Holdover Provisions

THE WHITE HOUSE

WASHINGTON

April 7, 1983

MEMORANDUM FOR HELENE VON DAMM

FROM: FRED F. FIELDING Orig. signed by FFF

SUBJECT: Duration of Holding Office Pursuant to a Statutory Holdover Provision

You have asked this office for guidance on the length of time a member of the Board of Directors of the Securities Investor Protection Corporation (SIPC) may hold office after expiration of his term pursuant to the statutory holdover provision. Five of the seven members of the SIPC Board are appointed by the President, by and with the advice and consent of the Senate, for fixed terms. Pursuant to 15 U.S.C. § 78ccc(c)(4)(C), a "director may serve after the expiration of his term until his successor has taken office."

Although this statutory holdover provision contains no specific limit on the length of time an individual may hold over, it is our view that an individual may hold office pursuant to a holdover provision only for a limited, "reasonable" period. Congress has enacted holdover provisions to guarantee that offices are occupied without interruption and to ensure continuity in government operations. It did not intend holdover provisions to be used as a means of circumventing its advice and consent function. While we have found no pertinent federal authority, this view of holdover provisions is amply supported by state court decisions interpreting analogous provisions in state law.

What constitutes a "reasonable" length of time will of course vary with the circumstances of each particular case. A given period of time may not be objectionable if, during that time, a nomination were pending before the Senate, the Senate recently rejected a nominee, or there were articulable difficulties in selecting a nominee, while the same period could be objectionable in the absence of such circumstances.

In sum, the SIPC Board holdover provision may not be used as a substitute for the statutorily mandated nomination and confirmation process. Permitting an incumbent to hold over indefinitely by failing to nominate someone (including the incumbent) for the vacancy would not only create a serious political controversy, but it could also subject the incumbent to lawsuits challenging his authority and subject any actions taken by him to collateral attack.

FFF/JGR:sts
FFFielding
JGRoberts
Subj.
Chron.

DRAFT

FOR: JOHN ROBERTS

FROM: CLAUDIA McMURRAY

SUBJECT: Holdover Provision for Securities Investor Protection Corporation

The President is empowered by statute to appoint five of seven directors of the Securities Investor Protection Corporation (SIPC), with the advice and consent of the Senate. 15 U.S.C. §78ccc(c)(2)(C). When a vacancy occurs, it is filled in "the same manner as the original appointment was made." 15 U.S.C. §78ccc(c)(4)(C). Until that vacancy is filled, however, "[a] director may serve after the expiration of his term until his successor has taken office." Id.

The statute gives no indication of how long a director might "holdover" after his term has expired. By the same token, it places no restrictions on the amount of time the President has to make an appointment to fill the vacancy. The legislative history sheds no light on the question either. A general look at the President's constitutional powers of appointment may be of more assistance in this inquiry.

Article II, Section 2 of the Constitution empowers the President to "appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other officers of the United States,..." with the Advice and Consent of the Senate." The Supreme Court has interpreted

Constitution to contemplate "three distinct operations" in the appointment process. See Marbury v. Madison, 5 U.S. 137, 155-56 (1803). According to the Court, the first step is the nomination of a candidate. "This is the sole act of the President, and is completely voluntary." Id. The appointment is the second step, and "can only be performed with the advice and consent of the Senate." Id. The third step in the appointment process is the President's granting of a commission to the person appointed. Id.

This analysis appears to assign to the Senate a relatively minor role in the appointment process. According to an opinion of the Attorney General, "The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President's nominations, and such nominations fail whenver it rejects them." 3 Ops. Atty. Gen. 188 (1837).

This constitutional analysis, coupled with the absence of any statutory limitations, would indicate that the President may initiate the appointment process at any time. Of course, when the Congress set the term for an SIPC director at three years, it undoubtedly intended that time frame to be followed as closely as possible. While the statute cannot effectively conditions on the President's appointment power, it may set a "reasonable time" limit on the President in this situation.

There is some authority on the state level for the proposition that, when an incumbent holds over at the expiration of his term, the term is not prolonged indefinitely, but only for a reasonable time for his successor to qualify. See Prowell v. State, 142 Ala. 80, 39 So. 164, 167 (1905). In Prowell, the court held that if a successor fails to qualify within a reasonable time, a vacancy in the office will occur. Id.

Only one case on this subject has arisen in the Federal Reserve Board, a governmental body comparable to the SIPC. In that case, the President appointed John Williams as Comptroller of the Currency, a member of the Federal Reserve Board. Five years later, upon the expiration of his term, the President appointed Williams to succeed himself. The President then sent Williams' nomination to the Senate, which failed to consider it before adjourning. In an opinion written two months after Williams was appointed, the Attorney General found that Williams was a de jure member of the Board, and that he could continue in that office "until the office holder's successor shall have been appointed and qualified." The Attorney General set forth no limits on the amount of time the Senate had to approve Williams' appointment.

Conclusion

There appears to be no explicit limit on the President's power to appoint a director of the SIPC. According to the Court in Marbury, the President's act of nomination is a voluntary one. Only some states have held that an appointment must be made "within a reasonable time" after the prior officer's term has expired.

(7) subject to the provisions of subsection (c) of this section, to elect or appoint such officers, attorneys, employees, and agents as may be required, to determine their qualifications, to define their duties, to fix their salaries, require bonds for them and fix the penalty thereof;

(8) to enter into contracts, to execute instruments, to incur liabilities, and to do any and all other acts and things as may be necessary or incidental to the conduct of its business and the exercise of all other rights and powers granted to SIPC by this chapter; and

(9) by bylaw, to establish its fiscal year.

