

directed to our attention that would lead us to the view that there was any difficulty in the operation of the 1945 act with the loan limitations in effect prior to the enactment of the 1948 act.

In view of the 1948 act being a complete revision of the banking laws of this State, we feel that it is proper to comment briefly upon the rule found in *O'Neill vs. Johnson*, 99 N. J. L. 317. The Supreme Court in that case held that a statute of complete revision is decisive evidence of intent to repeal or supersede whatever of prior law on the subject matter is not included in the new act. However, in considering that rule, the Court in *Bugbee vs. Mills, supra*, held that this rule must be limited and controlled in accordance with the decisions above set forth.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: OLIVER T. SOMERVILLE,
Deputy Attorney General.

OTS/b

APRIL 11, 1949.

THE HONORABLE ALFRED E. DRISCOLL,
Governor of New Jersey,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 25.

DEAR GOVERNOR:

You have requested my opinion as to the status of the present Highway Commissioner. Mr. Miller was appointed April 29, 1942, for a six-year term; thus his term expired on April 29, 1948. On July 1, 1948, Chapter 91, P. L. 1948, "constituting" the Highway Department a principal department, became effective. On July 2, 1948, the Highway Commissioner was given an ad interim appointment. The Legislature was then only in temporary adjournment. The Legislature adjourned sine die September 8, 1948. In 1949, the nomination of Mr. Miller, for appointment as Highway Commissioner, was submitted to the Senate. It has not been acted on; it has neither been rejected nor confirmed.

In determining the status of the present Highway Commissioner, the Statutes in force at the time of the original appointment, the Constitution of 1947, and the 1948 Act must, in turn, be considered.

I. WHAT IS THE EFFECT OF THE APPOINTMENT UNDER THE STATUTES IN FORCE PRIOR TO THE 1948 ACT?

Mr. Miller was appointed in 1942 pursuant to the provisions of Revised Statutes 27:1-3:

"The state highway commissioner, hereinafter in this title referred to as the 'commissioner', shall be a citizen and resident of this state, and shall be nominated and appointed by the governor, by and with the advice and consent

of the senate, to serve for the term of six years and until his successor shall be appointed and qualified, unless sooner removed by the governor. The governor shall have the power to remove the commissioner for cause."

Under this act, therefore, the Commissioner was appointed to serve a term of six years ". . . and until his successor shall be appointed and qualified . . .".

On April 29, 1948, the statutory term of the Commissioner therefore ended. His tenure of office, however, continued. He, by virtue of his appointment, held the office not only for the term of six years, but also until his successor shall have been appointed and qualified. Thus, his term ended on that date, but his tenure did not.

In *Mount vs. Howell*, 85 N. J. L. 487, the Supreme Court held that under a statute providing that appointees serve for a specified term ". . . and until their successors are appointed and qualify . . .", no vacancy is created if no appointment is made at the end of the specified term, since the incumbents hold over by the express terms of the statute ". . . until their successors are appointed and qualify . . .". In *Kimberlin vs. State*, 29 N. E. 773, it is said:

" . . . a term of office fixed by statute runs not only for the period fixed but for an additional period between the date fixed for its termination and the date at which a successor shall be qualified to take the office. The period between the expiration of the term fixed by statute and the time at which a successor shall be qualified to take the office is as much a part of the incumbent's term as the fixed statutory period."

The Highway Commissioner has tenure of his office, since no successor has been appointed and qualified, subject to any change that may have been caused by the Act of 1948.

II. DID THE ACT OF 1948 CREATE A NEW OFFICE OR ABOLISH THE OFFICE TO WHICH THE HIGHWAY COMMISSIONER WAS APPOINTED OR AFFECT THE STATUS THEREOF?

In 1948, the Legislature enacted Chapter 91. This Act is entitled:

"An Act relating to the reorganization of the executive and administrative offices, departments, and instrumentalities of the State Government; constituting and concerning the State Highway Department as a principal department in the executive branch of the State Government; amending sections 27:1-1, 27:1-3, 27:1-4, 27:1-7, 21:1-14, 27:1-15 and 27:1-16 of the Revised Statutes; and supplementing subtitle one of Title 27 of the Revised Statutes."

Section 27:1-3 was amended to read as follows:

"The State Highway Commissioner, hereinafter in this Title referred to as the 'commissioner,' shall be the head of the State Highway Department. He shall be a citizen and resident of this State, and shall be nominated and appointed by the Governor, with the advice and consent of the Senate, and shall serve at the pleasure of the Governor during the Governor's term of office and until the appointment and qualification of the commissioner's successor."

