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JUDGES -APPOINTMENT OF SUBSTITUTE FOR RECUSED JUDGES - DISQUALIFICATION OF JUDGES

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JUDGES — APPOINTMENT OF SUBSTITUTE FOR RECUSED JUDGES — DISQUALIFICATION OF JUDGES — The problems of the disqualification of judges because of prejudice and of the appointment of substitutes for judges so disqualified were considered in the recent case of *State ex rel. Thompson v. Day*.[1] One of the defendants in a labor injunction suit had filed with the governor an affidavit setting forth facts showing that the sole judge of the district in which the dispute had arisen had anti-labor tendencies to such extent that the petitioner could not obtain a fair trial and requested that the regular judge be disqualified from hearing the injunction proceedings and a substitute appointed. The governor granted the petition and designated the judge of another district to hear the case. The plaintiffs in the injunction proceedings then sued out a writ of prohibition to prevent the substitute from sitting in the case, claiming that the exercise of such powers of disqualification and appointment by the governor was illegal in that it violated the

[1] (Minn. 1937) 273 N. W. 684. See also State ex rel. F. W. Woolworth Co. v. Day, (Minn. 1937) 273 N. W. 691, involving identical facts.

separation of powers provision of the constitution.[2] A majority of the court held that the action of the governor was unconstitutional in two respects, namely that the disqualification of a judge on account of prejudice could not be determined by the chief executive and that the substitute for a disqualified judge could not be appointed by him. The minority opinion pointed out that the state constitution authorized the legislature to provide by law that the judge of one district may discharge the duties of the judge of any other district when convenience or public interest so requires[3] and that a delegation of such power of appointment to the governor was not unconstitutional. The two constitutional issues presented by this case will be considered in reverse order.

I.

The second holding of the court, namely that the appointment of a substitute judge by the governor is unconstitutional in that it pertains to the everyday routine management of the courts and thus violates the separation of powers principle, appears to be out of line with the course of decisions in this country. In only a few instances have legislative provisions for appointment of substitute judges been stricken down as unconstitutional and no case has been found in which the decision rested on the separation of powers clause. The early decision of Cohen v. Hoff[4] most closely resembles the holding of the principal case. In that case the governor, pursuant to statute, appointed a substitute for a judge who was unable to hold court because of illness. The opinion points out that when South Carolina was a royal province such appointments were legal because the governor acted as representative of the Crown and the Crown could make temporary, as well as permanent, appointments, but that the constitution of the state now required election of all judges by the legislature. Therefore the statute providing for appointment of substitute judges by the governor was held unconstitutional. This case has been criticized and distinguished by other courts,[5] but at least one case is in accord with it.[6] Other statutory methods of substitution have been held invalid in that the constitution provided for one particular method of appointment and the

[2] "The powers of the government shall be divided into three distinct departments, the legislative, executive, and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers belonging to either of the others, except in the instances expressly provided in this constitution." Minn. Const., art. 3, § 1.

[3] Minn. Const., art. 6, § 5.

[4] 3 Brev. (S. C.) 500 (1814).

[5] E.g., Venable v. Curd and White, 2 Head (39 Tenn.) 582 (1859).

[6] Smith v. Normant, 5 Yerg. (13 Tenn.) 271 (1833).

statute did not comply therewith. Thus in *Van Slyke v. Fire Ins. Co.*,[7] a statute providing that the parties to the cause might stipulate that a member of the local bar sit as judge in the cause was held void as conflicting with a constitutional clause requiring a change of venue in such cases. In *Oates v. State*[8] a statute providing for selection of substitute judges by the governor was held violative of the constitutional requirement that the parties should first have the opportunity to select a proper person by agreement among themselves. These few decisions, however, are in conflict with the general tendency in this country to give the legislature wide powers in providing for the selection of substitute judges. Although in Pennsylvania it was held that the supreme court has broad authority over the lower courts and in its supervisory jurisdiction may appoint substitutes,[9] nevertheless, as will appear later, the legislature is generally considered to have such powers.

In many states there are provisions in the constitutions for various methods of appointment of substitute judges. These clauses are in some instances explicit, in others indefinite. Thus in Maryland it is provided that the venue be changed to another court as directed by the disqualified judge.[10] Most states have thought it desirable to obviate the necessity of change of venue, however. The most common provision in the constitutions is one similar to that of Minnesota, namely that the legislature may provide by law that the judge of one district may discharge the duties of the judge of any other district without specifying by whom the appointment is to be made.[11] Just what are the limitations on the broad powers thus granted the legislature will be considered at a later point. Another clause appearing in the organic acts of several states permits the governor to appoint the substitute,[12] a power which the statute in the *Day* case unsuccessfully attempted to confer.

