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Court of Appeals of Maryland.
CULL et al.
v.
WHELTLE et al.

Nov. 30, 1910.

Appeal from Superior Court of **Baltimore** City; Henry D. Harlan, Judge.

Petition for mandamus by Roger W. Cull and others against John B. A. Wheltle and others. From a judgment denying the writ and dismissing the petition, petitioners appeal. Affirmed.

West Headnotes

Municipal Corporations 181
268k181 Most Cited Cases
Const. art. 2, § 15, provides that the Governor may suspend or arrest any military officer of the state for any military offense, and may remove him in pursuance of the sentence of a court-martial, and "may remove for incompetency, or misconduct, any civil officer who receives appointment from the executive for a term of years." By Act 1900, c. 15, the Governor was authorized to appoint **police** commissioners for the city of **Baltimore** by and with the consent of the Senate, and Code Pub.Loc.Laws, art. 4, § 740, as amended by such act, declares that any of such commissioners shall be subject to removal by the Governor for official misconduct or incompetency as provided by law in the case of other civil officers. Held, that the Governor had no authority to suspend members of such board pending a hearing of charges preferred against them.

Municipal Corporations 181
268k181 Most Cited Cases
Const. art. 2, §§ 10, 13, authorizing the Governor to fill vacancies, applies only to appointments made by the Governor by and with the consent of the Senate, and does not apply to appointments to the office of **police** commissioner in the city of **Baltimore**, or to other civil offices which the Governor has power to fill without confirmation by the Senate.

Municipal Corporations 181
268k181 Most Cited Cases
Where the Governor had no constitutional authority to suspend **police** commissioners of the city of **Baltimore** pending the hearing of charges preferred against them, such suspension did not create a vacancy which the Governor was authorized to fill by an ad interim appointment.

Officers and Public Employees 71
283k71 Most Cited Cases
Where the Constitution gave to the Governor no express power to suspend civil officers whom the Governor was authorized to remove on conviction on charges preferred against them, the power to suspend pending hearing of charges will not be implied from the power to remove.
***821** Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON, and URNER, JJ.

Randolph Barton, Isidor Rayner, and Isaac Lobe Straus, for appellants.

Edgar H. Gans and Wm. S. Bryan, Jr., for appellees.

BOYD, C. J.

The appellees were on the 24th day of September, 1910, members of, and constituted, the board of **police** commissioners of **Baltimore** city. On that day the Honorable Isaac Lobe Straus, Attorney General of Maryland, preferred before the Governor "complaints and charges of incompetency and official misconduct" against them, and

the Governor named Wednesday, October 12, 1916, as the time for a hearing. On October 8th the Governor notified each of the three that, in view of the charges and complaints against him, he was suspended as a member of the board of **police** commissioners of **Baltimore** city from that date until the decision and determination of the charges and complaints against him, and ordered him to turn over the possession, property, effects, and appurtenances of said office to such person as may be appointed by him to hold and exercise the duties of said office for the indicated period of temporary suspension. A commission was issued on the same day to each of the three appellants, by which each was appointed a member of the board during the period of the pendency of the charges and complaints against the suspended member whose place he was appointed to, "and until the said charges and complaints shall, after inquiry, examination, and hearing thereinto and thereof, have been decided and determined." The appellees having refused to surrender their offices to the appellants, the latter filed a petition for a mandamus. An answer was filed by the defendants (the appellees) to which the petitioners (the appellants) demurred. The demurrer was overruled, and, no further proceedings having been taken by the petitioners, an order was passed refusing and finally dismissing the petition, with costs to the defendants. From that order this appeal was taken.

As this is the first time the right of the Governor to suspend an officer pending proceedings to remove him for cause has been presented to this court or its predecessors for determination, or, so far as we are aware, has arisen in any of the courts of this state, the case is one of more than usual importance to the people of the state at large, as well as to the parties immediately concerned. The appellees have urged several grounds for denying the right of the appellants to the writ of mandamus, but we will only consider such as we deem necessary or desirable to be determined on this appeal.