The context of both the title and the body of Chapter 91, P. L. 1948, clearly indicates that the enactment was pursuant to the intendments and directions of Article V, Section IV, Paragraph 1 of the Constitution of 1947:

"All executive and administrative offices, departments, and instrumentalities of the State Government, including the offices of Secretary of State and Attorney General, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments, in such manner as to group the same according to major purposes so far as practicable."

The Act of 1948 did not create a new department. It continued the State Highway Department and "constituted" it a principal department. The Act did not change the title "State Highway Commissioner." It inserted in section 27:1-3 of the Revised Statutes, the provision that the Commissioner ". . . shall be the head of the State Highway Department . . .". Prior to the 1948 Act, Revised Statutes 27:1-7 provided that the Commissioner shall be ". . . the administrative and executive head of the department." The 1948 Act retains the exact language in the amended section. Revised Statutes 27:1-3 was amended to change the term so as to provide that the Commissioner ". . . shall serve at the pleasure of the Governor during the Governor's term of office . . .". This was done in conformance with the constitutional mandate contained in Article V, Section IV, Paragraph 2:

"Each principal department shall be under the supervision of the Governor. The head of each principal department shall be a single executive unless otherwise provided by law. Such single executives shall be nominated and appointed by the Governor, with the advice and consent of the Senate, to serve at the pleasure of the Governor during his term of office and until the appointment and qualification of their successors, except as herein otherwise provided with respect to the Secretary of State and the Attorney General."

The 1948 Act took effect July 1. On that date, Mr. Miller's term had expired but he was vested with hold-over tenure of the office. The Act must be construed in the light of the provisions of Article V, Section IV, Paragraph 1, *supra*, and Article XI, Section III, Paragraph 2 of the Constitution. The provision of Paragraph 2 which is applicable to the tenure and status of the Highway Commissioner reads as follows:

"The taking effect of this Constitution or any provision thereof shall not of itself affect the tenure, term, status or compensation of any person then holding any public office, position or employment in this State, except as provided in this Constitution."

"Tenure, term, status." No language can be more explicit and comprehensive. Thus, at the time the 1947 Constitution became effective, the tenure and status of Mr. Miller was protected subject to legislative enactment.

Did the 1948 Act create a new office? The answer to this question must be in the negative. It is the general rule of statutory construction that unless the statute explicitly provides for the abolition of an existing office and the creation of a new office, the office will not be considered changed. *Bird vs. Johnson*, 59 N. J. L. 59; *Birdsey vs. Baldwin*, 45 Conn. 134. In *Farrell vs. Pingree*, 16 P. 843, which was

approved by the Supreme Court of this State in *Bird vs. Johnson*, supra, the Court said:

"There was no repeal of the act creating the office. The amendment dealt only with the length of the term of office. It left all the residue of the statute intact, and in full force. If the legislature intended to vacate the office, that intention must clearly appear before a court is warranted in saying it exists."

The 1948 Act effected no repeal of the law creating the office. The office of Highway Commissioner was continued. No new office was created. The abolition of an office may only be accomplished by precise and definite language in the statute. Cf. *46 Corpus Juris*, page 935, section 30:

". . . to abolish the office, the intention of the competent authority to abolish such office must be clear."

In *Campbell vs. Schmidt*, 219 N. Y. S. 25, the Court stated:

"It has been said that, to abolish an office, the intention of the competent authority to abolish such office must be clear."

42 American Jurisprudence, p. 906, par. 35; *Quigg vs. Evans*, 53 P. 1093.

It is, therefore, concluded that the Act of 1948 did not create a new office and did not abolish the then existing office of State Highway Commissioner; and that Mr. Miller has tenure which, under the existing law, continues at the pleasure of the Governor and until the appointment and qualification of the Commissioner's successor.

III. WHAT IS THE EFFECT OF THE AD INTERIM APPOINTMENT?

Mr. Miller received a commission appointing him ad interim as State Highway Commissioner on July 2, 1948. Article V, Section 1, Paragraph 13 of the 1947 Constitution provides:

"The Governor may fill any vacancy occurring in any office during a recess of the Legislature, appointment to which may be made by the Governor with the advice and consent of the Senate, or by the Legislature in joint meeting. An ad interim appointment so made shall expire at the end of the next regular session of the Senate, unless a successor shall be sooner appointed and qualify; and after the end of the session no ad interim appointment to the same office shall be made unless the Governor shall have submitted to the Senate a nomination to the office during the session and the Senate shall have adjourned without confirming or rejecting it. No person nominated for any office shall be eligible for an ad interim appointment to such office if the nomination shall have failed of confirmation by the Senate."

Under this constitutional provision, before the Governor can make an ad interim appointment, there must first exist a vacancy in an office and the appointment must be made during a recess of the Legislature.