[7] 39 Wis. 390 (1876).

[8] 56 Tex. Crim. 571, 121 S. W. 370 (1909).

[9] In re Carbon County Judicial Vacancy, 292 Pa. 300, 141 A. 249 (1928). This case, however, involved appointment of the substitute for a deceased judge.

[10] Md. Const., art. 4, § 8.

[11] Ala. Const., § 160 (if certain prescribed methods fail to provide an acceptable substitute); Ga. Const., art. 6, § 4, par. 9, § 5; Ind. Const., art. 7, § 10; Ky. Const., § 136; La. Const., art. 7, § 38 (except as otherwise provided); Minn. Const., art. 6, § 5; Mo. Const., art. 6, § 29; N. C. Const., art. 4, § 11; S. C. Const., art. 5, § 6; S. D. Const., art. 5, § 29 (regulations of exchange of judges shall be presecribed by law); Tenn. Const., art. 6, § 11; Tex. Const., art. 5, § 11 (when parties cannot agree); Va. Const., § 97 (exchange of judges may be required or authorized); W. Va. Const., art. 8, § 15.

[12] Ark. Const., art. 7, § 36; Del. Const., art. 4, § 18; Fla. Const., art. 5, § 8; Miss. Const., § 165 (in case the attorneys in the cause cannot agree on a substitute); R. I. Const., art. 10, § 5; S. C. Const., art. 5, § 6 (note that there is also provision for appointment by the governor).

In Arkansas[13] and Kansas[14] there are provisions for election of the substitute judge by the members of the bar present in court. In other states the recused judge may himself request the judge of another district to hear the case,[15] with a further provision in some of these jurisdictions that if the governor requests the substitute so chosen by the regular judge to act it becomes his duty to do so.[16] In other states there is merely a general authorization that judges may exchange districts.[17] Finally, there are provisions allowing the parties to agree among themselves upon the substitute,[18] with various alternatives in the event that they fail to reach agreement.[19]

With such a wide variety of constitutional provisions, it is only natural that the statutes in the various states should likewise be varied. Furthermore, in some jurisdictions it has been held that the constitutional provisions are not exclusive and that the legislature may enact other means of selecting substitutes even though certain methods are expressly set forth in the constitution.[20] Change of venue is provided for in a number of states,[21] either as a matter of course or as a last resort if

[13] Ark. Const., art. 7, § 21.

[14] Kan. Const., art. 3, § 20.

[15] Mo. Const., art. 6, § 29.

[16] Ariz. Const., art. 6, § 7; Idaho Const., art. 5, § 12; Utah Const., art. 8, § 5; Wash. Const., art. 4, § 7. (In Idaho, Utah, and Washington, the parties may first agree on a judge pro tempore, subject to the approval of the court.)

[17] Ga. Const., art. 6, § 5; Mont. Const., art. 8, § 12 (judges shall exchange districts when required by law, but may do so anyway); Neb. Const., art. 5, § 12 (when required by law or ordered by supreme court, it is the duty of judges to exchange districts); Va. Const., § 97 (judges may be required or authorized to exchange districts).

[18] Cal. Const., art. 6, § 5, amendment of 1928 (the agreement of the parties is subject to the approval of the court and subject to regulations prescribed by the judicial council); Fla. Const., art. 5, § 19 (parties may either agree on a substitute or agree to transfer to another circuit or to a referee); Mont. Const., art. 8, § 36 (agreement subject to approval by the court).

[19] Ala. Const., § 160 (in case of failure to agree, clerk of court appoints the special judge); Miss. Const., § 165 (governor appoints substitute if parties fail to agree); Tex. Const., art. 5, § 11 (if parties fail to agree, the substitute is appointed in such manner as may be prescribed by law).

For provisions in Idaho, Utah, and Washington, see note 16.

[20] State ex rel. Spencer v. Baker, (Ind. 1937) 7 N. E. (2d) 984; Price v. Russell, 154 Ky. 824, 159 S. W. 573 (1913); Kentucky Union Co. v. Bailey, 174 Ky. 488, 192 S. W. 708 (1917); Chandler v. Chandler, 92 Kan. 355, 140 P. 858 (1914); Schieffelin v. Goldsmith, 253 N. Y. 243, 170 N. E. 905 (1930); Kruegel v. Nash, (Tex. Civ. App. 1903) 72 S. W. 601.