(c) Board of Directors.—

(1) Functions.—SIPC shall have a Board of Directors which, subject to the provisions of this chapter, shall determine the policies which shall govern the operations of SIPC.

(2) Number and appointment.—The Board of Directors shall consist of seven persons as follows:

(A) One director shall be appointed by the Secretary of the Treasury from among the officers and employees of the Department of the Treasury.

(B) One director shall be appointed by the Federal Reserve Board from among the officers and employees of the Federal Reserve Board.

(C) Five directors shall be appointed by the President, by and with the advice and consent of the Senate, as follows—

(i) three such directors shall be selected from among persons who are associated with, and representative of different aspects of, the securities industry, not all of whom shall be from the same geographical area of the United States, and

(ii) two such directors shall be selected from the general public from among persons who are not associated with a broker or dealer or associated with a member of a national securities exchange, within the meaning of section 78c(a)(18) or section 78c(a)(21), respectively, of this title, or similarly associated with any self-regulatory organization or other securities industry group, and who have not had any such association during the two years preceding appointment.

(3) Chairman and vice chairman.—The President shall designate a Chairman and Vice Chairman from among those directors appointed under paragraph (2)(C)(ii) of this subsection.

(4) Terms.—

(A) Except as provided in subparagraphs (B) and (C), each director shall be appointed for a term of three years.

(B) Of the directors first appointed under paragraph (2)—

(i) two shall hold office for a term expiring on December 31, 1971,

(ii) two shall hold office for a term expiring on December 31, 1972, and

(iii) three shall hold office for a term expiring on December 31, 1973,

as designated by the President at the time they take office. Such designation shall be made in a manner which will assure that no two persons appointed under the authority of the same clause of paragraph (2)(C) shall have terms which expire simultaneously.

(C) A vacancy in the Board shall be filled in the same manner as the original appointment was made. Any director appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A director may serve after the expiration of his term until his successor has taken office.

(5) **Compensation.**—All matters relating to compensation of directors shall be as provided in the bylaws of SIPC.

(d) **Meetings of Board.**—The Board of Directors shall meet at the call of its Chairman, or as otherwise provided by the bylaws of SIPC.

(e) **Bylaws and rules.**—

(1) **Proposed bylaw changes.**—The Board of Directors of SIPC shall file with the Commission a copy of any proposed bylaw or any proposed amendment to or repeal of any bylaw of SIPC (hereinafter in this paragraph collectively referred to as a "proposed bylaw change"), accompanied by a concise general statement of the basis and purpose of such proposed bylaw change. Each such proposed bylaw change shall take effect thirty days after the date of the filing of a copy thereof with the Commission, or upon such later date as SIPC may designate or such earlier date as the Commission may determine, unless—

(A) the Commission, by notice to SIPC setting forth the reasons therefor, disapproves such proposed bylaw change as being contrary to the public interest or contrary to the purposes of this chapter; or

(B) the Commission finds that such proposed bylaw change involves a matter of such significant public interest that public comment should be obtained, in which case it may, after notifying SIPC in writing of such finding, require that the procedures set forth in paragraph (2) be followed with respect to such proposed bylaw change, in the

NAME	POL.	STATE	APPOINTED	EXPIRES
* SABINE RIVER COMPACT ADMINISTRATION (Texas & Louisiana)				
Representative of the U.S.				
Lamar E. Carroon, Mississippi District of the Water Resources Division, U.S. Geological Survey, Jackson, Mississippi	D	Miss.	8/21/78	
SECURITIES AND EXCHANGE COMMISSION (5) (BI-PARTISAN)				
John R. Evans	R	Utah	9/20/79	6/5/83
Bevis Longstreth	D	N.Y.	8/20/82	6/5/84
Barbara S. Thomas	D	N.Y.	9/8/80	6/5/85
John S. R. Shad (CHAIRMAN)	R	N.Y.	6/5/81	6/5/86
James C. Treadway, Jr.	R	D.C.	8/20/82	6/5/87
SECURITIES INVESTOR PROTECTION CORPORATION (5)				
→ James G. Stearns (CHAIRMAN)	R	Nev.	7/16/82	12/31/82
Ralph D. DeNunzio	R	Conn.	8/17/82	12/31/82
James W. Fuller	R	Calif.	7/16/82	12/31/83
David F. Goldberg	R	Ill.	8/17/82	12/31/84
Roger A. Yurchuck (VICE CHAIRMAN)	R	Ohio	8/17/82	12/31/84

tificate it seems that there was ample authority and opportunity to do so, and it certainly knew how. In so close a question we are reluctant to add words and thoughts to the restriction in order that it may be interpreted to mean other than just what it says.

Affirmed.

BROWN, SIMPSON and STAKELY, JJ., concur.

STATE ex rel. BENEFIELD v. COTTLE.
5 Div. 494.

Supreme Court of Alabama.
Nov. 30, 1950.

Quo warranto proceeding by the State on the relation of J. V. Benefield against Ed Cottle, to determine who was the constable of Beat 10, Randolph County. The Circuit Court, Randolph County, Will O. Walton, J., entered judgment in favor of respondent and relator appealed. The Supreme Court, Lawson, J., held that on February 17, 1950, there was a vacancy in the office of constable in question, and on that date the Governor had the right to appoint respondent as constable.

Affirmed.