The primary question is: "Had the Governor the power, under the Constitution and laws of this state, to suspend these officers pending the proceedings to remove them on the charges and complaints of incompetency and misconduct in office?" That inquiry is made assuming, but not deciding, that the specifications filed do amount to charges of incompetency and misconduct in office within the meaning of the law under which the appellees were appointed. A board of **police** commissioners for **Baltimore** city has been in existence for 50 years, but the number of members, the method of their appointment, and other provisions have been changed several times. By Acts 1900, c. 15, the Governor was authorized to appoint, by and with the advice and consent of the Senate, three commissioners for the term of two years and until their respective successors were appointed and qualified, their terms beginning on the first Monday of May next ensuing their appointment. Prior to that time the commissioners were elected by the General Assembly (the mayor being ex officio a member until 1867), and the Governor had no power to appoint, excepting to fill vacancies during the recess of the Legislature. From 1867 to 1900 the General Assembly, if in session, was authorized to remove the commissioners for official misconduct, and during the recess of the Legislature the Governor was empowered to remove them on conviction of any felony before a court of law, and to appoint successors to such delinquent commissioners until the next meeting of the Legislature.

By section 740 of article 4 of the Code of Public Local Laws, as amended by chapter 15 of the Acts of 1900, which is still in force, it is provided that "any of said commissioners shall be subject to removal by the Governor for official misconduct or incom-

petency, in the manner provided by law in the case of other civil officers"; and section 741 provides that, "in case of the death, resignation, removal or disqualification of any commissioner, the Governor shall appoint a successor for the remainder of the term so vacated, subject to the provisions of the foregoing section, and of the Constitution of the state." It will be observed that the causes for removal are the same as those in section 15 of article 2 of the Constitution, and the power to fill vacancies is expressly made subject to the provisions of the Constitution on that subject. We are therefore not called upon to consider, as we have sometimes been, any supposed conflict between the statute and the provisions of the Constitution, but will refer to the latter in our discussion of the case. Section 15 of article 2 of the Constitution is: "The Governor may suspend or arrest any military officer of the state for disobedience of orders or other military offense; and may remove him in pursuance of the sentence of a court-martial; and may remove for incompetency or misconduct all ***822** civil officers who received appointment from the executive for a term of years." That language of itself must be admitted to be at least suggestive, for when the same section authorized the Governor to "suspend or arrest" a military officer for the causes given, and to remove him in pursuance of the sentence of a court-martial, and then, when it deals with civil officers, only authorizes him to "remove" them, the maxim, "Expression unius est exclusio alterius," naturally suggests itself. There is no other power of removal of these officers expressly given to the Governor, either by the Constitution or by statute, and there is not only no express power of suspending them given him, but a striking contrast is made between his powers in reference to military officers and those concerning civil officers. If it be said that it was necessary for him to have the power to suspend military officers for disobedience of orders or other military offense, why did the framers of the Constitution nevertheless expressly insert that power, and yet omit it in dealing with civil officers, if the power to suspend them be an incident to the power to remove for cause?

But the history of this provision of the Constitution sheds much light on the subject. Article 48 of the Constitution of 1776 provided "that the Governor, for the time being, with the advice and consent of the council, may appoint the chancellor, and all judges and justices, the Attorney General, naval officers, officers in the regular land and sea service, officers of the militia, registers of the land office, surveyors, and all other civil officers of government (assessors, constables and overseers of the roads only excepted) and may also suspend or remove any civil officer who has not a commission during good behavior; and may suspend any militia officer for one month; and may also suspend or remove any regular officer in the land or sea service; and the Governor may remove or suspend any militia officer, in pursuance of the judgment of a court-martial." In that Constitution he was thus expressly authorized to suspend or remove any civil officer who had not a commission during good behavior. Then we find in the Debates and Proceedings of the Convention of 1851 that, when the committee on the executive department made its report, it recommended, after stating what is now in section 15 as to military officers, that the Governor "may suspend or remove any civil officer whose term of office is not placed beyond his control by some other provision of this Constitution." A substitute for that report was offered, including one as follows: "He may remove any of the civil officers of the government, of his appointment, upon satisfactory evidence of any malfeasance in office, but shall report every such case to the Legislature at the next session thereafter." There was considerable discussion as to the power of the Governor to remove, and, al-

