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SENATE

REPORT
No. 3

CREDENTIALS OF GERALD P. NYE AS SENATOR FROM NORTH DAKOTA

REPORT

OF THE

COMMITTEE ON PRIVILEGES AND ELECTIONS

ON THE RIGHT OF GERALD P. NYE TO A SEAT IN THE SENATE AS A SENATOR FROM THE STATE OF NORTH DAKOTA

TOGETHER WITH

VIEWS OF THE MINORITY

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CREDENTIALS OF GERALD P. NYE AS A SENATOR FROM NORTH DAKOTA

Mr. ERNST, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the credentials of Gerald P. Nye as a Senator from the State of North Dakota, have considered the same and beg leave to submit the following report:

The Hon. Edwin F. Ladd was duly elected a Senator from North Dakota for the full six-year term beginniug March 4, 1921. He died June 22, 1925, and on the 14th day of November, 1925, the governor of North Dakota, the Hon. A. G. Sorlie, designated Hon. Gerald P. Nye to fill the vacancy thus occasioned until June 30, 1926. The credentials of Mr. Nye were duly presented to the Senate on December 7, 1925, and by it referred to its Committee on Privileges and Elections. The credentials are as follows:

To the PRESIDENT OF THE SENATE OF THE UNITED STATES:

This is to certify that pursuant to the power in me vested by the Constitution of the United States and the constitution and State laws of the State of North Dakota, I, A. G. Sorlie, the governor of said State, do hereby appoint Gerald P. Nye, a Senator from said State, to represent said State in the Senate of the United States until the vacancy caused by the death of Edwin F. Ladd is filled by election, duly called for June 30, 1926.

In witness whereof I have hereunto set my hand and caused the great seal of the State of North Dakota to be affixed at the capitol in the city of Bismarck, this fourteenth day of November, in the year of our Lord one thousand nine hundred and twenty-five.

A. G. SORLIE, *Governor.*

Attest:
[SEAL.] ROBERT BYRNE, *Secretary of State.*

These credentials having been duly considered by the Committee on Privileges and Elections, it now reports that in its opinion the Governor of North Dakota had no authority under the Constitution of the United States and the constitution and laws of the State of North Dakota to make the appointment, and that the said Gerald P. Nye is not entitled to a seat in this honorable body.

The right of the Governor of North Dakota to designate the Hon. Gerald P. Nye to serve as a Senator of the United States from the State of North Dakota until June 30, 1926, depends solely upon the construction to be given to the seventeenth amendment to the Constitution of the United States as well as the constitution and State laws of the State of North Dakota.

The seventeenth amendment to the United States Constitution is as follows:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

The constitution of the State of North Dakota, as well as the laws of that State under which the right to designate Mr. Nye is sought to be sustained, are as follows:

Section 78 of the constitution of North Dakota reads:

When any office shall from any cause become vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill such vacancy by appointment.

The act of March 15, 1917, chapter 249 of the laws of North Dakota, 1917, is as follows:

AN ACT Amending and reenacting section 696 of the Compiled Laws of North Dakota for 1913, relating to filling vacancies

Be it enacted by the Legislative Assembly of the State of North Dakota:

(1) That section 696 of the Compiled Laws of North Dakota for 1913 be amended and reenacted to read as follows:

696. Vacancies, how filled: All vacancies, except in the office of a member of the legislative assembly, shall be filled by appointment as follows:

1. In the office of State's attorney in which a vacancy has occurred by reason of removal under section 685 of the Compiled Laws of North Dakota for the year 1913, by the board of county commissioners by and with the advice and consent of the governor.

2. In county and precinct offices by the board of county commissioners, except vacancies in such board.

3. In offices of civil townships, by the justices of the peace of such township, together with the board of supervisors or a majority of them, and if a vacancy occurs from any cause in the board of supervisors, the remaining member of the board shall fill such vacancy.

4. In State and district offices by the governor.

(2) All acts or sections in conflict herewith are hereby repealed.

Approved March 15, 1917.