1. Officers ⇐54

The words "until his successor is elected and qualified" as used in appointing statutes were never intended to prolong term of office beyond a reasonable time after election to enable newly elected officers to qualify.

2. Sheriffs and constables ⇐12

Where relator was appointed a constable by Governor in 1941 to fill a term of office which expired in January, 1945, but no one was elected as constable in the election in 1944 to qualify in January, 1945, and relator continued acting as constable during term beginning January, 1949, inasmuch as no one had been elected or appointed to office, on February 17, 1950, there was a vacancy in office of constable and Governor had right to appoint a new constable. Code 1940, Tit. 17, § 69; Tit. 54, §§ 29, 31.

D. T. Ware and Paul J. Hooton, of Roanoke, for appellant.

Thos. W. Graff, of Roanoke, for appellee.

LAWSON, Justice.

This is an information in the nature of a quo warranto by the State, on the relation of J. V. Benefield, and by J. V. Benefield individually, against Ed Cottle. From a judgment in favor of respondent, relator appeals to this court.

J. V. Benefield was appointed constable of Beat 10, Randolph County, by the Governor in October, 1941. The appointment was to fill a vacancy created by resignation. The appointment was for the unexpired portion of the term and until his successor was elected and qualified. § 29, Title 54, Code 1940. Mr. Benefield was duly commissioned. Before entering upon his duties he executed bond in accordance with the requirements of § 31, Title 54, Code 1940.

The term of Mr. Benefield's predecessor expired in January, 1945. He did not offer for reelection in 1944, nor was anyone else elected constable of Beat 10, Randolph County, at the election held on the first Tuesday after the first Monday in November, 1944. § 69, Title 17, Code 1940. Although Mr. Benefield was neither elected nor appointed constable of Beat 10, Randolph County, for the term beginning January, 1945, and ending January, 1949, he continued to act as such constable and on December 2, 1946, filed a bond in the office of the probate judge of Randolph County, reciting in part as follows:

"Whereas, the principal has been elected or appointed to the office of Constable

Now, Therefore, the Condition of this Obligation is such, that if the said 'Principal' shall during the period beginning January 20, 1947 and ending January 19, 1951

well and faithfully discharge all the duties and trusts imposed upon him by reason of his election or appointment to said office, and honestly account for all moneys coming into his hands as such officer according to law except as hereinafter limited, then this obligation shall be null and void; otherwise to be and remain in full force and virtue."

The next date prescribed by law for the election of a constable for Beat 10, Randolph County, was on the first Tuesday after the first Monday in November, 1948. § 69, Title 17, Code 1940. No one was elected constable of said beat in that election. Mr. Benefield continued to act as constable during the term beginning in January, 1949, although he had not been elected or appointed to the office since his appointment in October, 1941.

On February 17, 1950, the present Governor appointed the respondent, Ed Cottle, constable of said beat. He executed bond. Thereafter commission was issued by the Governor on February 23, 1950.

The manner of filling vacancies in the office of constable is prescribed by § 29, Title 54, Code 1940, which section is as follows: "Vacancies in the office of constable are filled by appointment of the governor, and the person appointed holds office for the unexpired term, and until his successor is *elected* and qualified." (Emphasis supplied.)

The argument of appellant, relator below, is in substance that there was no vacancy in the office of constable of Beat 10, Randolph County, at the time the Governor attempted to appoint the respondent, Cottle, in that relator had been appointed to that office in October, 1941, had continued to perform the duties of the office, had not resigned, and no one had been *elected* as his successor. Otherwise expressed, relator claims that under the last clause of § 29, Title 54, he is the de jure constable of said beat under the 1941 appointment until he or someone else is elected to that office.

[1] We cannot agree with this insistence. It is now the settled law of this state that the words "until his successor is elected and qualified" were never intended to prolong the term of office beyond a reasonable time, after the election, to enable the newly elected officer to qualify. Prowell v. State, 142 Ala. 80, 39 So. 164; Ham v. State, 162 Ala. 117, 49 So. 1032. As stated by Chief Justice Brickell in City Council of Montgomery v. Hughes, 65 Ala. 201, 206–207, wherein a similar provision was involved, after the expiration of such reasonable time the office would become vacant.

[2] We are clear to the conclusion that on February 17, 1950, the date on which the Governor appointed Mr. Cottle, there was a vacancy in the office of constable of Beat 10, Randolph County, and that by virtue of that appointment Cottle became the constable of said beat. The trial court correctly so held.

The judgment is affirmed.

Affirmed.

FOSTER, LIVINGSTON, and STAKELY, JJ., concur.

WEST KEY NUMBER SYSTEM

KEITH v. CITY OF BIRMINGHAM.

6 Div. 988.

Court of Appeals of Alabama.

Aug. 8, 1950.

Rehearing Denied Oct. 3, 1950.

S. P. Keith, Jr., was convicted in the Circuit Court, Jefferson County, George Lewis Bailes, J., of violating municipal parking ordinance of the City of Birmingham, and defendant appealed. The Court of Appeals, Bricken, P. J., held that the evidence sustained conviction.

Affirmed.

Certiorari denied, 49 So.2d 227.

1. Automobiles ⇐6

The municipal parking ordinance of city of Birmingham was valid. Code 1940, Tit. 37, § 455.

when controversy involved in the appeal relates to an amount more than $200 but less than $2,500, Court of Appeals did not acquire jurisdiction of the subject matter. KRS 21.080.

2. Waters and Water Courses ⊂=209

In action against water company for damages allegedly resulting to goods, merchandise and equipment by water leaking into plaintiff's basement allegedly as result of negligence of water company, evidence as to whether water company was negligent was insufficient to present question of fact for jury.