The present State Highway Commissioner had, on July 2, 1948, hold-over tenure at the pleasure of the Governor until his successor was appointed and qualified. There was no vacancy. This precise question of vacancy was passed upon by Chief Justice Beasley, with whom sat Justices Van Syckel, Depue and Knapp, in the case of *Stilsing vs. Davis*, 45 N. J. L. 390. A police justice held office under a statute which per-

mitted the Governor to fill a vacancy, and under a subsequent statute, had the right to hold office for the determined period and “. . . until his successor has been appointed and qualified . . .”. The prescribed term had expired. Another was appointed ad interim. The first appointee challenged the existence of a vacancy. Chief Justice Beasley said:

“The contention of the relator is, that by force of this law his own official life was prolonged and that as no vacancy existed, the respondent’s appointment was and is a nullity.

“In my opinion, this contention must prevail.”

See also *McCarthy vs. Watson* (Conn.), 47 Atl. (2) 716, 164 A. L. R. 1238 and extensive annotation following; *Mount vs. Howell*, 85 N. J. L. 487. It, therefore, must be concluded that no vacancy existed in the office of Highway Commissioner to which ad interim appointment could be properly made.

An ad interim appointment can be made only “. . . during a recess of the Legislature . . .”. It is noteworthy that in the immediately following section of the Constitution (Article IV, Section I, Paragraph 14) reference is made to a “temporary” adjournment in the course of a regular or special “session” and to “adjournment sine die.” Which of these terms is meant by the term “recess” as used in paragraph 13? Under Article II, Section II, Clause III, of the United States Constitution, the President was given the right to fill vacancies “. . . that may happen during the recess of the Senate . . .”. In the opinions of Attorneys General, Volume 23, page 599, the President was advised by Attorney General Philander C. Knox that recess meant final adjournment.

“The recess means the period after the final adjournment of Congress for the session, and before the next session begins.”

The Supreme Court of this State in *Fritts vs. Kuhl*, 51 N. J. L. 191, discussed the meaning of the word “recess.” Justice Van Syckel reviewed the opinions of various Attorneys General of the United States, quoting from many, and basing his decision, in part, upon the statements contained in these opinions, thereby approving the authoritative effects of these precedents.

It has also been the established practice in this State to construe the word “recess” as meaning the adjournment sine die of the Legislature. Attorney General Katzenbach advised Governor Moore in 1926:

“The recess spoken of in the Constitution is obviously the absence sine die of the legislature, by consent of both houses. The present legislature is not absent sine die.

“Under the constitutional provisions, Your Excellency would have the right to make ad interim appointments after the occurrence of such event, but not before, . . .”

See Opinion Book 18, page 212.

It is significant that the delegates to the Convention which drafted the 1947 Constitution, carried over into the new document the word “recess” from the old Constitution. The long standing construction of the word “recess” was further confirmed when, in connection with a further limitation upon the Governor’s ad interim appointing power, the delegates employed language which definitely revealed their understanding of the word “recess” to be the period “. . . after the end of the session . . .”

It is therefore concluded that no recess existed which permitted an ad interim appointment of Mr. Miller. If there was no vacancy, and if the Legislature was not in recess, then what effect has the ad interim appointment? The answer to this must be that such appointment was without force or effect.

I therefore conclude that Mr. Miller occupies the office of State Highway Commissioner by reason of his hold-over tenure at the pleasure of the Governor and until his successor is appointed.

Respectfully,

THEODORE D. PARSONS,
Attorney General.

tdp:ap

APRIL 8, 1949.

HON. FRANK DURAND,
State Auditor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 26.

DEAR SIR:

By your letter of March 17th you advise that in connection with an audit of the accounts of the office of the Secretary of State, a test circularization was made to verify whether collection agencies operating within the State had filed a yearly bond and paid the annual fee for filing such bond as required by R. S. 45:18-1 to 45:18-6; and that in selecting the collection agencies to be circularized, reference was made to the current classified telephone directories, under the section headed "Collection Agencies", published in 1948. You request to be advised whether a listing in the classified section of the telephone directory constitutes advertising or soliciting in print the right to collect or receive payment for another of any bill or indebtedness.

We have been advised by the New Jersey Bell Telephone Company that throughout New Jersey only the persons whose names are printed in the classified section of the directory in heavy type pay for such insertions, and that the names in the lighter type are classified by the telephone company itself. The several independent telephone companies in New Jersey may not adhere to this system of classification, but I doubt whether the directories of these companies were examined by you. You are therefore advised that the persons whose names appear in heavy type in the New Jersey Bell Telephone Company books should be classified as advertisers.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: SACKETT M. DICKINSON,
Assistant Deputy Attorney General.