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REMOVAL AND RE-ELECTION OF PUBLIC OFFICERS

ON THE 1st day of September, 1932, the Mayor of the City of New York resigned his office. Because the City of New York is perhaps the most important urban center in the world, and also because its Mayor was so well known throughout the land and because his affairs had been widely discussed in the press, the legal problems that arose as a result of his resignation became the subject of frequent discussion not only among lawyers, but also among laymen.¹ Public interest in a *cause célèbre* always produces confused thinking about its legal essentials. It therefore escaped the attention of many lawyers that some of the problems involved in the resignation of the Mayor of the City of New York were simple legal problems about which the courts had spoken on other less auspicious occasions.

It is here proposed to analyze one aspect of the situation from the strictly legal point of view and to determine whether if a public officer resigns his office, pending proceedings looking to his removal, he can be elected or appointed to fill that office for the remainder of the unexpired term. This question has several aspects to it. *In the first place*, we must determine whether an officer who has been removed from his office by the properly constituted authorities, can be *re-elected* by the people to fill the balance of the unexpired term. *In the second place*, we must determine whether an officer who has been removed by the properly constituted authorities may be *appointed* by the body having the appointing power to fill the balance of the unexpired term. *In the third and fourth places*, we must answer these two questions with regard to an officer who has resigned his office pending removal proceedings.

There is a logical differentiation between *appointing* a removed or resigned officer to fill the balance of an unexpired term and the *election* of that officer by the people to fill the balance of the unexpired term. In the former case, if the

¹ See New York Times, Sept. 3, 1932, p. 1, col. 7; Sept. 4, 1932, p. 1, cols. 7 and 8; Sept. 13, 1932, p. 20, col. 8.

Governor has the power of removal and the Board of Aldermen has the power of appointment to fill vacancies, an endless and futile chain of events might be set in motion by the appointment of the man whom the Governor had removed. For no sooner would the Board of Aldermen appoint than the Governor would remove, or could if he chose. On the other hand, this being a democratic country, and the ultimate choice of our public officers being lodged in the hands of the electorate, the official who has the removing power must be satisfied or should be satisfied when the electorate has vetoed his act of removal by re-electing, for the balance of the unexpired term, the very man whom he has removed. These considerations apply with equal force to an officer who has resigned pending removal proceedings, as they do to an officer who has actually been removed.²

The statutes of the various states are curiously silent with regard to the situation that is here discussed. It would appear *à priori* that this is eminently a matter for legislative action and even perhaps for constitutional provision. Yet neither the Federal Constitution nor the various state constitutions nor any of the statutes in any of the states seem to contain any provisions with regard to this situation. And such law as there is has been entirely judicially created.

The judicial point of view is determined by the polite fiction which identifies the office with the term of office. It is suggested in some of the cases that the removal of an officer from his office is equivalent to a removal from the term of office, and that therefore he is disqualified from further holding that office.

In the state of New York, the leading case is *People v. Ahearn*.³ In that case a Borough President was removed by the Governor after a hearing upon charges. The power to fill vacancies, however, was lodged in those members of the Board of Aldermen representing the borough of Brooklyn. These gentlemen met and redesignated the removed Borough President to fill the balance of the unexpired term. A majority of the Court of Appeals held that the removed Borough President was ineligible for redesignation for the unexpired

² *Infra* notes 11, 12, 13, 14.