Thomas C. Carroll, Louisville (Greenebaum, Barnett & Carroll, Louisville), for appellant.

Charles W. Morris, Louisville (Morris & Garlove, Louisville), for appellee.

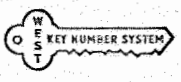
SIMS, Judge.

On July 6, 1953, appellant, Mann Chemical Corporation, filed suit against the Louisville Water Company for $1,605 for damages done their goods, merchandise and equipment by water leaking into their basement, which leak was alleged to have been caused by the negligence of the Water Company. At the conclusion of appellant's evidence the trial judge directed a verdict for the Water Company on the ground that appellant failed to make out its case and whether or not the Water Company was negligent was a matter of guess and surmise. This appeal followed.

[1] Notice of appeal was filed by appellant in the circuit court and it filed the record in the office of the clerk of this court, but did not file a motion for an appeal as required by KRS 21.080. This case is on all fours with Davis v. Underwood, Ky., 283 S.W.2d 851 and Johnson v. McCoy's Adm'r., Ky., 284 S.W.2d 676, wherein we held mandatory the provisions of KRS 21.080 requiring a motion to be filed in this court for an appeal from a judgment where the amount in controversy was more than $200 and under $2,500. Those cases hold that in such instances where appellant fails to file motion for an appeal, this court does not obtain jurisdiction of the subject matter.

[2] Had this appeal not been dismissed for the reason just stated, we would have been compelled to have affirmed the judgment on merits since an examination of the record convinces us the trial judge correctly directed a verdict for appellee.

Appeal dismissed for want of jurisdiction.



Joseph T. HANCOCK, Appellant,

v.

James F. QUEENAN, Clerk of Jefferson County Court, et al., Appellees.

Court of Appeals of Kentucky.

Oct. 5, 1956.

In an agreed case submitted pursuant to statutory authority, the Jefferson Circuit Court, Chancery Branch, 1st Division, Macauley L. Smith, J., adjudged that vacancy occurred in office of judge of Jefferson Circuit Court, Common Pleas Branch, 2nd Division, more than three months prior to general election to be held November 6, 1956, and that accordingly the county clerk must place names of nominees for office upon ballots. The judge who had been appointed to fill such vacancy less than three months prior to the 1956 election appealed, contending he had right to serve until November, 1957, election. The Court of Appeals, Stanley, C., held that when Circuit Judge's application for transfer or assignment to office of Special Judge was accepted by order of Court of Appeals, vacancy was ipso facto created by operation

of law, for purposes of constitutional provision making appointment to vacated office effective only until next election, if same occurs more than three months thereafter.

Affirmed.

1. Judges ⇐10

Circuit judge's filing of application in accordance with terms of retirement statute did not constitute tendering of "resignation" within meaning of constitutional requirement that resignations be filed with Governor. Const. § 76; KRS 63.010.

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

2. Judges ⇐7

Legislature had power to prescribe condition which, when voluntarily accepted by incumbent circuit judge, would bring about event which had legal effect of vacating office. Const. §§ 129, 152; KRS 23.300 to 23.380, 23.310, 23.320, 23.330.

3. Judges ⇐8

Constitutional provision, for circuit judges to continue in office until their successors have been qualified, has reference to reasonable extension of tenure, and is subject to condition that they do not vacate offices earlier; and incumbent circuit judge filing application for retirement did not continue as an incumbent of that office until his successor was appointed and qualified. Const. §§ 129, 165, 237; KRS 23.220, 23.330, 61.080.

4. Judges ⇐8

Taking oath of office as special judge was not prerequisite to occurrence of vacancy in office of retiring circuit judge. Const. §§ 129, 165, 237; KRS 23.220, 23.330, 61.080.

5. Officers ⇐30.2

There is no incompatibility in offices of regular and special circuit judge, insofar as incompatibility of duties or character and relationship of offices or constitutional requirements are concerned; but Legislature has power to say that a special judge appointed under provisions of retirement statute can hold no other office. Const. §§ 129, 165, 237; KRS 23.220, 23.330, 61.080.

6. Judges ⇐8

When circuit judge's application for transfer or assignment to office of special judge was accepted by order of Court of Appeals, vacancy was ipso facto created by operation of law, for purposes of constitutional provision making appointment to vacated office effective only until next election, if it occurs more than three months thereafter. Const. § 152; KRS 418.020 to 418.030.

7. Officers ⇐55(1)

An office is "vacant" when it is without an incumbent who is legally qualified to hold it or when incumbent has no right to exercise its functions or receive emoluments thereof.

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

8. Elections ⇐38

Presidential electors are "state officers" within the meaning of constitution section providing that elections of officers for unexpired terms shall be held at same time as election at which city, town, county, district or state officers are to be elected. Const. § 152; KRS 23.330.

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

James W. Stites, Luther Roberts, Louisville, for appellant.

Chas. Dobbins, J. W. Jones, Wilber Fields, Oldham Clarke, Louisville, for appellees.

STANLEY, Commissioner.

Section 152 of the Kentucky Constitution provides that if an office is vacated three months or more before an election for either city, town, county, district, or state officers, an appointment to the vacated office is effective only until the election. If the elapsed period is less than three months, the appointment holds until the next year's election. The question before us is as to the time a vacancy occurred. The particular facts make the case one of first impression.