[21] Ariz. Rev. Code (Struckmeyer, 1928), § 3721; Cal. Code Civ. Proc. (Deering, 1937), §§ 397, 398; Colo. Ann. Stat. (Courtright, 1930), § 7710; Iowa Code (1931), § 11417; La. Gen. Stat. (1932), § 1911 (change of venue as a last resort);

other methods fail to provide an adequate substitute. This method is undesirable in that it involves the expense and trouble of transporting parties, attorneys, witnesses and records to another county.[22] In a number of states the parties themselves are given an opportunity to agree upon the judge of another district[23] or a member of the local bar[24] as a substitute. In the event of disagreement between the parties, various other alternatives are provided for. However, in some instances, agreement by the parties has been held invalid because it smacked of arbitration, for which there was no authorization in the jurisdiction.[25] In Indiana the recused judge or the supreme court nominates three competent persons and each side may eliminate one name.[26]

In the federal courts statutes authorize appointment of the substitute judge by the senior circuit judge,[27] or in the event that there is no

Md. Ann. Code (1924), art. 75, § 109; 3 Mich. Comp. Laws (1929), § 13999; 4 Mont. Rev. Code (1935), §§ 9098, 9099 (as a last resort); Neb. Comp. Stat. (1929), § 20-410; Nev. Stat. (1931), c. 153; N. C. Code (1931), § 470; 1 Ore. Code (1931), §§ 1-404, 1-405; 19 Pa. Ann. Stat. (Purdon, 1930), § 551, 12 ibid., § 111, 17 ibid., § 583; R. I. Gen. Laws (1923), § 4750; Tenn. Code (1932), § 9906; Va. Code (1930), § 6176; 1 Wash. Comp. Stat. (Remington, 1922), § 209; W. Va. Code (1931), § 56-10-2; Wis. Stat. (1935), § 261.08; Wyo. Rev. Stat. (1931), § 89-1101.

Consumer's Power Co. v. Circuit Judge, 210 Mich. 572, 178 N. W. 98 (1920).

[22] Accord: State ex rel. Scotland Co. v. Bacon, 107 Mo. 627, 18 S. W. 19 (1891). See also the Texas statute which specifically states that its purpose is to obviate the necessity of a change of venue. Tex. Stat. (1928), art. 1885.

[23] Cal. Code Civ. Proc. (Deering, 1937), § 170; Ind. Ann. Stat. (Burns, 1933), § 2-1409; 4 Mont. Rev. Code (1935), § 9098; N. M. Laws (1933), c. 184.

Field v. Mark, 125 Mo. 502, 28 S. W. 1004 (1894).

[24] Ala. Code (Mitchie, 1928), § 8571 (if this method fails, then the clerk of court appoints the substitute); Colo. Ann. Stat. (Courtright, 1930), § 7721 (if this fails, then the venue is changed or the judge of another district is called in by the recused judge); 2 Fla. Comp. Gen. Laws (1927), § 4160; Ky. Stat. (Carroll, 1930), § 971-2, (Supp. 1933), § 971-3 (if this fails, the chief justice of the supreme court appoints the substitute); 1 Miss. Code (1930), § 737; 1 Mo. Rev. Stat. (1929), § 1943; 4 Mont. Rev. Code (1935), § 9098; 1 Okla. Stat. (1931), § 2912; Ore. Code (Supp. 1935), § 28-613; Tenn. Code (1932), § 9903; Tex. Stat. (1928), art. 1885; Utah Rev. Stat. (1933), § 20-3-19; Va. Code (1930), § 5900; 1 Wash. Comp. Stat. (Remington, 1922), § 40 (the selection must be approved by the court); W. Va. Code (1931), § 51-2-10.

Alabama & Florida R. R. v. Burkett, 42 Ala. 83 (1868); In re Kent's Estate, (Cal. App. 1935) 50 P. (2d) 457; Kentucky Cent. R. R. v. Kenney, 4 Ky. L. 968 (1883); State ex rel. Hollomon v. Leib, 17 N. M. 270, 125 P. 601 (1912); Patterson v. State, 87 Tex. Crim. 95, 221 S. W. 596 (1920).

