less similar to this are found in the constitutions of most of the States.[2]

II.

THE TRIBUNAL.

§ 470. **Impeachments originate in the House but are tried by the Senate.**—The Constitution of the United States provides that "The house of representatives shall * * * have the sole power of impeachment,"[3] but "The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present."[4]

This subdivision of the powers and responsibilities of impeachment is followed usually by the States.[5]

III.

WHAT OFFICERS MAY BE IMPEACHED.

§ 471. **Usually civil Officers only.**—By the constitution of the United States, as has been seen, it is declared that the president, vice-president, "and all civil officers of the United States" shall be liable to impeachment. This language, says Mr. Pomeroy,[6] "plainly excludes all private persons, and all officers in the land and naval forces," and Judge STORY,[7] following Mr. Rawle,[8] says that "all officers of the United States who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the

[1] Art. II., Sec. 4.
[2] A summary of these will be found in Stimson's Am. Stat. L., § 260.
[3] Art. I., Sec. II., Subd. 5.
[4] Art. I., Sec. III., Subd. 6.
[5] See Stimson's Am. Stat. L. § 262.
[6] Pomeroy's Const. Law, § 716.
[7] Story on Const. § 792.
[8] Rawle on Const. Ch. 22, p. 213.

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army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment." Whether this language includes senators and representatives themselves seems open to doubt.[1]

By the constitutions of the States the enumeration of the officers who may be impeached is usually made more specific.

IV.

FOR WHAT ACTS OFFICERS MAY BE IMPEACHED.

§ 472. **Conflict of Views upon this Question.**—Under the Constitution of the United States, an officer can be impeached only for "treason, bribery and other high crimes and misdemeanors." The question thereupon arises, what are "high crimes and misdemeanors" within the meaning of this provision.

It seems to be settled that there are no crimes against the United States except such as are expressly made so by act of Congress.[2] Acting upon this rule, it is maintained by a large class of constructionists that impeachment can be had only for acts which are indictable, and that unless the crime is specially named in the constitution, impeachments, like indictments, can only be instituted for crimes committed against the statutory law of the United States.[3]

But, on the other hand, a more liberal view is maintained with great plausibility and force. The supporters of this view maintain that impeachable crimes and misdemeanors can not be limited to those only which are expressly made so by statutory enactment, but that, to use the language of one writer, "an impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the constitution, of law, of an official oath, or of duty, by an act committed or omitted,

[1] See Story on Const. 793; Pomeroy's Const. Law, § 716. In the case of William Blount, a senator, it was held by the senate that senators are not "civil officers," within the meaning of the constitution. See also State *v.* Gilmore, 20 Kans. 551, 27 Am. Rep. 189.

[2] Wharton Crim. Law, §§ 163–164.

[3] See an exhaustive article by Prof. Theo. W. Dwight supporting this view in 6 Am. L. Reg. (N. S.) 257.

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or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose."[1] Whether the act in question is such an act is solely for the senate to determine.

V.

THE JUDGMENT THAT MAY BE RENDERED.

§ 473. **Removal from Office and Disqualification.**—"Judgment in cases of impeachment," declares the constitution of the United States, "shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."[2]

Provisions more or less similar are found in the constitutions of the States.

§ 474. **Whether Officer may be suspended during Proceedings.**—The constitutions of many of the States provide that all or certain officers shall be suspended from duty pending the impeachment proceedings. No such provision is found in the constitution of the United States. In the absence of such a provision, it is maintained that if the power exists at all it can be only in the case of subordinate ministerial officers.[3]

§ 475. **Impeachment does not prevent other Punishment.**—"Impeachments of public officers," says Chancellor SANDFORD, "a peculiar species of accusation, made and tried in a peculiar manner, are to extend no farther in their effect than to discharge an officer from his trust, and to render him incapable of holding office; but if the cause, for which the officer is thus punished, is a public offense, he may be also indicted, tried and punished, according to law; the constitution leaving the definition of the offense, and its particular punishment, in this case, as in all others,

[1] See an exhaustive article by Judge WM. LAWRENCE of Ohio, supporting this view, in 6 Am. L. Reg. (N. S.) 641. Prof. Pomeroy also supports this view. Pomeroy's Const. Law, § 725.

[2] Art. I. Sec. Subd. 7.

[3] Mr. Pomeroy is of the opinion that the power exists as to such officers. Const. Law, § 728. See also Prof. Dwight's article, 6 Am. L. Reg. (N. S.) at p. 276.

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to the general power of the legislature. This part of the constitution, concerning judgment on impeachments, is therefore a limitation of the power of the court for the trial of impeachments, and not a restriction upon the general power of the legislature over crimes." [1]

So where the constitution provides for the impeachment or removal of public officers for crime, incapacity or negligence, a statute providing for their removal for voluntary intoxication in business hours, or for habitual intoxication, is valid.[2]

[1] In Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 323.

[2] McComas *v.* Krug, 81 Ind. 327. 42 Am. Rep. 135. But see Commonwealth *v.* Williams, 79 Ky. 42, 42 Am. Rep. 204.

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