though we do not find any special objection made by the speakers to the word "suspend," the fact is that, when the Constitution was finally adopted, this section was changed to read: "And may remove for incompetency or misconduct, all civil officers who receive appointments from the executive for a term not exceeding two years." The express power to suspend was thus left out of the Constitution of 1851, and it was likewise omitted in those of 1864 and 1867. If the framers of those three Constitutions had intended that the Governor should not only have the power to remove civil officers for incompetency or misconduct, but also to suspend them, pending proceedings for such removal, it is impossible to understand why they should deliberately have omitted the term "suspend." It is more reasonable to conclude that they did not so intend, as they knew that the power to remove given by section 15 of article 2 might include officers of as much importance as many of those elected by popular vote. When by the act of 1900 the Legislature gave the Governor power to appoint the commissioners, and to remove them for official misconduct or incompetency, it by the next section (741) of the same act provided that, "in case of the death, resignation, removal or disqualification of any commissioner, the Governor shall appoint a successor for the residue of the term so vacated," but made no provision in case of suspension of a commissioner, although in section 749 it had expressly provided that "the said board shall have power to suspend from duty, fine or forfeit the pay of any officer or policeman," and in section 745 had said "the period of appointment in the regular **police** force shall be four years, unless sooner removed for official misconduct and inefficiency, of which the said board of **police** commissioners shall determine."

It cannot be denied by any one familiar with the provisions of the Constitutions of 1776 and 1851 that it was intended by the framers of the latter to limit the powers of the Governor. Under that of 1776 he had almost unlimited power of appointment of officers, while in that of 1851, and in the two later ones, most of the important offices were made elective by the people, and the power of the Governor to remove officers of such importance as the **police** commissioners was generally limited to action after conviction in a court of law. It is said that the right to suspend pending proceedings to remove is essential to the protection of the public. If that be so, the people of Maryland have been left by the constitutions of the state in a very helpless condition for many years. Without going back of the present one, it will be seen by an examination of it that the Governor has no power to remove many of the most important officers until conviction in a court of law, or, in some instances, after action by the Legislature. That statement applies to judges, clerks of courts, registers ***823** of wills, the Attorney General, state's attorneys, justices of the peace, constables, the mayor of **Baltimore**, and others, and there is no provision in the Constitution for the removal of sheriffs. Important as are the duties of those officers, it could not be pretended that if any of them were indicated, even for serious crimes, the Governor could suspend them prior to conviction, and then only by virtue of the express power conferred upon him. We are aware that, with the exception of the justices of the peace, the Governor does not appoint the officers above mentioned (beyond filling vacancies in certain cases), but we have referred to them in reply to what we regard an unsound argument, which is to be found in some of the cases in other jurisdictions which hold that the right to suspend pending proceedings to remove for cause is essential, and also for the purpose of showing that the right to suspend has not been found to be necessary or desirable in Maryland, even in case of such officers as sheriffs and constables, upon whom the

peace and good order of the counties in a large measure must depend, or the clerks and registers of wills, some of whom handle large sums of public money.