[25] Michales v. Hine, 3 G. Greene (Iowa) 470 (1852); Van Slyke v. Fire Ins. Co., 39 Wis. 390 (1876).

[26] Ind. Ann. Stat. (Burns, 1933), § 2-1409; Ind. Acts (1937), c. 85. State ex rel. Spencer v. Baker, (Ind. 1937) 7 N. E. (2d) 984.

[27] 36 Stat. L. 1087, §§ 20, 21 (1911), 28 U. S. C. (1935), §§ 24, 25.

judge available in the circuit, by the Chief Justice of the Supreme Court.[28] In a number of states there is also provision for appointment by the chief justice or the supreme court.[29] This, of course, retains control of the appointment in the judiciary and has a further advantage in that the supreme court is presumably more familiar with the condition of the calendar in the various districts of the state so that a judge who is not already too burdened with other cases can be selected. Another method which allows selection of the substitute to remain in the hands of the judiciary is the very common statute allowing the recused judge himself to call in the judge of another district[30] or appoint a member of the local bar.[31] This method seems open to the possible objection that the recused judge might call in a substitute

[28] 42 Stat. L. 837, § 3 [§ 13] (1922), 28 U. S. C. (1935), § 17.

[29] Cal. Code Civ. Proc. (Deering, 1937), § 170 (by the Judicial Council); Conn. Gen. Stat. (1930), § 5404; Del. Rev. Code (1935), §§ 5808, 5823; Kan. Gen. Stat. (1935), § 20-311a; Ky. Stat. (Carroll, 1930), § 971-2, (Supp. 1933), § 971-3; N. J. Laws (1931), c. 317; N. M. Laws (1933), c. 184; N. D. Comp. Laws (Supp. 1925), § 7644a3; 1 Ohio Gen. Code (Page, 1926), § 1687, (Supp. 1935), § 10501-11; 1 Ore. Code (1931), § 1-405; R. I. Gen. Laws (1923), § 4750; 1 S. C. Code (1932), § 44; 2 S. D. Comp. Laws (1929), § 5184; Vt. Pub. Laws (1933), § 1359; Wis. Stat. (1935), § 261.08 (by the chief of the board of circuit judges).

Clapp v. Sandidge, 230 Ky. 594, 20 S. W. (2d) 449 (1929); State v. Peterson, 49 N. D. 117, 190 N. W. 309 (1922); State ex rel. Holloman v. Leib, 17 N. M. 270, 125 P. 601 (1912); Barbe v. Territory, 16 Okla. 562, 86 P. 61 (1906).

[30] Ark. Acts (1933), No. 160; Ariz. Rev. Code (Struckmeyer, 1928), § 3721; Colo. Ann. Stat. (Courtright, 1930), §§ 7693, 7721; Conn. Gen. Stat. (1930), § 5403; Ga. Code (1933), § 24-2623; Idaho Laws (1933), c. 218; Iowa Code (1931), § 11417; La. Gen. Stat. (1932), §§ 1908, 1909; Me. Rev. Stat. (1930), c. 75, § 8; 3 Mich. Comp. Laws (1929), § 13999; 1 Miss. Code (1930), § 737; 1 Mo. Rev. Stat. (1929), § 1942; 4 Mont. Rev. Code (1935), § 8821; Nev. Stat. (1931), c. 153; 1 Ore. Code (1931), § 1-405; 17 Pa. Ann. Stat. (Purdon, 1930), § 591; 1 S. D. Comp. Laws (1929), § 4813; Utah Rev. Stat. (1933), § 20-3-13; Va. Code (1930), § 5898; 1 Wash. Comp. Stat. (Remington, 1922), § 209-1; W. Va. Code (1931), § 51-2-9; Wis. Stat. (1935), § 261.06; Wyo. Rev. Stat. (1931), §§ 31-203, 89-1101, 89-1107.

Bedingfield v. First Nat. Bank, 4 Ga. App. 197, 61 S. E. 30 (1908); Graham v. People ex rel. Rutledge, 111 Ill. 253 (1884); Consumers' Power v. Circuit Judge, 210 Mich. 572, 178 N. W. 98 (1920); Peter v. State, 7 Miss. 326 (1842); Sherwood v. Steel, (Mo. App. 1927) 293 S. W. 798; Akers v. Commonwealth, 155 Va. 1046, 156 S. E. 763 (1931); Tucker v. State ex rel. Snow, 35 Wyo. 430, 251 P. 460 (1926).