It is contended on behalf of Mr. Nye:

(1) That under the Constitution of the United States, article 1, section 3, prior to the adoption of the seventeenth amendment, it was provided that two Senators from each State should be chosen by the legislature,

and if vacancies happen * * * during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature which shall then fill such vacancy.

(2) That the framers of the Constitution were so solicitous that the States should have full and equal representation that they provided in article 5 that no State should be deprived without its consent of its equal suffrage in the Senate; and that the laws of the State of North Dakota providing for the filling of any vacancy in the office of United States Senator should receive a fair and liberal construction.

(3) That it has been for many years the policy of the people of North Dakota, as expressed in their constitution and laws, to fill vacancies by appointment rather than by special elections, and that to effectuate this purpose the laws of the State of North Dakota provide for filling vacancies by appointment in each and every office within the gift of the people of the State except vacancies in the

legislature of that State which the constitution provides should be filled by special election; and that vacancies in the lower branch of Congress, and vacancies in the United States Senate prior to the adoption of the seventeenth amendment are to be filled temporarily by appointment and then by election by the legislature.

(*a*) It is conceded as a general proposition that under the wording of the seventeenth amendment some affirmative action is necessary on the part of the Legislature of the State of North Dakota to give the governor power to appoint.

(*b*) It is insisted, however, that the legislature could by explicit and unequivocal language confer such power before the seventeenth amendment took effect.

(4) It is then argued that the statute of March 15, 1917, supra, providing that all vacancies in State and district offices shall be filled by appointment by the governor, is sufficient affirmative action on the part of the Legislature of the State of North Dakota to comply with the requirements of the seventeenth amendment.

(*a*) It is also conceded that the language used in the seventeenth amendment is inept "to provide for the appointment of a United States Senator," but is in effect sufficient to include the office of a United States Senator.

(*b*) Great stress is placed upon the words "all vacancies" used in the statute of March 15, 1917, supra, and it is insisted that if the legislature intended otherwise it would have said, "All vacancies except in the office of United States Senator."

(5) It is argued that the Legislature of North Dakota may have well considered a Senator to be a State officer in the sense that he is an officer elected by the people of the entire State; that in the technical sense of the term it is unnecessary to find that a United States Senator is a State officer in order to determine the issue presented.

(*a*) It is urged that the words "all vacancies" should be construed to mean "in offices voted for by the people of the State," or "an office in which the election district is the State." That it is only by such a construction that full force and meaning can be given to the words "all vacancies" as those words are used in the laws of North Dakota.

(*b*) It is conceded that there is a difference between "filling a vacancy," and making a "temporary appointment" until the vacancy can be filled by a special election. It is, however, insisted that the words "all vacancies" include temporary appointments, because "the power to do the greater will include the lesser"; and that the Governor of the State of North Dakota has exercised only the power which the seventeenth amendment contemplated, in that he gave to Mr. Nye a temporary appointment, until the vacancy can be filled by the election called for June 30, 1926.

(6) It is generally argued in substance by way of conclusion that a fair interpretation of the laws of North Dakota gives the governor power to make a temporary appointment, and that the credentials of Mr. Nye are valid.

The seventeenth amendment makes it clear that the Senate of the United States is to be elected by the people. It makes it the executive's duty to issue writs of election to fill all vacancies unless the legislature of the State concerned has affirmatively authorized the governor to make a temporary appointment for such period as the

legislature may direct. The amendment takes away directly from the executive the power to fill a vacancy, and in so doing it confers no power upon the executive to appoint. Obviously in the absence of an exercise by the legislature of the power delegated to it by the seventeenth amendment, the executive of any State must issue writs of election to fill a vacancy in the office of United States Senator whenever any such vacancy may arise.

It is interesting to note that 46 States have passed laws expressly recognizing by the language used the seventeenth amendment to the Constitution. Two States—Kansas and North Dakota—have omitted to recognize the amendment by any direct or express reference. The power to make temporary appointments has been conferred by 41 States upon their respective executives. Five States—Florida, Maine, Rhode Island, Vermont, and Wisconsin—have refused to confer the power of appointment upon their governors. These States have made express provisions for holding elections. The legislature of four States—Louisiana, Mississippi, Texas, and Tennessee—have limited the power of appointment to vacancies occurring during a session of Congress. North Carolina limits the period for which an appointee can serve to six months; and 27 States have expressly authorized that elections to fill any such vacancy should be held upon the same date as the general election.