The **police** commissioners of **Baltimore** city are officers of great importance. Each one of them gives bond in the penalty of $10,000 for the faithful discharge of his duties. They have under them very many persons, perhaps not far from a thousand. They can control the sheriff in the preservation of the public peace and quiet, can require him to summon the posse comitatus for that purpose. They can even call out the military forces in **Baltimore** city, and they have unusual and great powers. Their duties are not of a character which can be taken up today and laid aside to-morrow without great detriment to the public. It would be demoralizing to the discipline of the **police** department and injurious to the public welfare, if they could be suspended at the will of the Governor, or other appointing power, and others temporarily put in their places, and we cannot believe that the Legislature or the makers of our Constitutions ever intended that it should be done. It would bedifficult for any one to discharge the duties of **police** commissioner with that fearlessness and independence which the character of the duties peculiarly demands without making enemies, or at least having his motives misunderstood or misconstrued, and, if one must be suspended because charges are preferred against him, it would be an easy way for designing people to get rid of him for the time being, for, if the Governor must suspend them by reason of pending charges preferred at his instance, surely he should do so when they are preferred by others. If the people of the state of Maryland who framed the Constitution through their representatives and then by their votes ratified it are to be judged by their actions, they have unmistakably declared that it is not their will that those occupying important public offices be deprived of them merely because they are charged with incompetency or misconduct. It is not in accord with the spirit that has characterized the people of Maryland, at least since 1851, to say that one deemed worthy by the Governor and Senate of Maryland of a high and important office is to be even temporarily deprived of it, before he is convicted by the tribunal which they, through the organic law, or their representatives in the Legislature, have said shall give him a fair and impartial trial. Far better would it be to possibly suffer some occasional inconvenience or loss to the state by reason of the incompetency or even misconduct of some public official, than to subject one believed to be worthy of election or appointment to the mortification and indignity of being even temporarily removed merely because charges are preferred against him, for it is useless to suggest that an officer is not seriously injured in both his individual and official capacities by a suspension from office, although he may be eventually acquitted of the charges against him. On his trial he has the opportunity of letting the public, as well as the tribunal before whom he is tried, judge whether he is guilty or innocent, but a suspension on charges--in this case not even under oath--would not only deprive him of his office for the time being without a hearing, but almost necessarily carry with it some suggestion of guilt before he has an opportunity to vindicate himself. There is no necessity for such procedure, and we are satisfied that our laws do not contemplate it, however it may be regarded in other jurisdictions.

Sections 12, 13, and 14 of article 41 (article 42, Code 1860) provide the method of procedure before the Governor. In Harman v. Harwood, 58 Md. 1, this court through Chief Judge Bartol said in speaking of them: "The Code (article 42) in the sections to which we have referred carefully prescribes and directs the mode by which the Governor is re-

quired to exercise this delicate and important power, by providing for notice to the party complained against, an opportunity for defense, the examination of witnesses, and a full hearing of the case." Judge McSherry said in Miles v. Stevenson, 80 Md. 358, 30 Atl. 646: "It is the utmost stretch of arbitrary power and a despotic denial of justice to strip an incumbent of his public office and deprive him of its emoluments and income before its prescribed term has elapsed, except for legal cause, alleged and proved, upon an impartial investigation after due notice." We are aware that both of those cases involved removals, and not merely suspensions, but section 12 of article 41 provides that, "upon complaint made against any civil or military officer who can be re ***824** moved or suspended by the Governor, the Governor may summon before him any witnesses to testify for or against such complaint," and then authorizes the payment of witnesses' fees, and gives power to the Governor to require their attendance. Section 13 is: "Upon complaints made under the preceding section, the party complained against shall have a copy of the complaint and notice of the time when the Governor will inquire into and examine the same." The complaints "under the preceding section" are those "made against any civil or military officer who can be removed or suspended by the Governor." Clearly, then, if the appellees are civil officers who can be suspended, they have under those sections the same right to a hearing before being suspended as they would have before being removed, if the language of the statute is to be followed. Those sections were enacted in 1786, when the Constitution of 1776, which expressly authorized suspensions and removals, was still in force, and they were just as applicable to the one as to the other. They clearly did not contemplate either by the Governor before a hearing; and hence, if there is an implied power to suspend civil officers, the statute applies, and, if there is not, the Legislature may have assumed it could so provide in special cases, and hence let that remain in the Code.

In Groome v. Gwinn, 43 Md. 572, this court held that, although under the Constitution and existing laws the Governor had jurisdiction to hear and decide the case of a contested election for the office of Attorney General, yet until the Legislature clothed him with the authority and gave him the means and instrumentalities of exercising it, as it was authorized to do under section 56 of article 3 of the Constitution, he had no power to examine and decide the questions raised by such contest. Chief Judge Bartol said: "It has been argued that these powers are conferred upon the Governor by implication, upon the ground that, 'where a general power is conferred, every particular power necessary for its exercise will be implied.' We are not willing to adopt this rule in the board and unlimited terms in which it has been stated; nor is it in any sense applicable to the present case. *** But it is clear from the terms of the Constitution that no such powers were intended to be vested in the Governor by implication. By article 3, § 56, it is provided that 'the General Assembly shall have power to pass all such laws as may be necessary and proper for carrying into execution the powers vested by this Constitution in any department or office of the government, and the duties imposed on them thereby.'" Judge Bartol went on to say that many examples might be given to show the necessity for such legislation, but that a single one would suffice. He then referred to the power to remove conferred upon the Governor by section 15 of article 2, and cited sections 13, 14, and 15 of article 42 (now 41) of the Code. He said: "It has been argued that the general power of removal for cause conferred on the Governor by the Constitution might be exercised by him without the aid of these statutes; but the power thus exercised would be arbitrary,