Other statutes merely authorize an exchange of judges: Ga. Code (1933), § 24-2201; Ill. Rev. Stat. (1937), §§ 37-325, 37-338; Me. Rev. Stat. (1930), c. 97, § 14; N. C. Code (1931), § 1447; Tex. Stat. (Supp. 1931), art. 2092, § 23.

[31] La. Code Prac. (1932), art. 342; La. Gen. Stat. (1932), § 1908. Brown v. Buzan, 24 Ind. 194 (1865); State v. McCoy, 29 La. Ann. 593 (1877); Central Lumber Co. v. Jones, 182 La. 1, 161 So. 1 (1935).

who to some degree shares his own bias.[32] Other provisions retaining judicial control are the Michigan statute[33] allowing application to be made to the judge of another circuit, who may order transfer of the cause to his court, the Rhode Island provision[34] for performance of the duties of the disqualified judge by his clerk, and the Illinois and Alabama statutes for the calling in of another judge by the clerk.[35] Several states allow the members of the bar to elect a substitute from among their number,[36] but this provision was more common formerly than at present, when progress in transportation makes it easier to bring in the judge of some other circuit.

In a number of states there is provision for appointment of the substitute by the governor,[37] either in all cases or as an alternative when other methods fail. In some of these states there is constitutional authorization for the statute,[38] but in others there is no such provision in the constitution. In a number of the latter states the appointments have been upheld by the courts,[39] although the constitutional issue

[32] People v. Ebey, 6 Cal. App. 769, 93 P. 379 (1907), indicates judicial disapproval of the recused judge himself calling in another judge.

[33] 3 Mich. Comp. Laws (1929), §§ 13999, 14000.

[34] R. I. Gen. Laws (1923), § 4740.

[35] Ala. Code (Mitchie, 1928), § 8571; Ill. Rev. Stat. (1937), § 37-370; Moline v. Chicago, etc. R. R., 262 Ill. 52, 104 N. E. 204 (1914); Henderson v. Pope, 39 Ga. 361 (1869).

[36] Ark. Code (Pope, 1937), § 2854; Kan. Gen. Stat. (1935), § 20-306; 1 Mo. Rev. Stat. (1929), § 1943; 1 Okla. Stat. (1931), § 2913; Tenn. Code (1932), § 9919; Tex. Stat. (Supp. 1931), art. 2092, § 23; W. Va. Code (1931), § 51-2-10.

Davis v. Wilson, 11 Kan. 74 (1873); Kentucky Central R. R. v. Kenney, 4 Ky. L. 968 (1883); State ex rel. Scotland Co. v. Bacon, 107 Mo. 627, 18 S. W. 19 (1891); State v. Able, 65 Mo. 357 (1877); State v. Brown, 8 Okla. Cr. 40, 126 P. 245 (1912); Ligan v. State, 50 Tenn. 159 (1871); Dean v. Dean, (Tex. Civ. App. 1919) 214 S. W. 505.

[37] Ark. Code (Pope, 1937), § 2903; Del. Rev. Code (1935), § 5808; Fla. Comp. Gen. Laws (Cum. Supp. 1934), § 4348 (1); 1 Miss. Code (1930), § 738; 4 Mont. Rev. Code (1935), §§ 8821-8823; 29 N. Y. Consol. Laws (McKinney, 1917), § 153; Tenn. Code (1932), § 9923; Tex. Code Crim. Proc. (1928), § 553, Stat. (Supp. 1931), art. 2092, § 23; Va. Code (1930), §§ 5898, 5901a; 1 Wash. Comp. Stat. (Remington, 1922), §§ 27, 209-1.

Reed v. Bradford, 141 Ark. 201, 217 S. W. 11 (1919); Sewell v. Huffstetler, 83 Fla. 629, 93 So. 162 (1922); Kentucky Union Co. v. Bailey, 174 Ky. 488, 192 S. W. 708 (1917); Kruegel v. Nash, (Tex. Civ. App. 1903) 72 S. W. 601; Patterson v. State, 87 Tex. Crim. 95, 221 S. W. 596 (1920).

[38] Namely in Arkansas, Delaware, Florida, and Mississippi. See note 12, supra.