In an agreed case submitted under KRS 418.020 to 418.030, the trial court adjudged that a vacancy occurred in the office of Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, more than three months before the general election to be held November 6, 1956; hence, that the County Clerk must place the names of nominees for the office upon the ballots. Honorable Joseph J. Hancock, who was appointed by the Governor within less than three months of the 1956 election to fill the vacancy, brings an appeal. He maintains that he has the right to serve until the November, 1957, election.

In 1954 the General Assembly created the office of Special Circuit Judge of the Commonwealth and made eligible therefor regular circuit judges who had served as such for as long as ten years and who for a minimum of two years had contributed to a fund out of which the salaries and expenses of the special judges are payable. Chapter 83, Acts of 1954, now KRS 23.300 to 23.380. A judge who is eligible makes an application to the Court of Appeals for retirement and appointment to the office, and this Court is required to accept the application and make the appointment. KRS 23.320. This act establishes a system for retirement of circuit judges and at the same time sets up a pool of experienced judges who are required to serve as special judges and perform such other duties as may be assigned to them throughout the Commonwealth when and where needed.

Honorable Burrel H. Farnsley, who had served as a circuit judge for many years, was doing so for a term which will expire on the first Monday in January, 1958. Section 129, Constitution. On July 25, 1956, Judge Farnsley filed an application in accordance with the terms of the statute, and on July 30, 1956, this Court entered the following order:

> "The Honorable Burrel H. Farnsley, Judge of the Jefferson Circuit Court, Common Pleas Branch–Second Division, having filed application for transfer from the status of Circuit Judge to the status of Special Circuit Judge under provisions of KRS 23.310 and 23.330; and the Hon. Burrel H. Farnsley having fulfilled all requirements precedent to the making of such transfer, and the Court being sufficiently advised, it is ordered that the Hon. Burrel H. Farnsley be and he is hereby transferred to the status of Special Circuit Judge according to the statutes made and provided, said transfer to be effective August 1st, 1956."

On August 20, 1956, the Governor appointed the appellant, Joseph J. Hancock, to fill the vacancy.

Upon request, the Attorney General advised the County Court Clerk of Jefferson County, the appellee James F. Queenan, that when Judge Farnsley accepted the office of Special Judge, he automatically vacated the office he held; and that under the terms of Section 152 of the Constitution, a successor to serve during the unexpired term should be elected at the ensuing November, 1956, election. Thereafter, the appellee L. Lyne Smith, Jr. was nominated as the Republican candidate, and the appellee William Loraine Mix as the Democratic candidate.

The appellant's claim that he holds over until the November, 1957, election rests on the concept that the action taken by Judge Farnsley was a resignation of his office, and it did not take effect and a vacancy did

not occur until the governor appointed his successor, which was within three months of the 1956 election.

KRS 63.010 provides:

"All resignations of office shall be tendered in writing to the court or officer required to fill the vacancy, and received and recorded by the court or officer in its or his records. Resignations to the Governor shall be recorded in the Executive Journal."

We have held that in the absence of a statute to the contrary "the resignation of a public officer does not become effective until accepted by the proper authority, or by equivalent action, such as the appointment of a successor." Commonwealth ex rel. Wootton v. Berninger, 255 Ky. 541, 74 S.W.2d 932, 933, 95 A.L.R. 213.

[1] If Judge Farnsley had resigned his office, his resignation would have been filed with the Governor, who has the authority to fill a vacancy in the office of a circuit judge. Section 76, Constitution. If it had been made to any other officer, it would have been a nullity and of no effect. Sparks v. Adkins, 304 Ky. 212, 200 S.W.2d 307. But he did not tender a resignation, and we do not construe his action to have been a resignation within the meaning of the Constitution or the statute. It was retirement pursuant to and in accordance with a special statute, the spirit and intent of which control.

A vacancy in a public office may be created, of course, by means or events other than a formal resignation. Illustrative are failure to qualify, death, removal from the district, or removal from or forfeiture of the office or an abandonment thereof. The retirement statute effectually describes another event which will create a vacancy.

[2] It is doubtful if the Legislature could force or authorize the Court of Appeals to compel a relinquishment of the office of circuit judge and a transfer of the incumbent to the retired or semiretired status for that would be to legislate the incumbent out of office; but it cannot be doubted that the Legislature has power to prescribe a condition which, when voluntarily accepted by an incumbent officer, brings about an event which has the legal effect of vacating the office.

[3, 4] It is not an acceptable argument that Judge Farnsley continued as an incumbent of the office of circuit judge until his successor was appointed and qualified. Of necessity, the provision of Section 129 of the Constitution that circuit judges shall "continue in office until their successors shall have been qualified" refers to a reasonable extension of tenure, 67 C.J.S., Officers, § 48, and the provision is subject to the condition that they do not vacate the offices earlier. Nor can we accede to the argument that there could be no vacancy until Judge Farnsley took the oath of office as a special judge, which he has not done. Another special oath was not required. KRS 23.220 provides:

"The commission issued to each regular circuit judge shall have the effect of commissioning him a special judge of the Commonwealth with jurisdiction coextensive with the state, and the judge shall remain such as long as he continues to hold office under the commission as regular judge."

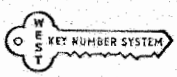
[5] Nor is there involved the question of vacating an office by accepting another that is incompatible. The appellant's argument that there is no incompatibility in the offices of regular and special judge is sound insofar as it concerns incompatibility of duties or the character and relationship of offices or as being in conflict with the terms of §§ 165 or 237 of the Constitution or KRS 61.080. James v. Cammack, 139 Ky. 223, 129 S.W. 582. But the Legislature had power to say that a special judge appointed under the provisions of the statute involved KRS 23.330, could hold no other office. What would be the result of such a special judge accepting some other office is of no

concern here. It is pertinent, however, to say that the statute discloses a legislative intent that the acceptance of the appointment as a special judge under the terms of the statute shall be deemed a vacation of the office of regular judge.

