When is it Vacant

E. W. Camp
that the Act of 1937 does not create any new Supreme Court justiceship, and that the retirement of a justice under its terms vacates one of the nine justiceships created by the Act of 1869. Secondly, it seems that a court would hold that the speculative possibility of greater pecuniary returns which may accrue to a justice from the retirement privilege does not amount to an increase in emoluments within the meaning of the Constitution.

D. O. McGovney.

School of Jurisprudence,
University of California.

When Is It Vacant?

When Mr. Justice Van Devanter "retired" and the President nominated Senator Black to fill the "vacancy", some persons, even some of high degree, insisted, and do yet insist, that while the acceptance of a resignation creates a vacancy, a retirement, which requires no acceptance, causes no vacuum. An Act of Congress fixed the number of Justices of the Supreme Court; the President and Senate have no authority to increase the number.

Probably few now living ever knew and most of them have forgotten, that eighty-five years ago the question "When is a Vacancy?" was heavily debated in California, and that the arguments are embalmed in 2 Cal. 198 to 236, both inclusive. The title of the case is People v. Wells.

The story runs thus: Solomon Heydenfeldt was elected to the Supreme Court in 1851, took his seat in January, 1852, participated in the labors of the Court for some six weeks; then obtained from the Legislature leave of absence from the state for six months to visit his home town in Alabama. That left the Court with but two justices in attendance. What if they should not agree? The Legislature passed an act in March, 1852, empowering the Governor to fill "temporary vacancies" caused by absence of a judge, the appointee to hold office during such vacancy and no longer.¹

Solomon having departed, Governor Bigler appointed Alexander Wells, who took the oath of office and then suggested to the Court, or at least to the two justices of the Court—or at any rate to the two other justices of the Court—that doubts having been expressed concerning the validity of the Act providing for appointments such as his, Attorney General Hastings might well be directed to take proceedings by writ of quo warranto to determine the question.

¹ Cal. Stats. 1852, c. 87, p. 162, repealed Cal. Stats. 1853, p. 23.
Soon after Wells and the Attorney General came into Court with a stipulation that presented the case to the Court "as though" a judgment had been entered pro forma in the District Court in Wells' favor, and an appeal had been taken to the Supreme Court. The stipulation stated the facts as already narrated and asked judgment.

This was raising legal fiction to a high power, but it shows Alexander Wells' punctilious, even meticulous, insistence that his right to the office even for a few months be established before he should take part in the work of the Court. How antiquated such nicety would now appear!

Chief Justice Murray maintained that the temporary absence of a judge from the state did not create a "vacancy" within the meaning of that word as used in the Constitution;\(^2\) that Heydenfeldt was just as truly a member of the Court as ever. He could not indeed while out of the State perform the duties of his office, just as he could not perform them if wholly incapacitated by illness or accident; that it was not within the power of the Legislature to declare what constitutes a vacancy in office; that no Legislature ought to be intrusted with such power.

Mr. Justice Anderson took the opposite view and covered many pages with mid-century rhetoric to sustain Wells' right to the seat and the salary.

The two justices being unable to agree no judgment was rendered and the Chief Justice remarked that "the respondent must exercise his own discretion in resuming his seat." In effect he had to decide his own case. Having done what he could to have the question settled, he participated in the work of the Court during Heydenfeldt's absence. His name appears at pages 261 and 294 of Volume 2.

After Justice Heydenfeldt returned he read the opinions in his substitute's case, and added a memorandum to the record that he fully agreed with the Chief Justice's opinion. So the judgment or supposed judgment of the District Court was reversed and the proceeding dismissed.

In the fall of that same year, 1852, Wells was elected as successor to Anderson. He died in office in October 1854. Murray died in office in 1857. Heydenfeldt resigned in that year.

How amusing it would have been if Mr. Justice Black had followed Wells' example and asked that Attorney General Cummings proceed by quo warranto to determine the validity of the President's appointment; and the other eight justices had split four to four on the answer!

Los Angeles, California.

---