[39] In Louisville & Nashville R. R. v. Malone, 116 Ala. 600, 22 So. 897 (1897), the governor appointed a substitute for a judge who was unable to attend court because of illness. See also, Kentucky Union Co. v. Bailey, 174 Ky. 488, 192 S. W. 708 (1917); Kruegel v. Nash, (Tex. Civ. App. 1903) 72 S. W. 601.

has not been mentioned in the reports. Such decisions seem to cast considerable doubt on the holding of the *Day* decision.[40]

It should be noted in any discussion of the validity of appointment of substitute judges that the question of de facto judges may become important. In the principal case this question did not arise because a writ of prohibition was sought before the substitute judge ever sat. However, the principle of de facto judges is many times raised after a case has gone to trial and the decision is being attacked on appeal. In many jurisdictions such de facto judgeships are not recognized.[41] In others they are recognized.[42]

From a study of the statutes and cases it appears that the courts allow the legislature a very wide discretion in the machinery they set up for the selection of substitute judges, even when the constitution explicitly sets forth one particular method. In the states where, as in the *Day* case, the constitution provides for selection in such manner as the legislature may provide, the variety of methods they may choose has been left practically unhampered. Thus in *Turner v. Commonwealth*[43] two cases from other jurisdictions,[44] which had held legislative provisions invalid, were distinguished on the ground that there

[40] Additional miscellaneous provisions: Utah Rev. Stat. (1933), § 20-4-9 (appointment by the mayor with consent of the municipal council in the city courts).

Appointment by the mayor: Cape Girardeau v. Goehring, (Mo. App. 1919) 12 S. W. (2d) 761; Schieffelin v. Goldsmith, 253 N. Y. 243, 170 N. E. 905 (1930); Demereaux v. State, 35 Ohio App. 418, 172 N. E. 551 (1930).

Appointment by municipal ordinance: Town of Grayson v. Bagby, 25 Ky. L. 44, 74 S. W. 659 (1903); People ex rel. Moore v. Witherell, 14 Mich. 48 (1865).

Appointment by the county clerk, sheriff and auditor: Feaster v. Woodfill, 23 Ind. 493 (1864).

Removal from inferior to superior courts: Graham v. People ex rel. Rutledge, 111 Ill. 253 (1884); Matter of Village of Rhinebeck, 19 Hun. (N. Y.) 346 (1879).

[41] McGarvey v. Hall, 7 Colo. App. 426, 43 P. 909 (1896); Bedingfield v. First Nat. Bank, 4 Ga. App. 197, 61 S. E. 30 (1908); Ex parte Fish, (Mo. App. 1916) 184 S. W. 479. All these cases involve substitute judges appointed in ways not sanctioned by statute.

[42] Powers v. State, 83 Miss. 691, 36 So. 6 (1903); State v. Lewis, 107 N. C. 967, 12 S. E. 457 (1890); Pearce v. Hawkins, 2 Swan. (Tenn.) 87 (1852); Venable v. Curd and White, 2 Head (39 Tenn.) 582 (1859).

[43] 2 Met. (Ky.) 619 (1860).

[44] Namely, Cohen v. Hoff, 3 Brev. (S. C.) 500 (1814), and Van Slyke v. Fire Ins. Co., 39 Wis. 390 (1876). For a discussion of these cases, vide supra. In Kentucky the constitution authorized that "The general assembly shall provide by law for holding circuit courts when, from any cause, the judge shall fail to attend, or cannot properly preside." Ky. Const., § 136. The legislature then enacted that the substitute be elected by the members of the bar. In Turner v. Commonwealth, 2 Met. (Ky.) 619 (1860), it was held error for the regular judge to refuse to hold an election of a special judge.

was no provision in the constitutions of those states giving the legislature power to provide by law for holding court when the judge was disqualified. Therefore the holding of the Minnesota court in the *Day* case seems distinctly at variance with the weight of authority. In fact, procedure such as existed in the principal case involving appointment by the governor has been upheld in several instances by other courts.[45]

2.

The other holding of the court, to the effect that the determination of the disqualification of the judge may not be made by the executive, may be justified by a strict construction of the Minnesota statutes. One statute provides for the filing of an affidavit with the court stating that affiant has good reason to believe and does believe that he cannot obtain a fair trial because of the bias and prejudice of the judge, but this statute applies specifically to districts where there are two or more judges.[46] In the *Day* case there was only one judge in the district. In 1937 an amendment to this statute was passed applying it to courts of all districts regardless of the number of judges,[47] but it was enacted after the commencement of this suit. Another statute provides that no judge shall sit in a case if he be interested in the determination thereof or if he might be excluded for bias from acting as a juror.[48] The majority of the court, applying the Minnesota precedents,[49] held that this statute applies only when the judge has pecuniary interest in the outcome of the suit and this did not exist in the principal case. Still another statute gives the governor power to designate, or the regular judge power to request, the judge of another district to sit when convenience or the interest of the public or interest of any litigant shall require it.[50] Upon the interpretation of this statute the supreme court was divided. The majority held that legislative history showed that this statute was intended to apply only when a judge was disabled or the