An analysis of chapter 249 of the laws of North Dakota, 1917, the act of March 15, 1917, discloses it to be merely an amendment and a reenactment of section 696 of the Compiled Laws of North Dakota for the year 1913. This act had its origin in section 8, chapter 22, of the Political Code of Dakota Territory for the year 1881. It is also found in the territorial laws for the year 1877. It has subsequently from time to time been reenacted until it found its way into the Compiled Laws of the State of North Dakota for the year 1913. When North Dakota ceased to be a territory the words "State officers" were substituted for "Territorial officers" that the statute might meet the exigencies of a sovereign State. It is sufficient to say that clauses 2, 3, and 4 of the act of March 15, 1917, supra, are but reenactments in identical terms of section 696 of the compiled laws for the year 1913. There is, however, in clause 1 the addition of the words "State's attorney" and the provision there made for filling any vacancy in such office.

Sections 685 to 695 of the Compiled Laws of North Dakota for 1913 gave the governor the power to remove certain officers, including State's attorneys. Section 696 of the Compiled Laws of North Dakota for 1913 expressly provided that the board of county commissioners should have the power to fill all vacancies in the office of State's attorney. A mere reading, therefore, of clause 1 of the act of March 15, 1917, supra, clearly indicates that the only respect in which the act of 1917, supra, differed from section 696 of the compiled laws for 1913, supra, was to change the statutory law relative to filling vacancies in the office of State's attorney by enacting that any such vacancy should be filled by the county commissioners, "by and with the advice and consent of the governor." The only other change in the law, if change it be, is the transposition of the identical language, "in State and district offices by the governor" in clause 1 of the compiled laws of 1913, supra, to clause 4 in the act of March 15, 1917.

The act of March 15, 1917, supra, does not refer expressly or by implication to the office of United States Senator, and does not in the language used, in the light of the history of the act, disclose a clear legislative intent to incorporate into the laws of the State of North Dakota the provisions of the seventeenth amendment to the Constitution of the United States. Nowhere is express reference made to the Constitution of the United States, and nowhere in said act does the language used indicate that the Legislature of the State of North Dakota had the seventeenth amendment to the Constitution of the United States in mind when the act of March 15, 1917, supra, was passed. Certainly the reasonable presumption is that if the Legislature of North Dakota had intended to incorporate into the act of March 15, 1917, supra, the provisions of the seventeenth amendment to the Constitution of the United States, it would have given the executive of that State the power, as the seventeenth amendment provides, to make a temporary appointment only, until the people should fill the vacancy by election, and would not have given the executive power to fill the vacancy. The act of March 15, 1917, supra, in so far as it can be held by construction and intendment to confer upon the executive of the State of North Dakota the power to make a temporary appointment, is in conflict with the seventeenth amendment to the Constitution of the United States, because it expressly, if it confers any power in the case of a United States Senator, confers the power to fill a vacancy, not the power to make a temporary appointment. It is only reasonable to assume that the Legislature of North Dakota would have noted the language employed in the applicable provisions of the seventeenth amendment to the United States Constitution and would, by the use of apt language, have conferred upon the executive the power to make temporary appointments in the case of a vacancy in the office of United States Senator and would not have premeditatedly exceeded the authority delegated and the power conferred to fill vacancies.

Section 78 of the constitution of North Dakota reads as follows:

> When any office shall from any cause become vacant and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill such vacancy by appointment.