³ 196 N. Y. 221, 89 N. E. 930 (1909).

term by the members of the Board of Aldermen. A careful reading of that decision, however, would seem to indicate that the Court had more serious consequences in mind than a mere holding that a removed officer could not be *reappointed* to fill the balance of the unexpired term, and that they were also inclined to the view that even the re-election of such an officer for the balance of the unexpired term would not be permissible. The Court referred to and relied upon a precedent from the House of Representatives dating back to 1870, where one Whitmore, having been refused admission as a member of the House, went back to his district and was re-elected, and thereupon the House again refused to admit him on the theory that he was not eligible to fill the balance of the unexpired term, having been removed on account of serious charges.⁴ The learned judge, writing the opinion in the *Ahearn* case, said:

“While personally I am not prepared to assent to the proposition that if the power of filling the vacancy caused by the appellant’s removal had been conferred upon the voters of a limited district to be exercised by election, they would have had any greater power or discretion than the board of aldermen, it is sufficient to say for the present that that question is not here and it is not necessary to pass upon it.”⁵

While this language is of course not decisive of anything, and is at best merely a dictum, it nevertheless indicates the general point of view of the Court to the effect that the election of a removed official stands on no better plane than his appointment. Taken together with the reliance of the Court on the *Whitmore* case,⁶ it is of course very strongly corroborative of the idea that re-election for the balance of the unexpired term is as much forbidden as reappointment.

On the other hand, the state of New Jersey came to a different conclusion. In the case of *State ex rel. Tyrrell v. Common Council of Jersey City*,⁷ it was held that a member

⁴ *Ibid.*

⁵ *Ibid.* note 3 at p. 235, 89 N. E. 930 at p. 934.

⁶ *Supra* note 3.

⁷ 25 N. J. L. 536 (1855).

of the Common Council who had been removed from his office for disorderly conduct might be re-elected by the people to fill the balance of the unexpired term. The Court took the view that the Common Council which had the authority to expel a member or to remove him from office, did not have authority to object to his being re-elected by the electorate for the balance of the term, and that it was the people, whom an officer represented, who were primarily concerned with the question of whether or not he should hold that office, and that, consequently, the choice of the people duly made at an election should not be overridden by the courts. The Court said:

"In the second place, we are of opinion that the sentence of expulsion, or amotion, did not disqualify Tyrrell to be re-elected to the same office. When the council expelled him, they had exhausted their power; their authority went no further; the charter does not annex to the sentence of expulsion that of disqualification; nor have the council, nor could they legally. Where the law annexes a disqualification to an offense, as part of its punishment, it does it in express terms."⁸

The *Tyrrell* case, however, stands almost alone in the expression of this point of view. A similar idea may be found in the dissenting opinion of the *Ahearn* case. There the dissenting judge said:

"But the difficulty in this case with the judgment below is that the legislature has enacted no provision of that character, and that judgment cannot be sustained unless this court holds as a matter of law that removal from office disqualifies from re-election or reappointment to the vacancy, although there is no statutory enactment to that effect. I had supposed that the law was too firmly established to the contrary to be open to question."⁹

The point of view of the dissenting judge in the *Ahearn* case and of the Court in the *Tyrrell* case commend themselves

⁸ *Ibid.* at p. 542.

⁹ *Supra* note 3 at p. 246, 89 N.E. 930, at p. 939.

to the mind as logical and forceful in so far as they deal with election by the people of a removed candidate to fill a vacancy. Certainly the Court ought not without statutory compulsion assume the obligation of passing upon the people's choice. And while in practice the existence of the machinery of politics often prevents a clear-cut choice by the people, nevertheless the theory of American institutions is that an election duly held by the people constitutes the people's choice. It may very well be that in practical operation this theory is not always carried out. Yet surely the remedy is not for the courts to find but for the legislature and constitution makers.

The courts, however, have not hesitated to take a different view as will appear from the decision of the Supreme Court of Kansas in the case of *State ex rel. Coleman v. Rose*.¹⁰ In that case, on the 3rd day of April, 1906, the Mayor of Kansas City filed his resignation. A proceeding was then pending in a court looking to his removal, and, as a matter of fact, a judgment of removal was actually entered against him three days after he had resigned. In spite of his resignation and subsequent removal, the people of Kansas City re-elected him to fill the vacancy caused by his resignation and removal. Nevertheless, the Court held that he was ineligible to fill the vacancy in spite of his re-election by the people. That case has been frequently cited and relied upon as an authority for the proposition that an officer who was removed or had resigned under fire was ineligible to fill the vacancy caused by his removal or resignation. The rule in that case is, of course, in direct conflict with the rules set up in the New Jersey case, and no other case has been found in which an officer who has been removed or who had resigned under fire was declared ineligible for *re-election*. In the states of Utah,¹¹ Iowa,¹² Minnesota,¹³ and Tennessee,¹⁴ decisions of the highest courts have made it clear that an officer once removed or who resigned under fire was ineligible for *reappointment* to fill the

¹⁰ 74 Kan. 262, 86 Pac. 296 (1906).