[45] Mosley v. Board of Comrs., 200 Ind. 515, 165 N. E. 241 (1929); Philpot v. Commonwealth, 240 Ky. 289, 42 S. W. (2d) 317 (1931); Graham v. England, 154 Tenn. 435, 288 S. W. 728 (1926). In these cases the constitutional question was specifically considered.

[46] 2 Minn. Stat. (Mason, 1927), § 9221.

[47] Minn. Laws (1937), c. 237.

[48] 2 Minn. Stat. (Mason, 1927), § 9218.

[49] In Sjoberg v. Nordin, 26 Minn. 501, 5 N. W. 677 (1880), it was held that interest or *bias* which would disqualify a judge must be a pecuniary interest. Although the statute existing at the time of the Sjoberg case was subsequently amended, the requirement of pecuniary interest was maintained. See State v. Ledbetter, 111 Minn. 110, 126 N. W. 477 (1910).

[50] 1 Minn. Stat. (Mason, 1927), § 158.

accumulation of business was such that he was unable to take care of it. The minority said that when a judge is prejudiced public interest requires that a substitute be appointed in order to protect the courts from any imputation of partiality. The division of the majority and the minority is obviously based on their views as to the policy behind letting the governor determine judicial disqualification.

The policy factors in the situation are obvious and the weighing of them difficult. Foremost among the factors which may influence the court to deny the power to the executive is the prevalent feeling that if the executive should have the power both to disqualify the incumbent and appoint the substitute he could shift the judges around so that litigation would be determined according to his fancy. In answer to this objection it may be suggested that in Minnesota provision was made for appointment only of duly elected judges of other districts, who, presumably, possess the requisite judicial attributes, including impartiality. There is an intimation of arbitrariness in denying relief to the applicant who claims the presiding judge is prejudiced on the ground that the substitute who may be appointed will have opposite prejudice. Furthermore, as Cardozo, J., once said, referring to the fact that after a judge is appointed by the governor to sit in a cause he is entirely free to exercise an independent judgment, "The power of the judge who sits in judgment is not affected by executive rescript or decree. It is governed only by the law."[51] It has become almost a truism that judges who have been appointed to the bench because they have been considered to have certain predetermined predilections often exhibit an unexpected metamorphosis. Another objection lies in the fact that this provides a device for delaying the dispensation of justice and harassing the opposition.[52] However, this feature is present in any method of providing substitute judges and may be obviated by restricting the number of times removal may be petitioned.[53]

On the other hand, in many states the determination of disqualifi-

[51] In People ex rel. Saranac Land & Timber Co. v. Supreme Court, 220 N. Y. 487 at 492, 116 N. E. 384 (1917). This case involved the power of the governor to declare an extraordinary term of the supreme court and appoint judges residing outside the district to sit. The appointments were held valid.

[52] In a comment by Decker, "Food for Thought," 5 ORE. L. REV. 316 at 320 (1926), the Oregon procedure of disqualification of judges was condemned, one of the grounds being that administration of justice was retarded. This was followed by a note in 11 Ore. L. Rev. 410 (1931), remarking that, though the statute had been amended to require an allegation that the affidavit was made in good faith and not for purposes of delay, the procedure was still being abused.

[53] Howell v. State, 77 Fla. 119, 80 So. 287 (1919), asserts that protection against abuse of the process lies in restricting the number of times that a party may petition for the appointment of a substitute judge.

cation of a judge has become automatic upon the filing of an affidavit showing prejudice,[54] and if disqualification follows as a matter of course upon the filing of the affidavit, it can make very little practical difference whether the affidavit is filed with the court or with the governor. The leading case on the subject is *Berger v. United States*.[55] The Supreme Court there held that a judge may pass upon the legal sufficiency of the allegations of prejudice made, but he may not pass on the truth of the accusations. This principle has been carried farther in *U'Ren v. Bagley*.[56] Here the Oregon court said that it is not the fact of prejudice which disqualifies a judge but the challenge of prejudice, for "the courts, like Caesar's wife, must be not only virtuous but above suspicion."[57]