[6, 7] In the present case, when Judge Farnsley's application for transfer or assignment to the office of special judge was accepted by the order of the Court of Appeals, copied above, a vacancy was ipso facto created by operation of law. No action on the part of the Governor or anyone else was needed to make the vacancy complete on that day. An office is vacant when it is without an incumbent who is legally qualified to hold it or the incumbent has no right to exercise its functions or receive the emoluments thereof. Kash v. Day, Ky., 239 S.W.2d 959. After the acceptance of the office of special circuit judge of the Commonwealth, Judge Farnsley had no authority to perform the duties as judge on his former bench or any other until and unless he was assigned specially by the Court of Appeals. KRS 23.330. As a matter of fact, Judge Farnsley did not undertake to serve as regular judge but received the allowance or benefits of the retirement fund from August 1, 1956, and not a salary as circuit judge.

[8] Another point raised by the appellant is that the election to be held in November, 1956, is not within the purview of § 152 of the Constitution. That section provides, as related above, that elections of officers for unexpired terms shall be held at the same time as an "election at which city, town, county, district or state officers are to be elected". The only officers that may be said to be within these classes to be voted on in Jefferson County at the coming election are presidential electors. This court has for many years consistently held that presidential electors are state officers within the meaning of this section of the Constitution. Todd v. Johnson, 99 Ky. 548, 36 S.W. 987, 33 L.R.A. 399; Smith v. Ruth, 308 Ky. 60, 212 S.W.2d 532. The appellant vigorously argues that this conclusion is erroneous and that the opinions so holding should be overruled and the court declare that presidential electors are federal and not state officers. We reconsidered the question in Smith v. Ruth, 308 Ky. 60, 212 S.W.2d 532, and continue to adhere to the view.

The judgment is affirmed.



BIG JIM COAL COMPANY BURIAL FUND et al., Appellants,

v.

Arthur CINNAMON, Appellee.

Court of Appeals of Kentucky.

Oct. 5, 1956.

Appeal from Circuit Court, Bell County; W. R. Knuckles, Judge.

J. C. Helton, Helton & Helton, Pineville, for appellants.

W. J. Stone, Pineville, for appellee.

PER CURIAM.

Appellee Arthur Cinnamon recovered judgment against appellants Big Jim Coal Company Burial Fund et al. for $520 as burial benefits for his wife. Upon examination of the record and reading of the briefs, no prejudicial error is found.

Motion for appeal is overruled and judgment is affirmed.

188 Neb. 710

Jake STASCH et al., Appellants,

v.

Clyde WEBER et al., Appellees.

No. 38354.

Supreme Court of Nebraska.

July 7, 1972.

County residents initiated quo warranto action to oust members of county committee for reorganization of school districts. The District Court, Cherry County, Robert R. Moran, J., rendered judgment for defendants and plaintiffs appealed. The Supreme Court, White, C. J., held that where statute required committee to be elected every four years by members of school boards and boards of education within county, but where there were no official minutes of an election or record of official board actions and there was no showing in record explaining failure of proof of official action in the official minutes of the county committee, members of committee had failed to meet their burden of proving that they were entitled to hold the office that they purported to occupy and were subject to ouster.

Reversed and remanded with directions.

1. Quo Warranto ⇦55

In a quo warranto proceeding, no legal presumption arises in favor of defendant merely from his establishment of his physical possession of office which he claims or from his attempt to exercise the authority of a public office.

2. Officers ⇦83

Quo Warranto ⇦55

In an ouster action, the person claiming the office must make a prima facie showing of his legal right to hold the office; ordinarily, in quo warranto proceeding, burden of proof in first instance is on the defendant whose right to the office is challenged.

3. Quo Warranto ⇦34

Under statute providing that any elector of county may file quo warranto proceeding against any person unlawfully holding or exercising functions of any public office if county attorney refuses to bring such action, residents of county, who had complied with provisions of statute, had standing to bring quo warranto action to oust members of county committee for reorganization of school districts, even though residents claimed no right to the office themselves. R.R.S.1943, § 25-21,-122.

4. Quo Warranto ⇦26, 55

Under statute providing that any elector of county may bring quo warranto action to oust an officeholder who is not legally entitled to his office when county attorney refuses to bring such action, residents of county, who had complied with provisions of statute, became substituted in interest with county attorney so that same rules as burden of proof and procedure applied as if action had been brought by the Attorney General or the county attorney in the first instance. R.R.S.1943, § 25-21,122.

5. Officers ⇦81

The identity of an elected public official must be established with certainty and cannot rest upon speculation as to phonic similarity with names of persons allegedly elected in prior years.

6. Quo Warranto ⇦55

When a challenged official purports to hold office by virtue of an election, he must show that the election was held and that he was in fact elected; holding a public office can rest on nothing less than such evidence, unless a satisfactory and convincing explanation is made as to the lack of an official record.

7. Officers ⇦81

The right to hold a public office is ordinarily shown by producing a certificate of election by the proper officer, or by

showing that by canvass of votes at election by the authorized persons, the officer has received a plurality or necessary number of votes to have been elected.