¹¹ Skeen v. Payne, 32 Utah 295, 90 Pac. 440 (1907).

¹² *State ex rel. Cosson v. Baughn*, 162 Iowa 308, 143 N. W. 1100 (1913).

¹³ *State of Minn. ex rel. Childs v. Dart*, 57 Minn. 261, 59 N. W. 190 (1894).

¹⁴ *State ex rel. Thompson v. Crump*, 134 Tenn. 121, 183 S. W. 505 (1915).

vacancy. These cases have all proceeded on the theory that the redesignation by the appointing power is a futile gesture, in view of the fact that the person redesignated is at once subject to the prospect of being again removed by the authority which had previously removed him. In only one case have we found the suggestion that an officer who resigned under fire stands in a different position from one who is actually removed. And that case was decided by the Supreme Court of Louisiana.¹⁵ There the Court indicated that disqualification to hold office even for the balance of an unexpired term can only result from removal after trial in which the incumbent was heard in his own defense. This point, however, while noted by the Court, is not essentially involved in the decision.

It will readily appear that this collection of cases does not dispose of the questions that we propounded at the outset of this discussion but that they still leave open, at least in the state of New York, two questions: first, may an officer who has been removed be re-elected to fill the vacancy even if he may not be reappointed to fill the vacancy, as was held in the *Ahearn* case, and second, may an officer who has resigned under fire be either reappointed or re-elected to fill the vacancy.

If we follow the general tenor of the decision in the *Ahearn* case, we must come to the conclusion that an officer who has been removed may neither be *appointed* nor be *re-elected* to fill the balance of the unexpired term. On the other hand, if we conclude that the New Jersey case states a better rule, there is nothing in the *Ahearn* case that will prevent the Court of Appeals from ultimately concluding that a removed officer may be *re-elected* to fill the vacancy. As we have already stated, this view commends itself to logical reasoning.

With regard to the second question, as to whether an officer who has resigned under fire is eligible for either appointment or election to fill the vacancy, I think we can say with certainty that there is no important body of judicial opinion that places an officer who resigned under fire upon any different footing from one who has actually been re-

¹⁵ State *ex rel.* Arcenaux v. Breaux, 169 La. 394, 125 So. 283 (1929).

moved. It would therefore follow that whatever conclusions the court should come to with regard to a removed officer would also apply to an officer who has resigned under fire. It cannot be that the courts will permit an officer who has been charged with conduct justifying his removal to avoid the consequences of his conduct by simply resigning before the conclusion of the proceedings. That result would render removal proceedings entirely innocuous.

Viewing the matter in its brightest light, it seems to us that this entire problem is most properly fitted for legislative and constitutional provision and that the various states of the Union ought to provide in their organic law, or at least by statute, a solution to this vexing problem. The personnel of public officers is a matter of paramount public interest and it is highly undesirable that the selection or continuation in office of public servants should depend upon considerations which are complicated by technical legal reasoning. These determinations involve the consideration of problems of policy which have vast consequences to the public welfare and therefore should be removed as rapidly as possible from the purview of judicial decision. There is a sphere of governmental activity, and perhaps a constantly increasing one, in which judicial review is not a very efficient medium for social control. This proposition is no longer new in juristic literature and has the sanction of distinguished commentators on public affairs.¹⁶

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¹⁶ Pound, *Limits of Effective Legal Action* (1917) 3 A. B. A. JOUR. 55.