The affidavits filed in such cases need not set forth facts showing prejudice; it is sufficient that they state that the affiant believes that he cannot obtain a fair trial because of the prejudice of the judge assigned to hear the case.[58] The Minnesota statute provides that a party may file such affidavit in districts where there are two or more judges.[59] This has been interpreted by the supreme court to mean that there need be no statement of facts in the affidavit, an affidavit in the language of the statute being sufficient.[60] There are numerous decisions in accord with the Minnesota view,[61] but these decisions rest on statutory provisions in the main, and there was no such statute directly applicable in Minnesota in districts with a single judge when the prin-

[54] See notes in 19 MICH. L. REV. 637 (1921) and 11 ORE. L. REV. 410 (1931). Cases on constitutionality of statutes so providing are collected in 5 A. L. R. 1275 (1920) and 46 A. L. R. 1179 (1927).

[55] 255 U. S. 22, 41 S. Ct. 230 (1921).

[56] 118 Ore. 77, 245 P. 1074 (1926).

[57] 118 Ore. at 82. As to prejudice of judge as a ground for disqualification, see notes in 41 HARV. L. REV. 78 (1927) and 13 CORN. L. Q. 454 (1928). As to prejudice of judge as a ground for change of venue, see 74 Am. Dec. 245 (1886). Prejudice disqualifies the judge even though it is not one of the grounds mentioned in the constitution. State v. Brown, 8 Okla. Cr. 40, 126 P. 245 (1912).

[58] Stephens v. Stephens, 17 Ariz. 306, 152 P. 164 (1915); Howell v. State, 77 Fla. 119, 80 So. 287 (1919) (cases contra discussed and distinguished); Mershon v. State, 44 Ind. 598 (1873); Vogel v. Milwaukee, 47 Wis. 435, 2 N. W. 543 (1879); Huhn v. Quinn, 21 Wyo. 51, 128 P. 514 (1912).

[59] 2 Minn. Stat. (Mason, 1927), § 9221.

[60] State v. Irish, 183 Minn. 49, 235 N. W. 625 (1931). It was here held that mere repetition of the language of the statute in the affidavit was sufficient. The case of State ex rel. Wilberg v. McNaughton, 159 Minn. 403, 199 N. W. 103 (1924), which held that repeating the language of the statute without setting forth facts justifying a reasonable mind in believing that the judge would not be impartial was insufficient, was distinguished on the ground that the peculiar language of the municipal court act was there involved.

[61] Some of these are set forth in footnote 58.

cipal case was decided. However, it is submitted that the decisions show a tendency toward ready disqualification of judges on the ground of prejudice in order that the reputation of the courts for impartiality may be maintained. The holding of the majority in the *Day* case, although it may well be justified by a strict construction of the statutes, seems to be contrary to this tendency. If other courts have gone so far as to make the filing with the court of an affidavit, alleging prejudice but setting up no facts in support thereof, work as a disqualification of the judge as a matter of course, it does not seem too much of an extension to give the same effect to the filing with the chief executive of an affidavit which does set forth facts showing prejudice.

The *Day* case leads to speculation as to the course of future decisions in Minnesota now that the amendment of 1937[62] has been passed permitting an affidavit alleging prejudice of the judge of the court of any district to be filed. The case of *State ex rel. Decker v. Montague*[63] arose in a district where there were several judges. Affiant petitioned the governor, alleging that the particular judge to whom the case had been assigned was prejudiced against him. The supreme court held that, since there were four other district judges of the district ready to serve, the governor might not appoint a substitute from outside the district. Now that the filing of affidavits alleging prejudice may be made in districts where there is only one judge, will the court extend the principle of *U'Ren v. Bagley* and hold that the affidavit of prejudice may be filed with the governor, merely alleging that the petitioner has reason to believe and does believe that he will be unable to obtain a fair trial on account of the prejudice or bias of the judge? Or will the court apply the principle which seems implicit in the *Day* and the *Montague* cases, namely that in no case may a determination of the disqualification of a judge and the appointment of his substitute be made by the governor, even though the determination of disqualification would follow as a matter of course from the filing of a like affidavit with a court? Will the separation of powers provision in the constitution extend to prevent an exercise by the executive of what seems at most a purely ministerial act of the judiciary?

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[62] Minn. Laws (1937), c. 237.
[63] 195 Minn. 278, 262 N. W. 684 (1935).