It has been suggested that the executive of North Dakota could find authority under this provision to appoint Mr. Nye temporarily to the vacancy caused by the death of the late Senator Ladd. Obviously it can not be logically and legally asserted that the affirmative legislation contemplated by the seventeenth amendment can be found in the provisions of a constitution adopted and ratified in 1889, approximately 24 years before the adoption of the seventeenth amendment to the United States Constitution. Then, again the power of the executive under section 78 of the constitution of North Dakota, supra, is limited to cases where "no mode is provided by the constitution or law for filling such vacancy." A mode for filling a senatorial vacancy, assuming the constitutional provision to be applicable, has been expressly provided by the seventeenth amendment to the Constitution of the United States, which is concededly the supreme law of the land, and which the Governor of the State of North Dakota is compelled to support. This amendment, in the absence of legislative action empowering him to make a temporary appointment, commands him to issue writs of election

The constitution of the State of North Dakota creates and sets forth specifically by name in article 3, sections 71, 72, and 82, the offices under the State government, and in article 4 of the constitution provision is made for the judicial officers of the State. In none of the constitutional provisions of the constitution of the State of North Dakota is any mention in any way made of the office of a United States Senator. It is, however, provided in section 196, article 14, of the constitution of North Dakota that—

> The governor and other State and judicial officers, except county judges, justices of the peace, and police magistrates, shall be liable to impeachment for habitual drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office * * *.

Obviously "congressional officers" are not embraced within the description of "the governor and other State and judicial officers."

In the Compiled Laws of the State of North Dakota for the year 1913 specific provision is made for the due induction into office of all State, district, county, and precinct officers of the State of North Dakota. It is also expressly provided in section 679 of the Compiled Laws of the State, supra, that in case of a noncompliance with any of the provisions of these laws such office shall be deemed vacant and shall be filled by appointment as provided by law.

No conclusion or argument, by construction, interpretation, or inference, can be made reasonably or logically that the constitution and the laws of the State of North Dakota, supra, intended in the use of the term "State officers" to include therein the office of United States Senator. This fact is made even clearer by a consideration of chapter 2, article 1, Compiled Laws of 1913 of the State of North Dakota, which provides specifically for the holding of primary elections. Section 852 provides that at the time stated therein—

> there shall be held in lieu of party caucuses and conventions, a primary election in the various voting precincts of this State, for the nomination of candidates for the following offices to be voted for at the ensuing general election, namely: Members of Congress, State officers, county officers, district assessors, and the following officers on the years of their regular election, namely, judges of the supreme and district courts, members of the legislative assembly, and county commissioners, and United States Senator in the year previous to his election by the legislative assembly.

Section 853 provides that "every candidate for United States Senator, Member of Congress, State officers, judges of the supreme and district courts" shall file their petitions with the secretary of state in the time and manner provided.

Section 859 further provides for the order in which candidates for the various offices shall appear on the ballot, and here it lists: Congressional officers, State officers, legislative officers, and county officers. Under State officers it lists the offices created in Article III, sections 71, 72, and 82 of the North Dakota constitution.

Section 863 seems to furnish us the last word on the subject when it provides that—

> Party candidates for the office of United States Senator shall be nominated in the manner herein provided for nomination of candidates for State offices.

The Sixty-third Congress denied to the Hon. Frank P. Glass a seat in the Senate of the United States as a Senator from the State of Alabama. The Governor of Alabama, acting under a statute of that State passed in 1909, appointed Mr. Glass to a vacancy occurring in

the representation of that State, due to the death of Senator Joseph M. Johnston. The term for which Senator Johnston was elected commenced prior to the adoption of the seventeenth amendment. The United States Senate there adopted the view that affirmative legislation was necessary under the seventeenth amendment to the United States Constitution to enable the executive of any State to make a temporary appointment of a United States Senator. The Alabama statute then under consideration was substantially the same as the North Dakota statute now under consideration. A comparison of these statutes shows that the only real difference was that the North Dakota statute was reenacted after the adoption of the seventeenth amendment, while the Alabama statute antedated the amendment.

It is therefore respectfully submitted that neither section 78 of the constitution of North Dakota nor the act of March 15, 1917, conferred any authority upon the executive of North Dakota either to make a temporary appointment or to fill a vacancy in the office of United States Senator by appointment; and that the Legislature of the State of North Dakota has not by due legislation conferred upon the governor of that State such appointive power as was delegated to it by the seventeenth amendment to the United States Constitution.