and contrary to the spirit and intent of the Constitution. No officer ought to be convicted of incompetency or misconduct, and deprived of his office without a fair and impartial trial." Can it be said in the face of that decision, and in view of the fact that the power of the Governor to suspend a civil officer was in one Constitution of the state and then omitted in the three others, and, moreover, that the statute, which was necessary to enable the Governor to exercise the power of removal, provides that when he has power to suspend or remove, it can only be done by adopting the method therein prescribed, that the Governor has the implied power to suspend without a hearing pending the proceedings for removal? There can be but one answer to that in our judgment. Possibly the Legislature can authorize it, but it has not done so, and hence we express no opinion as to that.

The appellants argued that, inasmuch as the Constitution does give the Governor power to remove for cause, such power included that to suspend, pending the proceedings to remove, and they assert that such is the universal doctrine accepted by other courts, and hence the framers of the Constitution are presumed to have intended to include it. But in the first place we have pointed out that, whatever may be the rule elsewhere, there is not only nothing to show that it was intended to be adopted here, but but there is much to establish precisely the contrary--such as deliberately leaving out of the later Constitutions the power to suspend, which was originally included, inserting provisions such as we have referred to limiting the powers of the Governor, and other things we have mentioned above. But beyond all that, even if we concede the claim of the appellants that other courts have unanimously adopted the view they contend for, they cannot rightfully contend that the framers of the Constitution of 1867--much less of that of 1851, when the change was first made--knew that under the decisions the power to remove for cause included that to temporarily suspend, and hence did not deem it necessary to give the express power to suspend. They could not have been of such opinion by reason of federal decisions, or action by the President and others connected with the general government, for the simple reason that the United States Constitution does not confer the power to remove, but the right to do so is based on the theory that the power to appoint includes the power to remove. Nor could the framers of our Constitution of 1851, or even the later ones, have ***825** been influenced by the decisions of state courts, as but few, if any, of those relied on by the appellants had then been rendered. That of State v. **Police** Commissioners, 16 Mo. App. 48, which seems to be the one most followed by other cases, was not decided until 1884, and then by a court which was not one of last resort, although of high standing. Whatever may now be the general trend of the decisions in other states, even if they be admitted to be practically unanimous on the one side, in the absence of some constitutional or statutory barrier, there was no such principle of law so generally recognized by the courts of this country in 1851 or 1867 as would justify us in assuming that by reason of it the framers of our Constitution intended to incidentally include the right to suspend in the power given to remove for cause, although they had deliberately omitted the power to suspend. Indeed, in one of the latest and strongest cases cited by the appellants (State v. Megaarden, 85 Minn. 44, 88 N. W. 414 [89 Am. St. Rep. 534]), the court said: "The authorities in respect to the incidental right to suspend pending the hearing are meager and unsatisfactory." In the still later case of Maben v. Rosser, 24 Okl. 588, 103 Pac. 674, decided in 1909 and cited by the appellants, that court said: "As between these two rules which appear to be about equally supported by the authorities *** we feel constrained to adopt" the rule, etc.