8. Quo Warranto ⇐55

Where statute required county committee for reorganization of school districts to be elected every four years by members of school boards and boards of education within county, but where there were no official minutes of an election or record of official board actions and there was no showing in record explaining failure of proof of official action in the official minutes of the county committee, members of committee had failed, in quo warranto action brought by residents of county, to meet their burden of proving that members of committee were entitled to hold the office that they purported to occupy and were subject to ouster. R.R.S.1943, §§ 25–21,122, 79–426.05.

9. Quo Warranto ⇐55

Statute allowing an incumbent to remain in office after expiration of his term until his successor is duly qualified has no application in a quo warranto proceeding where officer cannot show that he is an incumbent rightfully in office in the first place. R.R.S.1943, § 32–1045.

10. Officers ⇐54

Generally, provisions for holding over until a successor is elected and qualified do not prolong the incumbent's term indefinitely, but only for a reasonable time, to allow a successor to qualify.

11. Officers ⇐54

The only purpose of statute allowing an incumbent to remain in office after expiration of his term until successor is duly qualified is to prevent a temporary vacancy in a public office and to permit a reasonable time to allow for exigencies in transfer of public office; it is not intended to eliminate the necessity for having a proper and required statutory election, and for keeping a proper official record of such election and of the results thereof. R.R.S.1943, § 32–1045.

12. Officers ⇐54

Where statute required county committee for reorganization of school districts to be elected every four years and where members were last shown to have been elected in 1957, members could not claim, in quo warranto action brought over ten years later, to be holding over in office as incumbents under statute allowing an incumbent to remain in office after expiration of his term until his successor is duly qualified. R.R.S.1943, §§ 25–21,122, 32–1045, 79–426.05.

13. Quo Warranto ⇐54, 57

The only issue in a quo warranto action which may be litigated is the right of defendant to hold public office, and the action must be strictly confined to that issue; the legality of official action or constitutionality of statutes under which officer purports to act may not be litigated.

Syllabus by the Court

1. In a quo warranto proceeding, ordinarily the burden of proof in the first instance is on the defendant who claims the right to the office.

2. In a quo warranto proceeding, no legal presumption arises in favor of the defendant merely from his establishment of his possession of the office which he claims.

3. Section 25–21,122, R.R.S.1943, provides any elector of the appropriate county may bring a quo warranto proceeding against any county public office holder when the county attorney of the appropriate county refuses to do so.

4. Generally, in a quo warranto proceeding, when a challenged official purports to hold office by virtue of an election, he must show that the election was held and that he was in fact elected.

5. Generally, provisions for holding over until a successor is elected and quali-

fied do not prolong the incumbent's term indefinitely, but only for a reasonable time to allow a successor to qualify.

Michael V. Smith, Gordon, for appellants.

W. Gerald O'Kief, Valentine, John A. Wagoner, Thomas A. Wagoner, Grand Island, for appellees.

Heard before WHITE, C. J., and SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

WHITE, Chief Justice.

This is a quo warranto action initiated by several residents of Cherry County, Nebraska, seeking to oust the members of the Cherry County Committee for the Reorganization of School Districts, hereinafter referred to as the County Committee. The district court resolved all of the issues in favor of the defendants. We reverse the judgment of the district court and direct that a judgment of ouster be entered.

The issues presented in this case are whether the defendants, in the first instance, were lawfully elected to office and second, whether they are lawfully holding office at the present time. The statute establishing the procedure for the election to the County Committee is section 79-426.05, R.R.S.1943, which provides in relevant part: "All of the members of the school boards and boards of education within the county and joint districts under the jurisdiction of that county committee shall, at a meeting called for that purpose by the county superintendent of schools within one hundred twenty days from August 27, 1949, and each four years thereafter, (1) determine by a majority vote of those present the number of members of the county committee within the limits prescribed in this section, and (2) elect for a term of four years, all the remaining members of the committee * * *."

[1,2] Because of the nature and importance of an ouster action, the rules governing the procedure are different than in an ordinary civil action. No presumption arises in a person's favor merely from his physical possession or his attempt to exercise the authority of a public office. In an ouster action, the person claiming the office must make a prima facie showing of his legal right to hold the office. Once that is done, certain presumptions (not applicable herein) arise in his favor which may cause the burden of advancing to shift to the relator, but it is clear that the burden of proof in the first instance is on the defendant whose right to the office is challenged. See, State ex rel. Einstein v. Northup, 79 Neb. 822, 113 N.W. 540; 74 C.J.S. Quo Warranto § 43, p. 260; 44 Am. Jur., Quo Warranto, s. 106, p. 167; Ferris, Extraordinary Legal Remedies, s, 136, p. 156.

[3,4] The relators have standing to bring this action. This is true even though they claim no right to the office themselves. This result follows from a proper construction of section 25-21,122, R.R.S.1943. The action, under the statute, must in the first instance be brought by the county attorney of the appropriate county. The statute provides that in the event he refuses to bring such action, a private person acting in the public interest may bring such action to oust an officeholder who is not legally entitled to his office. The relators, having complied with the provisions of the statute, become substituted in interest with the county attorney and it follows that the same rules as to burden of proof and procedure apply as if the action were brought by the Attorney General or the county attorney in the first instance.