Therefore the committee respectfully recommends the adoption of the following resolution:

Resolved, That Gerald P. Nye is not entitled to a seat in the Senate of the United States as a Senator from the State of North Dakota.

VIEWS OF THE MINORITY

(Submitted by Mr. Stephens)

The credentials of Mr. Nye state that he is "to represent the State of North Dakota in the Senate of the United States until the vacancy caused by the death of E. F. Ladd is filled by election duly called for June 30, 1926."

Mr. Nye's right to a seat in the Senate is challenged, the ground of challenge being that the governor had no power to make the appointment. The Committee on Privileges and Elections has, by a majority vote, upheld this contention, and as I do not agree with the majority, I am filing this brief statement.

The seventeenth amendment to the Constitution of the United States contains this language:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment was ratified in 1913. It was held by the majority that the Legislature of North Dakota has not empowered the governor to make a temporary appointment and, therefore, he was without authority to appoint Mr. Nye; that the only authority that he had was to issue a writ of election so that the people could vote for and elect Mr. Ladd's successor.

If the legislature failed to grant the governor this authority, of course Mr. Nye's appointment was illegal and void and he should be denied the right to sit in the Senate.

There is a statute in North Dakota to which attention is now directed. It is section 696 of the code of that State, as amended in 1917 by chapter 249 of the session laws. This section, as amended, reads as follows:

> SEC. 696. Vacanies, how filled: All vacancies, except in the office of a member of the legislative assembly, shall be filled by appointment as follows:
>
> 1. In the office of State's attorney, in which a vacancy has occurred by reason of removal under section 685 of the Compiled Laws of North Dakota for the year 1913, by the board of county commissioners by and with the advice and consent of the governor.
>
> 2. In county and precinct offices, by the board of county commissioners, except vacancies in such board.
>
> 3. In offices of civil townships, by the justices of the peace of such townships, together with the board of supervisors or a majority of them; and if a vacancy occurs from any cause in the board of supervisors, the remaining members of the board shall fill such vacancy.
>
> 4. In State and district offices, by the governor.

This law was enacted about four years after the seventeenth amendment was ratified, so the question which arises is: Does this section meet the requirement of the seventeenth amendment with reference to empowering the governor to make a temporary appointment?

The majority decided that it does not grant such power. It was argued in the committee that the statute gave no such power to the governor for several reasons.

I. The legislature had no such intention when this statute was enacted.

In support of that argument, attention was called to the fact that for a long time prior to the adoption of the seventeenth amendment there had been a statute, identical in language with the statute as amended by the acts of 1917 in so far as a provision authorizing the governor to fill such vacancies is concerned.

That part of the statute which relates to the power of the governor to fill vacancies was the language, "in State and district offices." As the words "State and district offices" were written into the law many years before the Constitution was amended, so as to provide for the election of Senators by the people, and as the statute was reenacted without any reference to the seventeenth amendment and without any additional grant of power to the governor so far as using any different language, it is argued that it was not the intention of the legislature to grant such power. I do not agree with the argument.

It was unnecessary for the legislature in granting the governor power to make temporary appointments to refer in any way to the seventeenth amendment; nor was it necessary for the legislature, in reenacting the statute, to make use of words different from those used in the original act, if the language originally used was inclusive enough to include a Senator.

In other words, if the legislature, in providing for a grant of power in certain contingencies, at a later time, enacted legislation that is broad enough to cover an added contingency, it is sufficient to use the identical language used in the original law.

With what subject was the legislature dealing in each instance? Vacancies in office? What vacancies? The law says "all vacancies except in the office of a member of the legislative assembly."

"All vacancies" is comprehensive enough to include a vacancy in the United States Senate. The comprehensiveness of the term "all vacancies" is not lessened now because the same term was used with reference to the power of filling vacancies before the adoption of the seventeenth amendment. It is true that the amendment had added another to the class of vacancies, the filling of which the legislature was empowered to make provision for.

So we find that, according to the language used in the title of the statute, the legislature was attempting to provide for the filling of vacancies of every class, with a single exception. This was in line with the previous history of filling vacancies. There is not a single law in the State for filling the vacancy by election, except where there is a constitutional provision to that effect.