In 22 Am. & Eng. Ency. of L. 451, published as late as 1903, it is said: "Though the authorities are meager and unsatisfactory, the rule in several jurisdictions is that the" suspension pending the investigation of charges is not an improper exercise of authority. In some of the cases relied on by the appellants the question was whether a statute passed to authorize a temporary suspension pending proceedings to remove was constitutional, which is altogether another matter, although those cases do adopt the doctrine contended for by the appellants. In this state statutes have been passed authorizing the suspension as well as removal of inferior officers in particular cases, but the Legislature has not seen fit to give the Governor such power in cases arising under this provision of the Constitution, if it can do so. But without further discussing that subject, or the distinction claimed by the appellants to exist between this case and such as Gregory v. New York, 113 N. Y. 416, 21 N. E. 119, 3 L. R. A. 854, Emmitt v. New York, 128 N. Y. 117, 28 N. E. 19, and State v. Jersey City, 27 N. J. Law, 536, and the statements in Throop on Public Officers, § 404, and Mechem on Public Officers, § 453, which were cited by the appellees, what we have said is sufficient to show that there was no such consensus of opinion as to the law on this subject when either of our Constitutions was adopted as to suggest, much less establish, that it was intended to include in this power to remove for cause the power to temporarily suspend, even if we ignore what was said in Groome v. Gwinn about the effect of section 56 of article 3 on powers by implication. If the law had been then well established in other jurisdictions, it would be a very violent presumption, in view of the deliberate acts of our constitutional conventions, to conclude that such was the intention, especially when our statutes prescribing the mode of procedure and our decisions are borne in mind.

We will not discuss federal appointments, as those made by the President cannot be taken as precedents in construing our Constitution and laws. It may have been necessary to give the President such power as he had conferred upon him by Congress, but every one familiar with the history of our country knows how bitterly it was opposed. Possibly those controversies had something to do with the limitations placed upon the Governor of this state in 1851, and since continued. The President of a great country like this could not give up his time to hearing charges against such of the many thousands of officers scattered over our immense territory as may give offense or may be accused of being incompetent or guilty of misbehavior in office, but the fact is that the sentiment against frequent removals and suspensions of federal officers has been growing, and has resulted in some acts of Congress and orders of the President to prevent it, and the agitation of others. But there can be no reason why the Governor of this state cannot give officers appointed by him, not only a fair and full hearing, but such a speedy one that there can be no necessity for disturbing them in the discharge of their duties before trial.

What we have already said ought to be sufficient to show that in our judgment it was not intended to give the Governor an implied power to suspend, when section 15 of article 2 gave him the power to remove civil officers for the causes therein named. But there is another convincing reason for not adopting that construction--that is, if the power to suspend was admitted to exist, there is no authority in the Constitution or statute for him to appoint others in the places of those suspended. It cannot be pretended that there is any express power, but it is argued that, as by section 1 of article 2 of the Constitution the executive power of the state is vested in the Governor, and by section 9 he is required to take care that the laws are faithfully executed, if the power to

remove given by section 15 includes the power to suspend temporarily, it is his right and duty to prevent the offices from being unoccupied, and hence he can make the ad interim appointments, although not in terms so authorized. Of course, it will be observed that that assumes the very important premise that section 15 does include the power to suspend temporarily, which we do not ***826** admit, but, if it did, could the Governor make the ad interim appointments? There is no provision or authority for the Governor making an appointment outside of sections 10 and 13 of article 2, excepting to fill a vacancy, and those two sections refer to the appointments made by the Governor and Senate, and cannot be said to in any way reflect on this question. It was said in Smoot v. Somerville, 59 Md. 84, referring to sections 11, 13, and 14 of article 2: "From the language employed in these sections, it is manifest that the power of appointment to all civil offices was intended to be, and was, confided, not to the Governor alone, but to the Governor and Senate, and that the Governor has no power to appoint to office without the advice and consent of the Senate except to fill vacancies in offices, which may occur during the recess of the Senate, or, as provided by the fourteenth section, within ten days before its final adjournment." Or, as was said by Judge Alvey in a concurring opinion in that case: "Now it is too clear for question that the Governor cannot make a vacancy in the office by appointing a successor to the incumbent. The vacancy must actually exist before the power of appointment can be exercised; for it is only the existence of the vacancy that can call into activity the power to appoint." Judge Alvey had previously said: "There is one thing clear, and that is that it is only a vacancy in the office that the Governor, under the Constitution, is authorized to fill, without the concurrence of the Senate"; and, after stating that the only exception to making appointments with the advice and consent of the Senate exists in case of vacancies that occur during the recess or within 10 days before its adjournment, added: "This exception exists, and is provided for, from the necessity of the case; and it is only in case of a vacancy so occurring that the Governor has power to fill it without the advice of the Senate and that simply because such advice and consent cannot readily be obtained. The Governor has no power of appointment except as expressly provided by the Constitution or statute; and, if he attempts to make an appointment without such express authority, that appointment would simply be without effect."