[5] We turn to the evidence. Despite the fact that the statute requires an election every 4 years, the only official record in the evidence in this case of an election of or to the County Committee are the minutes of a meeting held for that purpose on October 15, 1957. The minutes show that one "Cleo Bloom" was elected in 1957, and "Cleo Bloom, Jr." is a defendant in this

action brought over 10 years later. There is nothing in the record to explain or to show that these names refer to the same person. More important, "Bob Hanna" was elected, according to the minutes, in 1957, and "Samuel K. Hanna" is a defendant herein. There is an oblique reference in the record which indirectly suggests that these may be the same person, but there is no proof that they are. Surely the identity of an elected public official must be established with certainty and cannot rest upon speculation as to phonic similarity.

The record does show that in January 1963, an information letter was set to the State Committee for Reorganization of School Districts which shows the names of the members of the County Committee and indicates that they were elected April 5, 1962. But nowhere in the record does there appear the official minutes of the County Committee, the results of the voting, or a canvass of the votes to establish officially the record of the defendants' election. No explanation of this failure appears in the record. It is not suggested that they were lost, destroyed, or for some other reason secondary evidence could not be introduced to establish the minutes showing that the statutory procedure had been followed and the election held. It becomes apparent there is a total lack of competent proof in this record to establish that a proper election was held under the statute and that the defendants were legally elected by a majority vote of those present to the office they now purport to hold.

Turning now to the situation 4 years later in 1966 we find there is evidence in the record showing the publication of an official notice of an election to be held to select members of the County Committee. This election was to be held, pursuant to the terms of the notice, on April 1, 1966. Assuming that this election was held, pursuant to the notice, there is no record of the results. The lack of all official action and all official record is confirmed by the fact that the only evidence introduced in this respect is that the then county superintendent of schools testified this election was in fact held but *could not remember who had been elected.* Again, there are no official minutes, no showing that the election was held by the proper officers, no showing that the votes were canvassed, or the number of votes cast or that they were cast by the authorized persons. Again, the only evidence in the record in this respect is that almost one and one-half years later, in August 1967, and again in August 1968, an information letter was set to the State Department of Education which purports to show that the members of the County Committee included most, but not all, of the defendants. Again, the court is left in doubt with reference as to whether any legal election was held, because there is no statement or report of the election and its results in this information letter.

[6–8] We can come to no other conclusion but that the defendants have failed to meet their burden of proof. Without explanation, there are no official minutes or record of official board action, no official document in the record which entitles the defendants to hold the office that they purport to occupy. When a challenged official purports to hold office by virtue of an election, he must show that the election was held and that he was in fact elected. Holding a public office can rest on nothing less than such evidence, unless a satisfactory and convincing explanation is made as to the lack of an official record. The right to hold a public office is ordinarily shown by producing a certificate of election by the proper officer, or by showing that by the canvass of votes at the election by the authorized persons, the officer has received a plurality or the necessary number of votes to have been elected. 2 Bailey on Habeas Corpus, s. 329, p. 1278. There is no showing in this record explaining the failure of proof of the official action in the official minutes of the County Committee. The integrity of the elective process cannot be established by extra-statutory informational letters signed by one person as a substitute for the unexplained

absence of any official record of the election and the legal results thereof. There has been an entire failure of the burden of proof on the part of the defendants to establish their right to hold the purported office that they claim.

[9–11] Also the defendants contend that they are holding over in office by virtue of section 32–1045, R.R.S.1943, which provides for an incumbent to remain in office after the expiration of his term until his successor is duly qualified. There are two answers to this contention. First, this section obviously has no application in a quo warranto proceeding where the officer cannot show that he was an incumbent who was rightfully in office in the first place. Second, even if the defendants are the same persons who were elected in 1957, they cannot claim the protection of the statute. The proper rule is stated in 67 C.J.S. Officers § 48, p. 204, where it is stated: "Provisions for holding over until a successor is elected and qualified do not prolong the incumbent's *term* indefinitely, but only for a reasonable time to *allow a successor to qualify.*" (Emphasis supplied.) The only purpose of the holding over statute is to prevent a temporary vacancy in a public office, and to permit a reasonable time to allow for the exigencies many times present in the transfer of public office from one person to his successor. It was not intended to eliminate the necessity for having a proper and required statutory election, and keeping a proper official record of such election and the results thereof. Otherwise the integrity of the elective process would be emasculated by the indifference or the negligence of the parties responsible under the statute for complying with the mandatory requirements of holding the election and officially reporting the results thereof. All of these principles are particularly applicable where you have the same entity charged with the responsibility of the election of their own successors in office.

[12] In the context presented here the defendants' contention that they are legally holding over in office as incumbents is without merit.

[13] Other issues are presented in the briefs of the parties. The main contention is the unconstitutionality of the enabling statutes for the creation of the County Committee and the exercise of its powers thereunder. It is not necessary to discuss this issue because, from what we have said herein, the defendants are not legally holding office and are subject to ouster. We point out, however, that the only issue in a quo warranto action which may be litigated is the right of the defendant to hold public office, and the action must be strictly confined to that issue. The legality of the official action or the constitutionality of the statutes under which the officer purports to act may not be litigated in a quo warranto action. State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N.W.2d 784; State ex rel. Good v. Conklin, 127 Neb. 417, 255 N.W. 925; 74 C.J.S. Quo Warranto § 11, p. 193.

The judgment of the district court is reversed and the cause remanded with directions to enter the proper judgment of ouster against the defendants.

Reversed and remanded with directions.

188 Neb. 727

HYDROTEX, a corporation, Appellee,

v.

L. D. PUTNAM, Appellant.

No. 38428.

Supreme Court of Nebraska.

July 7, 1972.

Seller brought action against buyer to recover price of goods allegedly sold to buyer. The District Court, Holt County, William C. Smith, Jr., J., rendered judg-