How natural, then, that the legislature should pass legislation as provided for under the seventeenth amendment. Each State is anxious to have full representation in the Senate. The right to full and equal representation was jealously guarded by the framers of the Constitution.

II. It was also argued that this statute is invalid so far as it relates to authority on the part of the governor to appoint a Senator because it provided for the filling of the vacancies when, under the seventeenth

amendment, he could commission a Senator to serve only until an election should be held. There is no merit in this argument. The answer is that a greater includes a lesser. Of course, the governor's commission and his right to appoint would have to be considered and construed in the light of the seventeenth amendment; and the time that his appointee can serve would be limited and restricted by the provisions of that amendment.

In support of this contention I refer to two cases. In Scott *v.* Flowers (61 Nebr. 620) the court said:

> The legislature has clearly here expressed its will, but it has gone too far; it has transcended the limits of its authority. It has, in an unmistakable manner, signified its purpose not only to authorize the commitment to the reform school of certain children under 16 years of age, but also children beyond that age, who, although guiltless of crime, have evinced a criminal tendency and are without proper parental restraint. The legislature having declared its will, and its command to the courts being in part valid and in part void, the decisive question is, Shall section 5 be given effect so far as it is in accord and agreement with the paramount law? It seems that both good sense and judicial authority require that the question should receive an affirmative answer.

The other case is Commissioners *v.* George (104 Ky. 260). In this case there appears this language:

> The act construed created a board of penitentiary commissioners, and provided that of the first board one should hold for two years, one for four years, and one for six years, and that their successors should be elected for six years. The constitution forbade the creation of officers with a longer term than four years. The act was held to create a four-year term and to be valid as so modified.
>
> The language employed shows that the general assembly was willing that one of the commissioners should hold his office for six years—two years longer than the constitution will permit. As the general assembly expressed a willingness that one of the commissioners should hold for two years longer than the constitution permits, it is certainly reasonable to conclude that it was the will of that body that the commissioners should hold for four years, as this term is necessarily included in the longer one which is fixed. To hold the act void in so far as it makes the term six years instead of four, still the balance of the act is complete and enforceable. The purpose and intent of the general assembly that the commissioners should manage and control the penitentiaries can be effectuated by eliminating from the act that part which attemped to make terms six instead of four years.

The holding of these cases is to this effect: That the appointment is not invalidated, but that the time the appointee can hold is limited; that when some one is duly elected, the person who was appointed is no longer entitled to hold the office.

III. Again, it is contended that the statute referred to does not include a United States Senator in its grant of authority to the governor to fill vacancies, although the legislature may have intended to so include Senators.

The language of the statute is "in State and district offices." So the question arises: Is this language broad enough to give the authority to appoint a Senator?

Of course, it does not refer to a Senator in terms. It might well have been more definite. But there is strong legal authority for the contention that a Senator is a State officer.

The Supreme Court, in the Burton case (202 U. S. 344) says:

> While the Senate, as a branch of the legislative department, owes its existence to the Constitution, and participates in passing laws that concern the entire country, its Members are chosen by the State legislatures and can not properly be said to hold their places under the Government of the United States.

In United States *v.* Mouat (124 U. S. 307) there is this language:

> Unless a person who is in the service of the Government holds his place by virtue of an appointment by the President, or of the courts of justice, or heads of departments, authorized by law to make such appointment, he is not strictly an officer of the United States.

The holding of the court is to the same effect in United States *v.* Germaine (99 U. S. 309).

In the Fifth Congress an effort was made to impeach William Blount, a United States Senator. The proceeding was dismissed on the ground that he was not a United States officer.

Dr. William Bennett Moore, professor at Harvard University, in his book "The Government of the United States," says:

> The basis of representation in Congress, therefore, is this: Two interests are to be represented, namely, the States and the people of the States. The States, as such, are equally represented by each having two Members in the upper branch of Congress, the Senate. The people of the several States, on the other hand, are represented by a varying number of Representatives in the lower branch of Congress. In both cases the unit of representation is the State. Congress accordingly is a bicameral convention of State envoys; its Members are officers of the State from which they come and are not officers of the National Government.