Then section 11 provides that: "In case of any vacancy during the recess of the Senate, in any office which the Governor has power to fill, he shall appoint some suitable person to said office, whose commission shall continue in force until the end of the next session of the Legislature, or until some other person is appointed to the same office, whichever shall first occur." If then there was a vacancy which the Governor had power to fill, the appointment would have to be until the end of the next session of the Legislature, or until some other person is appointed to the said office, whichever shall first occur, and it is not pretended that he had such power in this case. If there was no vacancy, then he had no power to appoint, and hence in neither event could he make these ad interim appointments. But it is clear there was no vacancy, and to admit that there was no vacancy, and to admit that there was would be an effective answer to the contention that the Governor had the right to suspend, for there can be no doubt that a suspension which would create a vacancy would be equivalent to a removal. If there are vacancies, and the appellees are acquitted of the charges, they could only be again restored by being reappointed. There could be no possible justification in the attempt to suspend them in view of our Con-

stitution and laws, if the suspension created a vacancy, and hence we will not dwell on that or cite other authorities on that subject.

We cannot understand how such cases as Robb v. Carter, 65 Md. 321, 4 Atl. 282, County Commissioners v. School Commissioners, 77 Md. 290, 26 Atl. 115, Sappington v. Scott, 14 Md. 56, Kroh v. Smoot, 62 Md. 172, and others cited in connection with them, can aid the appellants. Robb v. Carter and similar cases are simply to the effect that, in the absence of some limitation, officers in this state hold over until their successors are appointed and qualify in order to prevent an interregnum. They did not lessen, but lengthened, the terms of the offices involved. The expression in Kroh v. Smoot as to an ad interim appointment expressly referred to one in which there was a vacancy by reason of the recess appointment expiring at the end of the session of the Senate. As the appointee for the regular term would not go into office under section 13 of article 2 until the first Monday of May, there would be vacancy between the adjournment of the Legislature and that date, which, like other vacancies, the Governor could fill.

What we have already said will relieve us of further reference to authorities cited from other jurisdictions, and, regardless of them, we are of the opinion that, under the Constitution and laws of this state, as construed and interpreted by this court: (1) The Governor had no power to suspend the appellees pending the proceedings against them for removal; and (2) that he had no power to appoint the appellants **police** commissioners of **Baltimore** city, because there were no vacancies in those officers, and he could create none by his orders of suspension, which he is authorized by the Constitution to fill. As the conclusions above announced must result in an affirmance of the order appealed from, which denied the appellants the writ of mandamus applied for, the right to which is the real question in this case, we will not, as urged by the appellees to do, pass upon the sufficiency of the charges or express our views as to the power or propriety of the Governor acting on them, inasmuch as it is admitted that they were made at his instance. It may sometimes be desirable for ***827** an appellate court to determine questions presented to it other than those required for the purposes of its judgment, but it is always a matter of great delicacy for one of the coordinate branches of the government to pass on or deal with questions which the Constitution or laws submit to another, and it should be avoided, excepting in so far as necessary. We have no right to assume that the Governor cannot or will not give the appellees a fair and impartial hearing, such as the Constitution and laws of the state demand. If, as contended by the appellees, the charges are not sufficient, either because they do not amount to charges of incompetency or official misconduct, or because they are too indefinite, or if the statute does not authorize the Governor to prefer the charges, or have them preferred, and then afterwards hear the case, such questions can and should be presented to the Governor, and will doubtless receive proper consideration by him.

Our refusal to now entertain the above questions cannot prejudice the appellees, for we express no opinion on them, and we are determining a case between the appellees and the appellants, and not one between them and the Governor, who is not a party, although this proceeding is the result of his action.

We deem it proper to add that our examination of the authorities cited has convinced us that our statute regulating the procedure before the Governor in such cases, which was first enacted over a hundred years ago, might with great benefit be amended. In some states the mode of procedure adopted relieves the accused and the one hearing the charges from much of the embarrassment

that must necessarily exist when the proceedings are conducted as they seem to be here.

Order affirmed, the appellants to pay the costs, above and below.

114 Md. 58, 78 A. 820

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