Tucker's "Constitutional Law," page 414, says:

> Nowhere in the Constitution is a Senator or Representative spoken of as an officer of the United States, or even as an officer at all, and in article 1, section 6, clause 2 of the Constitution, the distinction between a Senator and a Representative and a civil officer of the United States is very clearly set forth.

In another place Mr. Tucker says:

> States, not men, are constituents of the Senate.

The seventeenth amendment says:

> The Senate of the United States shall be composed of two Senators from each State.

Again it says:

> When vacancies happen in the representation of any State in the Senate.

If it should be granted that a Senator is not a State officer, this would not necessarily decide this matter. In 4 Sawyer, 302, Mr. Justice Field said:

> Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature.

Sutherland's Statutory Construction says:

> When the intention can be collected from the statute, words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency with such intention. * * * The intention of the act will prevail over the literal sense of the terms. * * * The true meaning of any clause or provision is that which best accords with the subject and general purpose of the act and every other part. * * * The general intent should be kept in view in determining the scope and meaning of any part. * * * The presumption is that the lawmaker has a definite purpose in every enactment, and has adopted and formulated the subsidiary provisions in harmony with that purpose. * * * Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject matter and general purpose of the statute. * * * The mere literal construction ought not to prevail if it is opposed to the intention of the legislature; and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effected, the law requires that construction to be adopted. * * * The natural import of words in their literal sense; but this may be greatly varied to give effect to the fundamental purpose of the statute. * * * Courts look at the language of the whole act and if they find in any particular clause an expression not so large and

extensive in its import as those used in other parts of the statute; if, upon a view of the whole act, they can collect from the more large and extensive expressions used in the other parts the real intention of the legislature, it is their duty to give effect to the larger expression.

As has been stated, it was the policy of North Dakota to fill vacancies by appointment; this statute was enacted after the adoption of the seventeenth amendment; the manifest purpose of the statute was to provide for filling vacancies; the language was as broad and comprehensive as could have been used—"all vacancies."

As the amendment had been adopted several years before the statute was enacted, no one will seriously question that the members of the legislature had knowledge of its provisions. At any rate, the law presumes that every man knows the law, and we have the right to presume that the members of the legislature were entirely familiar with the amendments and the rights of their State under its provisions.

When we apply these principles of law and rules of statutory construction to the facts of this case, a reasonable conclusion is that the appointment of Mr. Nye was authorized, and that he is entitled to a seat in the Senate.

To deprive Mr. Nye of a seat wrongfully is a matter of secondary importance. To deprive the State of North Dakota of the right of full representation in the Senate is a matter of primary importance.

Representation in the Senate is not a privilege, but a right—a sacred, substantial, inviolable right. So jealous of this right were the framers of the Constitution that there was written into article 5 that "No State, without its consent, shall be deprived of its equal suffrage in the Senate."

If Mr. Nye were the only interested party, it might well be said that he should not be allowed to sit in the Senate unless it should be shown clearly and beyond any doubt that his claim to a seat is valid in every respect.

But, as has been suggested, the State is the real party in interest. The governor of the State has made an appointment. The seventeenth amendment provides that if a temporary appointment is made when a vacancy occurs, the governor shall make it. The act of the governor has the presumption of regularity. This presumption should be controlling unless it clearly appears that the governor was without authority. To deprive a State of full representation in the Senate upon mere presumptions, or upon bare technicalities, is wholly unjustifiable. In this case, to deny Mr. Nye the right to be seated would be to inflict a serious wrong upon the State of North Dakota. Therefore, it is my judgment that a resolution should be adopted declaring that Gerald P. Nye is entitled to a seat in the Senate as a Senator from the State of North Dakota.

H. D. STEPHENS.

I do not think that the question as to whether a Senator is an officer of the State is necessarily involved in this matter. With that exception, I concur in this report.

E. D. SMITH.

I concur in the conclusion of the foregoing report, but for reasons not assigned therein.

M. M. NEELY.